TENNESSEE COURT RULES
Annotated

2021

Volume 1

Tennessee Code Annotated

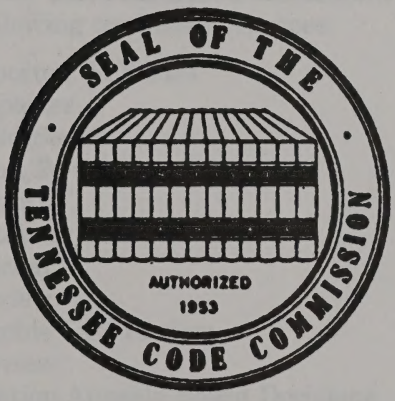
Court Rules Annotated

2021

Volume 1

THE OFFICIAL TENNESSEE CODE

Prepared Under the Supervision of the
Tennessee Code Commission



Chief Justice Jeffrey S. Bivins, Chair
Anastasia P. Campbell
The Honorable Herbert Slatery, III
Justice Cornelia A. Clark
Susan Short Jones, Esq.

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ISBN 978-1-66330-223-6 (Set)

Preface

This Tennessee Court Rules Annotated 2021 Edition has been split into two volumes to facilitate the research and the use of this material. This 2021 Edition will be supplemented in November. This supplementation program will keep you up to date with current rules.

This volume was prepared by the editorial staff of the publisher.

The Tennessee Supreme Court has rule-making authority for all state courts. The effective date of rules is governed by § 16-3-404, which provides in part that rules must be approved by resolutions of both houses of the General Assembly before taking effect.

Rules received through May 14, 2021, are included in this volume.

The text of each section of the state and local rules printed and appearing in this replacement volume has been prepared from copies of these rules as supplied to the publisher by the applicable clerks, or from copies of rules and rule amendments supplied on the relevant court's website, as of the time of publication. Any errors or omissions or any inquiries concerning errors in these rules should be directed to the clerk for the court promulgating such rules.

For your convenience, each set of rules is followed by its own index.

This publication contains annotations reflecting decisions or articles posted to Lexis Advance. These annotations are taken from decisions or articles that will appear in the following traditional sources:

South Western Reporter, 3d Series
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Bankruptcy Reporter
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June 2021 LexisNexis

User's Guide

For information and suggestions for the use of the Tennessee Code Annotated and its editorial features, please consult the User's Guide published near the front of Tennessee Code Annotated Volume 1. Consult also the Supplement pamphlet to Volume 1 for updated or additional information pertaining to the User's Guide.

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TENNESSEE RULES OF EVIDENCE

[EFFECTIVE JANUARY 1, 1990]

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Compiler's Notes. These rules, which were contingent upon approval by both houses of the general assembly, were ratified and approved in 1989 House Resolution 10 and Senate Resolution 4.

The January 23, 1989 order adopting these rules provided that they take effect January 1, 1990 and be applicable to all cases tried from and after that date. The order also provided that the rules "govern evidence rulings in all trial courts of the state except as otherwise provided by statute or rules of this court."

ARTICLE I. GENERAL PROVISIONS

Rule 101. Scope. —

These rules shall govern evidence rulings in all trial courts of Tennessee except as otherwise provided by statute or rules of the Supreme Court of Tennessee.

Advisory Commission Comments. These rules would apply in all trials, including those in general sessions courts and juvenile courts. See T. R. Juv. P. 28(c) (adjudicatory hearings). Sentencing proceedings are not covered, with respect to strict application of the hearsay exclusionary rule. See Tenn. Code Ann. § 40-35-209(b), Tenn. Code Ann. § 39-2-203(c) [Repealed], and T. R. Juv. P. 32(f). Administrative hearings are not covered. See Tenn. Code Ann. § 4-5-313(1).

Advisory Commission Comments [1991]. The Tennessee Claims Commission applies the Tennessee Rules of Evidence by incorporation through internal Rule 43.

Advisory Commission Comments [1993]. These rules apply in all trials, including those in general sessions and juvenile courts. Some hearings, however, are not controlled solely by these rules. Preliminary proceedings and sentencing proceedings often involve hearsay not admissible under traditional exceptions. See, for example, Tenn. Code Ann. § 40-35-209(b) and T. R. Juv. P. 15(b), 16(a), and 32(f). Administrative hearings are not governed exclusively by these rules; see Tenn. Code Ann. § 4-5-313(1). The Tennessee Claims Commission, on the other hand, incorporates the Tennessee Rules of Evidence through internal Rule 43.

Law Reviews. A Meta-Analysis of the Tennessee Rules of Evidence (Neil P. Cohen), 57 Tenn. L. Rev. 1 (1989).

Criminal Discovery, Scientific Evidence, and DNA, 44 Vand. L. Rev. 791 (1991).

Judicial Notice in Tennessee (Robert Banks, Jr. and Elizabeth T. Collins), 21 Mem. St. U.L. Rev. 431 (1991).

Juvenile Court Hearsay (Donald F. Paine), 36 Tenn. B.J. 35 (2000).

Some Comparisons Between the New Tennessee Rules of Evidence and the Federal Rules of Evidence Part I (Robert Banks, Jr.), 20 Mem. St. U.L. Rev. 283 (1990).

Some Comparisons Between the New Tennessee Rules of Evidence and the Federal Rules of Evidence Part II, 20 Mem. St. U.L. Rev. 499 (1991).

Some Comparisons Between the New Tennessee Rules of Evidence and the Federal Rules of Evidence Part III, 21 Mem. St. U.L. Rev. 1 (1991).

The Ten Commandments of Direct Examination (Donald F. Paine), 36 Tenn. B.J. 20 (2000).

NOTES TO DECISIONS

1. Application.

There is no provision in the Rules of Evidence for the exclusion of testimony based on an alleged violation of the Code of Professional Responsibility (repealed). TBC Corp. v. Wall, 955 S.W.2d 838, 1997 Tenn. App. LEXIS 157 (Tenn. Ct. App. 1997).

Tennessee Rules of Evidence apply to proceedings before the Tennessee board of professional responsibility's hearing committee. Welch v. Bd. of Prof'l Responsibility for the Supreme Court of Tenn., 193 S.W.3d 457, 2006 Tenn. LEXIS 429 (Tenn. 2006).

Rule 102. Purpose and construction. —

These rules shall be construed to secure the just, speedy, and inexpensive determination of proceedings.

Advisory Commission Comments. This language comes from T. R. Civ. P. 1.

NOTES TO DECISIONS

1. Prejudice.

Trial court's contemplation of unfair prejudice may extend beyond merely the impact of a prosecution witness's testimony on direct examination (or the impact of an exhibit admitted through that witness), so a trial court may consider not only the impact of the evidence itself but the impact of potential cross-examination resulting from admission of the evidence, which allows a trial court to recognize and effectuate Tenn. R. Evid. 102 and 106 and an accused's constitutional rights to explain the circumstances surrounding his or her incriminating statements and permits a trial court to exercise discretion in a manner that recognizes the overarching concern of a criminal defendant's fundamental right to a fair trial. State v. McCaleb, 582 S.W.3d 179, 2019 Tenn. LEXIS 371 (Tenn. Aug. 21, 2019).

Rule 103. Rulings on evidence. —

(a) Effect of Erroneous Ruling. — Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and

(1) Objection. — In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection if the specific ground was not apparent from the context; or

(2) Offer of Proof. — In case the ruling is one excluding evidence, the substance of the evidence and the specific evidentiary basis supporting admission were made known to the court by offer or were apparent from the context.

Once the court makes a definitive ruling on the record admitting or excluding evidence, either at or before trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

(b) Record of Offer and Ruling. — The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection made, and the ruling. It shall permit the making of an offer in question and answer form.

If an issue arises concerning the privileged nature of a communication, the trial court may require the communication be reduced to writing for in camera review. If ruled not privileged, the communication can be divulged in open court and will become part of the record for appellate review. If ruled privileged, the trial court shall seal the writing reviewed in camera and attach it to the record for appellate review.

(c) Hearing of Jury. — In jury cases, proceedings shall be conducted to the extent practicable so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

(d) Plain Error. — Nothing in this rule precludes taking notice of plain errors affecting substantial rights although they were not brought to the attention of the court. [As amended by order entered January 25, 1991, effective July 1, 1991; by order entered January 23, 2001, effective July 1,

2001; and by order entered January 6, 2005, effective July 1, 2005.]

Advisory Commission Comments. Part (a) restates current law. Errors must be substantial rather than harmless. The effect of a trial error, including an erroneous ruling on evidence, is set out if T.R.A.P. 36(b). Objections must be timely and specific. Offers of proof must indicate to the reviewing court what was excluded. Note that in Part (b) the trial court must permit a formal question-and-answer offer, the kind favored by appellate courts.

Part (d) recognizes that some errors are so plain and harmful that a trial judge can be reversed despite absence of objection. See T.R.A.P. 36(b), T. R. Crim. P. 52(b), and *State v. Ogle*, 666 S.W.2d 58 (Tenn. 1984) (reversing for *Bruton* error not raised in trial court or Court of Criminal Appeals).

Advisory Commission Comments [1991]. Subsection (a)(2) is amended to add a specificity requirement as to the evidentiary rule supporting an offer of proof, thereby making this requirement for offers consistent with that for objections in subsection (a)(1).

Advisory Commission Comments [2001]. The final sentence of Rule 103(a) eliminates the need to repeat objections or offers of proof.

Advisory Commission Comments [2005]. The second paragraph in Rule 103(b) provides a procedure for appellate review where parties disagree whether a communication is privileged. Rulings at trial are subject to interlocutory appeals pursuant to Appellate Rules 9 and 10.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 6, 2005, was ratified and approved by House Resolution 13 and Senate Resolution 11. The order promulgating the amendment of this rule provided that it take effect July 1, 2005.

Law Reviews. Comparing the Tennessee and Federal Rules of Evidence (Donald F. Paine), 26 Tenn. B.J. 37 (1990).

ESI Tennessee: At the Intersection of Privilege and E-Discovery (M. James Thomas), 44 Tenn. B.J. 14 (2008).

The Ten Commandments of Direct Examination (Donald F. Paine), 36 Tenn. B.J. 20 (2000).

NOTES TO DECISIONS

ANALYSIS

1. Objections.
2. —Waiver.
3. Offers of Proof.
4. Plain Error.
5. Substantial Right Not Affected.
6. Preservation for Review.

1. Objections.

Rationale for requiring objections to evidence to be made at the first available opportunity applies equally to proceedings before the hearing committee of the Tennessee board of professional responsibility as it does to proceedings in a trial court. Welch v. Bd. of Prof'l Responsibility for the Supreme Court of Tenn., 193 S.W.3d 457, 2006 Tenn. LEXIS 429 (Tenn. 2006).

2. —Waiver.

Failing to make a timely, specific objection in the trial court prevents a litigant from challenging the introduction of inadmissible evidence for the first time on appeal. In re Estate of Armstrong, 859 S.W.2d 323, 1993 Tenn. App. LEXIS 161 (Tenn. Ct. App. 1993), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 223 (Tenn. 1993).

Where photographs offered by appellee for the purpose of establishing physical resemblance between claimant and alleged half-sister were entered into evidence without objection, appellant could not raise the issue on appeal. In re Estate of Armstrong, 859 S.W.2d 323, 1993 Tenn. App. LEXIS 161 (Tenn. Ct. App. 1993), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 223 (Tenn. 1993).

Defendant waived his claim on appeal that the trial court erred in admitting an investigating officer's testimony regarding the consistency of a child victim's statements because the only authority cited in defendant's brief was Tenn. R. Evid. 801 and Tenn. R. Evid. 803 when, at trial, defendant objected on lay opinion grounds only pursuant to Tenn. R. Evid. 701, and defendant was bound on appeal to the basis of his objection at trial pursuant to Tenn. R. Evid. 103(a); furthermore, defendant failed to cite authority to support his claim based on Tenn. R. Evid. 701 in his appellate brief as required by T.R.A.P. 27(a)(7), and therefore the appellate court considered the issue waived under Tenn. Ct. Crim. App. R. 10(b). State v. Schiefelbein, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 138 (Tenn. Crim. App. Feb. 8, 2007), modified, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 213 (Tenn. Crim. App. Mar. 7, 2007).

Defendant's conviction for premeditated first-degree murder was appropriate because his argument that admission of testimony that the victim told a witness that she was trying to get away from defendant because she was afraid of him was not objected to at trial; moreover, appellate court saw no basis for noticing the error despite waiver. State v. Gilley, 297 S.W.3d 739, 2008 Tenn. Crim. App. LEXIS 660 (Tenn. Crim. App. Aug. 13, 2008).

Defense waived its argument that a juvenile summons was hearsay because it failed to make an objection at trial. State v. Collins, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 295 (Tenn. Crim. App. Apr. 18, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 489 (Tenn. Aug. 8, 2018), cert. denied, Collins v. Tennessee, 139 S. Ct. 649, 202 L. Ed. 2d 498, -- U.S. --, 2018 U.S. LEXIS 7182 (U.S. Dec. 10, 2018).

Although defendant contended that a CD of convenience store surveillance videos contained additional videos of angles that were not authenticated and placed into evidence, the issue was waived because defendant made no offer of proof, the issues were only tentatively suggested, and the record was only partially and incompletely developed. Moreover, any error in the admission of the evidence was harmless because the evidence of defendant's guilt in colluding with co-defendant was overwhelming. State v. Bingham, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 760 (Tenn. Crim. App. Oct. 8, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 61 (Tenn. Jan. 17, 2019).

While defendant waived his right to appeal the issue by failing to make a timely objection to the admission of the photograph at trial, notwithstanding waiver, no abuse of discretion was found; the photograph at issue was relevant to an agent's opinion that the revolver found in defendant's girlfriend's car was the same used to shoot the bullets found in the victim and at the scene, and defendant failed to specify any prejudicial effect. State v. Wilson, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 35 (Tenn. Crim. App. Jan. 17, 2019).

Trial court did not abuse its discretion in a foreclosure proceeding by admitting bank's exhibits into evidence, and the appellate court considered the issue waived because the borrower failed to object to the introduction of any of the exhibits. Starkey v. Wells Fargo Bank, N.A., — S.W.3d —, 2019 Tenn. App. LEXIS 190 (Tenn. Ct. App. Apr. 23, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 408 (Tenn. Aug. 14, 2019).

Although defendant argued that the trial court erred by permitting the state of Tennessee to refer to defendant as the leader of a crime family and by allowing the state to elicit testimony regarding the criminal acts of other people affiliated with the crime family, appellate review of the issue was waived because the defense did not object contemporaneously to the admission of the evidence. State v. Frazier, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 385 (Tenn. Crim. App. July 1, 2019).

Because no objection was raised to the admission of a financial statement into evidence, the trial court did not err in considering it in valuing the marital estate. Barton v. Barton, — S.W.3d —, 2020 Tenn. App. LEXIS 502 (Tenn. Ct. App. Nov. 10, 2020).

3. Offers of Proof.

Courts are required, in appropriate circumstances, to allow offers of proof when evidence is excluded so as to enable consideration of the issue on appeal. Alley v. State, 882 S.W.2d 810, 1994 Tenn. Crim. App. LEXIS 240 (Tenn. Crim. App. 1994).

In circumstances where it is obvious from the record that the proffered evidence could, under no circumstances, be relevant to the issues, a trial court's refusal to grant an offer of proof is not error. However, if the obvious incompetence or irrelevance is not readily apparent from the record, it is error to exclude any reasonable offer which demonstrates the relevance and general import of the excluded evidence. Alley v. State, 882 S.W.2d 810, 1994 Tenn. Crim. App. LEXIS 240 (Tenn. Crim. App. 1994).

Question and answer offers of proof are preferred, and the trial court must allow them when appropriately offered. Alley v. State, 882 S.W.2d 810, 1994 Tenn. Crim. App. LEXIS 240 (Tenn. Crim. App. 1994).

The trial court's improper limitation of defendant's expert witness did not require reversal under Tenn. R. Evid. 103(a)(2), where defendant made no offer of proof of what the improperly excluded testimony would have been. State v. Robinson, 73 S.W.3d 136, 2001 Tenn. Crim. App. LEXIS 858 (Tenn. Crim. App. 2001).

In a child custody case, because a custody decision was not yet final and nine months had elapsed since the entry of the initial custody order, any evidence regarding the children's current circumstances was relevant, and the successor trial judge should have permitted evidence on the matter. Even after it decided not to hear any evidence regarding the custody issue, the trial court should have permitted the parties to make an offer of proof. Shofner v. Shofner, 181 S.W.3d 703, 2004 Tenn. App. LEXIS 865 (Tenn. Ct. App. 2004), rehearing denied, 181 S.W.3d 703, 2005 Tenn. App. LEXIS 854 (Tenn. Ct. App. 2005), appeal denied, Shofner v. Kalisz, — S.W.3d —, 2005 Tenn. LEXIS 943 (Tenn. Oct. 24, 2005).

No offer of proof was made at trial regarding the substance of the excluded evidence and the specific evidentiary basis supporting its admission; the appellate court was unable to tell from the record before it exactly what evidence would have been admitted and cannot assume that the evidence would have been admissible and that it would have affected the outcome of the trial. Hampton v. Braddy, 270 S.W.3d 61, 2007 Tenn. App. LEXIS 634 (Tenn. Ct. App. Oct. 5, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 238 (Tenn. Apr. 7, 2008).

Trial court's failure to hold an in limine hearing on the issue of whether the citizen should be allowed to proceed with his quo warranto action after the district attorney general declined to participate in the lawsuit was not reversible error, because he failed to make

an offer of proof regarding the evidence he would have presented in an in limine hearing to establish his standing to challenge the validity of the city ordinance. Dossett v. City of Kingsport, 258 S.W.3d 139, 2007 Tenn. App. LEXIS 729 (Tenn. Ct. App. Nov. 28, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 464 (Tenn. June 2, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 430 (Tenn. June 16, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 423 (Tenn. June 16, 2008).

Finding that the claimant was not entitled to recover benefits after her fiancé committed suicide while incarcerated was proper because the Tennessee Claim Commission correctly determined that the claimant was unable to prove a breach of duty without expert evidence to establish the applicable standards of care by which the appellate court was able to judge the actions of the prison officials and mental health professionals involved in the decision not to implement suicide precautions. Because the claimant made no offer of proof concerning a nurse's intended expert testimony under Tenn. R. Evid. 103(a)(2) on the Tennessee Department of Correction's suicide prevention policies and procedures, or the reasonableness of the treatment team's conduct, there was no reversible error in rejecting the nurse's testimony. Atkinson v. State, 337 S.W.3d 199, 2010 Tenn. App. LEXIS 440 (Tenn. Ct. App. July 9, 2010), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 1120 (Tenn. Nov. 16, 2010).

Trial court properly admitted the documents by which a judgment creditor proved the debt because they attested to the indebtedness, the debtor's liability, and expressly provided that documents were obtained by the creditor from an original creditor in the regular course of business. Midland Funding, LLC v. Thuy Chau, — S.W.3d —, 2019 Tenn. App. LEXIS 298 (Tenn. Ct. App. June 14, 2019).

In a case in which a minority business owner sued the city and two city officials alleging that the city wrongfully terminated his service contract and contracted with two non-minority owned companies for similar services in violation of state and federal law, evidence of the contract conversations was properly excluded as the owner never made an offer of proof; the substance of the conversations was not apparent from the record; and an appellate court could only determine whether the exclusion of evidence was reversible error if it knew what the excluded evidence would have been. Belton v. City of Memphis, — S.W.3d —, 2020 Tenn. App. LEXIS 435 (Tenn. Ct. App. Sept. 30, 2020).

Defendant was properly convicted of aggravated robbery because she pulled a gun on the victims, demanded their property, and use of the car they were in, the prosecutor provided a facially race-neutral reason for the challenges to the five non-Caucasian jurors, defendant made no offer of proof regarding any "mental disorder" that was caused by a traumatic event that happened to her while she was in the backseat of a vehicle, and she did not preserve her argument regarding the issue of her interview with law enforcement after arrest. State v. Horton, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 419 (Tenn. Crim. App. June 17, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 535 (Tenn. Oct. 7, 2020).

4. Plain Error.

The following factors should be considered by a court when determining whether an error constitutes "plain error": (1) The record must clearly establish what occurred in the trial court; (2) A clear and unequivocal rule of law must have been breached; (3) A substantial right of the accused must have been adversely affected; (4) The accused did not waive the issue for tactical reasons; and (5) Consideration of the error is necessary to do substantial justice. State v. Smith, 24 S.W.3d 274, 2000 Tenn. LEXIS 374 (Tenn. 2000).

In addition to the five factors that should be considered by an appellate court when determining whether an error constitutes "plain error," the plain error must have been of such a great magnitude that it probably changed the outcome of the trial. State v. Smith, 24 S.W.3d 274, 2000 Tenn. LEXIS 374 (Tenn. 2000).

5. Substantial Right Not Affected.

In an action seeking to establish that a public road extended to a company's northern property line, the adjoining property owners and the city failed to convince the appellate court that the exclusion of disputed evidence affected the jury's verdict; thus, the exclusion of the testimony concerning a desire to purchase the disputed property was not inappropriate. Brandy Hills Estates, LLC v. Reeves, 237 S.W.3d 307, 2006 Tenn. App. LEXIS 794 (Tenn. Ct. App. Dec. 15, 2006), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 607 (Tenn. June 25, 2007).

6. Preservation for Review.

Although a driver did not make an offer of proof pursuant to Tenn. R. Evid. 103(a)(2) with respect to the trial court's grant of a trucking company's motion in limine as to some of the driver's expert's deposition testimony, as the substance of the evidence and the specific evidentiary basis supporting the ruling were apparent from the context, the failure to make an offer of proof did not bar review of the issue on appeal. Singh v. Larry Fowler Trucking, Inc., 390 S.W.3d 280, 2012 Tenn. App. LEXIS 598 (Tenn. Ct. App. Aug. 15, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 920 (Tenn. Dec. 11, 2012).

Testimony of a licensed clinical psychologist who had been treating the child was properly allowed where the father had not objected to the testimony or sought to limit it in any way.

In re Jaxon W., — S.W.3d —, 2019 Tenn. App. LEXIS 87 (Tenn. Ct. App. Feb. 15, 2019).

Evidentiary issue was waived, and defendant was not entitled to relief, because defendant's failure to make an offer of proof as to what the proposed testimony of a witness would have been precluded effective and meaningful appellate review of the trial court's exclusion of the testimony. Furthermore, defendant changed theories regarding the admissibility of the evidence on appeal. State v. Coleman, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 277 (Tenn. Crim. App. Apr. 30, 2019).

Although the defense did not object when the state of Tennessee questioned defendant about defendant's involvement in the death of a witness to a shooting, the defense raised the issue in defendant's amended motion for a new trial. Consequently, appellate review was limited to plain error. State v. Frazier, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 385 (Tenn. Crim. App. July 1, 2019).

Rule 104. Preliminary questions. —

(a) Questions of Admissibility Generally. — Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination the court is not bound by the rules of evidence except those with respect to privileges.

(b) Relevance Conditioned on Fact. — When the relevance of evidence depends on the fulfillment of a condition of fact, the court shall admit it upon the introduction of evidence sufficient to support a finding of the fulfillment of the condition. In the court's discretion, evidence may be admitted subject to subsequent introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(c) Hearing of Jury. — Hearings on the admissibility of confessions shall in all cases be conducted out of the hearing of the jury. Hearings on other preliminary matters shall be so conducted when the interests of justice require or when an accused is a witness and so requests.

(d) Testimony of Accused. — The accused does not by testifying upon a preliminary matter become subject to cross-examination as to other issues in the case.

(e) Weight and Credibility. — This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility. [As amended by order entered January 25, 1991, effective July 1, 1991.]

Advisory Commission Comments. Part (a) governs the fact questions to be resolved by trial courts in deciding whether a sufficient foundation has been laid. For example, the court must decide that the declarant believed death was imminent in order to admit a dying declaration. This preliminary determination can be based on hearsay, because the judge should be able to separate reliable from unreliable proof.

Part (b) allows the court to admit evidence over a relevancy objection on condition that the offering party prove other facts making the evidence relevant. If subsequent proof fails to establish relevancy, the conditionally admitted evidence should be stricken with an appropriate jury instruction; extreme prejudice could result in a mistrial.

Whether preliminary questions are determined outside the jury's presence is discretionary under Part (c), except where a confession is offered or where the accused in a criminal case is a witness and requests a jury-out hearing through counsel.

Advisory Commission Comments [1991]. This is a technical amendment.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), No. 3-16-1.

Law Reviews. Competency and Impeachment of Witnesses (Leo Bearman, Jr.), 57 Tenn. L. Rev. 89 (1989).

Judicial Notice in Tennessee (Robert Banks, Jr. and Elizabeth T. Collins), 21 Mem. St. U.L. Rev. 431 (1991).

NOTES TO DECISIONS

Analysis

1. Witnesses.
2. —Conspirators.
3. Hearing Before Jury.
4. Testimony Admissible.

1. Witnesses.

Because of an attorney's repeated statements to defendant that the attorney was not acting as defendant's attorney, but was present at the scene because of the attorney's friendship with the victim, the trial court's finding that the attorney could testify, as defendant had no reasonable belief or expectation that the attorney had assented to the formation of an attorney-client relationship, was not clearly erroneous. State v. Jackson, 444 S.W.3d 554, 2014 Tenn. LEXIS 619 (Tenn. Aug. 22, 2014).

2. —Conspirators.

While some initial proof of a conspiracy is required before the introduction of a co-conspirator's declarations, the trial judge may permit the declaration conditioned on the fact that a conspiracy will later be established by additional evidence. State v. Gaylor, 862 S.W.2d 546, 1992 Tenn. Crim. App. LEXIS 748 (Tenn. Crim. App. 1992), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 234 (Tenn. June 7, 1993).

3. Hearing Before Jury.

Whether a hearing out of the jury's presence is required is within the discretion of the trial court, and as such, the trial court's refusal to conduct a jury out hearing was not an abuse of the court's discretion. State v. Kennedy, 7 S.W.3d 58, 1999 Tenn. Crim. App. LEXIS 136 (Tenn. Crim. App. 1999).

Defendant's conviction for driving with an alcohol concentration of .10 or more was proper where the deputy testified that he observed defendant in the jail for 20 minutes and that defendant did not ingest anything; the trial court had broad discretion in determining whether to have a hearing outside of the jury's presence, Tenn. R. Evid. 104(c), and it was not improper that the trial court did not conduct such hearing. State v. Mullen, 151 S.W.3d 518, 2004 Tenn. Crim. App. LEXIS 297 (Tenn. Crim. App. 2004), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 886 (Tenn. Oct. 11, 2004).

4. Testimony Admissible.

Investigator's testimony as to the identifications made by witnesses was permissible at the sentencing hearing, because the rules of evidence did not apply to such a proceeding. State v. Bonds, 502 S.W.3d 118, 2016 Tenn. Crim. App. LEXIS 266 (Tenn. Crim. App. Apr. 7, 2016).

Rule 105. Limited admissibility. —

When evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court upon request shall restrict the evidence to its proper scope and instruct the jury accordingly.

Advisory Commission Comments. This is the common law rule.

NOTES TO DECISIONS

1. Jury Instructions.

The jury should have been instructed that the prior conviction or convictions had been admitted into evidence for the sole purpose of establishing that the defendant had been convicted of a felony, an essential element of the offense, and for no other purpose. State v. Wingard, 891 S.W.2d 628, 1994 Tenn. Crim. App. LEXIS 595 (Tenn. Crim. App. 1994).

In an action stemming from an automobile accident, there was no question that the substance of the two consumer complaints at issue was hearsay and there was likewise no question that the trial court's limiting instruction could have been more artfully worded; however, the manufacturer did not object to either the substance of the limiting instruction or insist that the evidence regarding the two consumer complaints was so prejudicial that it should have been excluded under Tenn. R. Evid. 403, and after considering the trial court's limiting instruction in context, the instruction conveyed to the members of the jury an understanding that they should not take the substance of the consumer complaints as true. Duran v. Hyundai Motor Am., Inc., 271 S.W.3d 178, 2008 Tenn. App. LEXIS 79 (Tenn. Ct. App. Feb. 13, 2008), rehearing denied, 271 S.W.3d 178, 2008 Tenn. App. LEXIS 127 (Tenn. Ct. App. Feb. 27, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 632 (Tenn. Aug. 25, 2008).

Rule 106. Writings or recorded statements — Completeness. — When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Advisory Commission Comments. The rule restates settled law.

Law Reviews. The Rule of Completeness (Donald F. Paine), 38 Tenn. B.J. 31 (2002).

NOTES TO DECISIONS

Analysis

1. Construction and Purpose.
2. Illustrative Examples.

1. Construction and Purpose.

Tenn. R. Evid. 106 reflects the concern for fairness that the trier of fact be permitted to access related information without being misled by hearing only certain portions of evidence. State v. Keough, 18 S.W.3d 175, 2000 Tenn. LEXIS 171 (Tenn. 2000), rehearing denied, — S.W.3d —, 2000 Tenn. LEXIS 271 (Tenn. May 16, 2000), cert. denied, Keough v. Tennessee, 531 U.S. 886, 121 S. Ct. 205, 148 L. Ed. 2d 144, 2000 U.S. LEXIS 6053 (2000).

Where the prosecution introduces a statement made by the defendant, the trial court may in the interest of fairness order that the remainder of the statement be admitted as well under Tenn. R. Evid. 106. State v. Keough, 18 S.W.3d 175, 2000 Tenn. LEXIS 171 (Tenn. 2000), rehearing denied, — S.W.3d —, 2000 Tenn. LEXIS 271 (Tenn. May 16, 2000), cert. denied, Keough v. Tennessee, 531 U.S. 886, 121 S. Ct. 205, 148 L. Ed. 2d 144, 2000 U.S. LEXIS 6053 (2000).

Trial court's contemplation of unfair prejudice may extend beyond merely the impact of a prosecution witness's testimony on direct examination (or the impact of an exhibit admitted through that witness), so a trial court may consider not only the impact of the evidence itself but the impact of potential cross-examination resulting from admission of the evidence, which allows a trial court to recognize and effectuate Tenn. R. Evid. 102 and 106 and an accused's constitutional rights to explain the circumstances surrounding his or her incriminating statements and permits a trial court to exercise discretion in a manner that recognizes the overarching concern of a criminal defendant's fundamental right to a fair trial. State v. McCaleb, 582 S.W.3d 179, 2019 Tenn. LEXIS 371 (Tenn. Aug. 21, 2019).

2. Illustrative Examples.

Where portions of defendant's statements were at most cumulative of the defendant's statements denying involvement in the crime which were read into evidence by the prosecutor, none of the unfairness concerns which Tenn. R. Evid. 106 is designed to alleviate were present. State v. Hartman, 42 S.W.3d 44, 2001 Tenn. LEXIS 350 (Tenn. 2001).

In defendant's murder trial, the court erred in denying the admission of a videotape of defendant's statements; however, the error was harmless, because the evidence of defendant's guilt was overwhelming, and nothing on the videotape remotely implied that defendant was innocent of the crime. State v. Torres, 82 S.W.3d 236, 2002 Tenn. LEXIS 336 (Tenn. 2002).

Trial court never made a determination that fairness demanded that the various portions be considered at the same time, but while defendant should not have been prohibited from introducing the subsequent portion of the witness's deposition testimony on re-direct, as this did not affect the judgment, the error was harmless. Boyd v. BNSF Ry. Co., 596 S.W.3d 712, 2018 Tenn. App. LEXIS 736 (Tenn. Ct. App. Sept. 12, 2018), appeal denied, Boyd v. BNSF Ry. Co., — S.W.3d —, 2019 Tenn. LEXIS 235 (Tenn. May 20, 2019).

Trial court abused its discretion by excluding defendant's voluntary statements made during the post-polygraph interview; the statements amounted to a confession and the probative value was very high, the trial court incorrectly evaluated the danger of unfair prejudice resulting from defendant's presumed response to the evidence, he could provide context for the statements even without mention of the polygraph, and while he could not be required to testify to provide context, the analysis had to focus on his statements, not his reaction to them. State v. McCaleb, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 426 (Tenn. Crim. App. June 1, 2018), rev'd, 582 S.W.3d 179, 2019 Tenn. LEXIS 371 (Tenn. Aug. 21, 2019).

Hearing Panel of the Board of Professional Responsibility did not abuse its discretion by excluding the written declaration of an independent computer consultant a lawyer engaged to search the law firm's computers because it appropriately allowed the lawyer to introduce other parts of his district court testimony; the rule did not authorize the lawyer to introduce the testimony or proof other persons provided in the district court. Bd. of Prof'l Responsibility of the Supreme Court of Tenn. v. Justice, 577

S.W.3d 908, 2019 Tenn. LEXIS 288 (Tenn. July 2, 2019), cert. denied, 206 L. Ed. 2d 187, 140 S. Ct. 1212, — U.S. —, 2020 U.S. LEXIS 944 (U.S. Feb. 24, 2020).

Even though the trial court erred by sustaining the prosecutor's objection to the admission of defendant's written statement to police on the basis that any exculpatory statements contained therein were self-serving, as the State questioned a sergeant regarding the more inculpatory portions of defendant's statement and the trial court should have admitted the remainder of the statement pursuant to the rule of completeness, the error was harmless because defendant testified, thereby placing the substance of his "self-serving" statement before the jury. State v. Brewer, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 157 (Tenn. Crim. App. Mar. 11, 2019).

Trial court properly found that the rule of completeness did not justify the introduction of the entire video of defendant's DUI arrest because much of contained defendant's self-serving statements and it was defense counsel's choice not to request that the field sobriety portion of the video be published to the jury during the officer's cross-examination. State v. Worthington, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 300 (Tenn. Crim. App. May 8, 2019).

Trial court did not abuse its discretion in refusing admit the entire video recording of defendant's statement to police, and the decision to show only the first 36 minutes and 25 seconds was within the range of acceptable dispositions; the portion shown included defendant explaining that he initially lied because of his mother's presence in the room and he was embarrassed, which put his statement in context. The jury did not need to see the entire video recording in order to ensure a fair understanding of the proof. State v. Smartt, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 620 (Tenn. Crim. App. Oct. 3, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 92 (Tenn. Feb. 19, 2020).

Although defendant contended that a trial court erred by excluding the entirety of the police interview of a witness as inadmissible hearsay plain error relief was not warranted because the witness was permitted to testify on redirect examination and clarify for the jury that, although the witness assumed defendant was driving a truck, the witness did not see the driver and did not know with certainty who was driving. In light of the other evidence at trial further consideration of the alleged error was not necessary to do substantial justice. State v. Davidson, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 14 (Tenn. Crim. App. Jan. 14, 2020).

ARTICLE II. JUDICIAL NOTICE

Rule 201. Judicial notice of adjudicative facts. —

(a) Scope of Rule. — This rule governs only judicial notice of adjudicative facts.

(b) Kinds of Facts. — A judicially noticed fact must be one not subject to reasonable dispute, in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

(c) When Discretionary. — A court may take judicial notice whether requested or not.

(d) When Mandatory. — A court shall take judicial notice if requested by a party and supplied with the necessary information.

(e) Opportunity to Be Heard. — A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice is taken.

(f) Time of Taking Notice. — Judicial notice may be taken at any stage of the proceeding.

(g) Instructing the Jury. — In a civil action or proceeding, the court shall instruct the jury to accept as conclusive any fact judicially noticed. In a criminal case, the court shall instruct the jury that it may, but is not required to, accept as conclusive any fact judicially noticed.

Advisory Commission Comments. Judicial notice really does not involve admission and exclusion of evidence; rather, no evidence is necessary. Part (b) limits judicial notice to a relatively small class of adjudicative facts. The lawyer may have to supply the court with reference materials, such as an almanac.

Law Reviews. A Meta-Analysis of the Tennessee Rules of Evidence (Neil P. Cohen), 57 Tenn. L. Rev. 1 (1989).

Judicial Notice in Tennessee (Robert Banks, Jr. and Eliabeth T. Collins), 21 Mem. St. U.L. Rev. 431 (1991).

Some Comparisons Between the New Tennessee Rules of Evidence and the Federal Rules of Evidence Part I (Robert Banks, Jr.), 20 Mem. St. U.L. Rev. 283 (1990).

NOTES TO DECISIONS

Analysis

1. In General.
2. Matters Not Appropriate for Judicial Notice.
3. Matters Appropriate for Judicial Notice.
4. Failure to Request Hearing.

1. In General.

It was error for court to base its decision on facts not contained in the record, but acquired by the court's extrajudicial observations of the plaintiff; the trial judge saw the plaintiff on three separate occasions prior to trial and based his decision, in part, on what was observed. Vaughn v. Shelby Williams of Tennessee, Inc., 813 S.W.2d 132, 1991 Tenn. LEXIS 265 (Tenn. 1991).

The implicit effect of Tenn. R. Evid. 201 is that if an aggrieved party does not act under subsection (e), the noticed fact is taken as a given for purposes of both the trial and appellate proceedings. State v. Nunley, 22 S.W.3d 282, 1999 Tenn. Crim. App. LEXIS 712 (Tenn. Crim. App. 1999).

A judicially noticeable fact that is duly noticed by the trial court without timely objection is a part of the record as stated by the trial court and is in lieu of the "evidence" that T.C.A. § 40-35-210(g) otherwise requires. State v. Nunley, 22 S.W.3d 282, 1999 Tenn. Crim. App. LEXIS 712 (Tenn. Crim. App. 1999).

Appellate court saw no reason why Tennessee should scorn the emerging consensus on the amenability of Google Maps to judicial notice, at least for the purpose of establishing distance between two points. Therefore, the appellate court found no abuse of discretion in the trial court's decision to take judicial notice of distances using Google Maps. Total Garage Store, LLC v. Moody, — S.W.3d —, 2020 Tenn. App. LEXIS 531 (Tenn. Ct. App. Nov. 24, 2020).

While the record contained evidence from which it could be inferred that the offenses at the home occurred in Obion County, the record did not support the conclusion that the touching that was the basis of the conviction occurred at the home; defendant's stepdaughter's testimony at trial clarified that the incident she had described, which formed the basis of the charge, occurred elsewhere, and thus venue was not established by a preponderance of the evidence as to this aggravated sexual battery conviction. State v. Haven, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 431 (Tenn. Crim. App. June 19, 2020).

2. Matters Not Appropriate for Judicial Notice.

The court's personal opinion based on past experience that there is a connection between used car businesses and illegal drug enterprises was not an appropriate matter for judicial notice. State v. Matheny, 884 S.W.2d 480, 1994 Tenn. Crim. App. LEXIS 301 (Tenn. Crim. App. 1994).

If a party offers anything other than dilatory or pretextual reasons for opposing the taking of judicial notice, the court should view the fact as subject to reasonable dispute and decline to take judicial notice of it. State v. Nunley, 22 S.W.3d 282, 1999 Tenn. Crim. App. LEXIS 712 (Tenn. Crim. App. 1999).

A court may not consider facts outside the record that are within the judge's personal knowledge under the guise of taking judicial notice. State v. Nunley, 22 S.W.3d 282, 1999 Tenn. Crim. App. LEXIS 712 (Tenn. Crim. App. 1999).

Spouse's need for alimony is not a fact of which judicial notice may be taken, but must be established by proof. Mayfield v. Mayfield, 395 S.W.3d 108, 2012 Tenn. LEXIS 876 (Tenn. Dec. 3, 2012).

3. Matters Appropriate for Judicial Notice.

Pursuant to Tenn. R. Evid. 201, the two missing dates in the second action, that were provided from the trial court's record in the first action, were capable of accurate and ready determination by referencing the court's files, and the accuracy of the dates could not reasonably be questioned because the dates were imprinted by the circuit court clerk on the documents as they were filed in that action; Tenn. R. Evid. 201(b) authorized the trial court to take judicial notice of a fact that was not subject to reasonable dispute if it was capable of accurate and ready determination by resort to sources whose accuracy could not reasonably

be questioned, and the trial court's decision to take judicial notice of the two missing dates was an appropriate exercise of its discretion. Counts v. Bryan, 182 S.W.3d 288, 2005 Tenn. App. LEXIS 413 (Tenn. Ct. App. 2005), appeal denied, — S.W.3d —, 2005 Tenn. LEXIS 1109 (Tenn. Nov. 28, 2005).

Trial court properly took judicial notice of its own prior proceedings; because defendant's first indictment was timely and pending at the time the grand jury returned the second indictment, the one-year statute of limitations applicable to misdemeanors under T.C.A. § 40-2-102(a) was tolled. The order of expunction should not have been entered and was of no effect and thus, defendant's conviction for driving under the influence, third offense, was proper. State v. Lawson, 291 S.W.3d 864, 2009 Tenn. LEXIS 514 (Tenn. Aug. 24, 2009).

Evidence regarding the location of the offenses, evidence that included testimony about the street address and city where the offenses occurred and the school the victims attended, was sufficient to allow the factfinder to infer, pursuant to facts generally known within the territorial jurisdiction, that the offenses occurred in Obion County. State v. Haven, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 431 (Tenn. Crim. App. June 19, 2020).

4. Failure to Request Hearing.

The trial judge properly took judicial notice of the rendering of 300 drug-case indictments in the trial court during a two-year period; thus, the defendant's failure to request a Tenn. R. Evid. 201(e) hearing precluded appellate review of the underlying fact. State v. Nunley, 22 S.W.3d 282, 1999 Tenn. Crim. App. LEXIS 712 (Tenn. Crim. App. 1999).

Rule 202. Judicial notice of law. —

(a) Mandatory Judicial Notice of Law. — The court shall take judicial notice of (1) the common law, (2) the constitutions and statutes of the United States and of every state, territory, and other jurisdiction of the United States, (3) all rules adopted by the United States Supreme Court or by the Tennessee Supreme Court, and (4) any rule or regulation of which a statute of the United States or Tennessee mandates judicial notice.

(b) Optional Judicial Notice of Law. — Upon reasonable notice to adverse parties, a party may request that the court take, and the court may take, judicial notice of (1) all other duly adopted federal and state rules of court, (2) all duly published regulations of federal and state agencies and proclamations of the Tennessee Wildlife Resources Agency, (3) all duly enacted ordinances of municipalities or other governmental subdivisions, (4) any matter of law which would fall within the scope of this subsection or subsection (a) of this rule but for the fact that it has been replaced, superseded, or otherwise rendered no longer in force, and (5) treaties, conventions, the laws of foreign countries, international law, and maritime law.

(c) Determination by Court. — All determinations of law made pursuant to this rule shall be made by the court and not by the jury. In making its determination the court is not bound by the rules of evidence except those with respect to privileges. [As amended by order entered January 25, 1991, effective July 1, 1991.]

Advisory Commission Comments. Note that judicial notice of ordinances is discretionary and requires notice to adverse parties.

See also the Uniform Judicial Notice Act, Tenn. Code Ann. § 24-6-201 — 207 [§§ 24-6-201 — 24-6-206 repealed].

Advisory Commission Comments [1991]. The Tennessee Wildlife Resources Agency issues proclamations to regulate hunting seasons and limits. These are published in the Administrative Register. Under the amended rule, a court could judicially notice such proclamations.

Law Reviews. Judicial Notice in Tennessee (Robert Banks, Jr. and Elizabeth T. Collins), 21 Mem. St. U.L. Rev. 431 (1991).

NOTES TO DECISIONS

Analysis

1. Introduction of Evidence.
2. Ordinance.

1. Introduction of Evidence.

A scientific manual first cited in defendant's appellate brief was not admissible since an appellate court may not consider the introduction of evidence in the first instance. State v. Smith, 893 S.W.2d 908, 1994 Tenn. LEXIS 278 (Tenn. 1994), rehearing denied, 893 S.W.2d 908, 1995 Tenn. LEXIS 48 (Tenn. 1995), cert. denied, Smith v. Tennessee, 516 U.S. 829, 116 S. Ct. 99, 133 L. Ed. 2d 53, 1995 U.S. LEXIS 5601 (1995).

2. Ordinance.

Because no copy of a municipal code was included in the record, the court of appeals had to confine its application of the municipal code to a section as it appeared in the record. Williams v. Epperson, 607 S.W.3d 289, 2020 Tenn. App. LEXIS 88 (Tenn. Ct. App. Feb. 27, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 440 (Tenn. July 17, 2020).

ARTICLE III. PRESUMPTIONS [RESERVED.]

Advisory Commission Comments. The Commission believed that presumptions were outside the scope of its present assignment from the Tennessee Supreme Court.

Compiler's Notes. The amendment of the Advisory Commission Comments to Article III, which deleted the former second paragraph of the original Comments and the 1993 Comments, as promulgated and adopted by the Supreme Court in its order dated January 8, 2008, was ratified and approved by House Resolution 239 and Senate Resolution 221. The order promulgating the amendment of the Advisory Commission Comments provided that it take effect July 1, 2008.

ARTICLE IV. RELEVANCE

Rule 401. Definition of "relevant evidence." —

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

Advisory Commission Comments. This proposal does not change Tennessee common law. The theoretical test for admissibility is a lenient one, as it should be, and practical difficulties can be resolved under Rule 403 or the exclusionary rules of legal relevancy that follow.

The materiality concept is found in the words, "any fact that is of consequence to the determination of the action." To be relevant, evidence must tend to prove a material issue.

Law Reviews. A Meta-Analysis of the Tennessee Rules of Evidence (Neil P. Cohen), 57 Tenn. L. Rev. 1 (1989).

Evidence — State v. Begley: When the Tennessee Supreme Court Meets PCR-Method DNA Analysis, Its Love at First Sight, 28 Mem. St. U.L. Rev. 1239 (1998).

Fye v. Kennedy: Time to Examine Tennessee's Collateral Source Rule (William S. Walton), 48 Tenn. B.J. 16 (2012).

I See Dead People: Examining the Admissibility of Living-Victim Photographs in Murder Trials, 69 Vand. L. Rev. 1423 (2016).

Relevance: The Tennessee Balancing Act (Robert Banks, Jr., Melissa Maravich), 57 Tenn. L. Rev. 33 (1989).

Some Comparisons Between the New Tennessee Rules of Evidence and the Federal Rules of Evidence Part I (Robert Banks, Jr.), 20 Mem. St. U.L. Rev. 283 (1990).

The Nature and Purpose of Evidence Theory, 66 Vand. L. Rev. 547 (2013).

NOTES TO DECISIONS

Analysis

1. Photographs.
2. Expert Testimony.
3. Pretrial Statements.
4. Drug Tests.
5. Evidence of Motive.
6. Condemnation Proceedings.
7. Victim's Prior Injuries.
8. Background Evidence.

9. Illustrative Cases.
10. Burden of Proof.
11. Evidence Properly Included.
12. Evidence Properly Excluded.
13. Evidence Improperly Excluded.
14. Evidence Improperly Included.
15. Harmless Error.
16. Tenn. R. Evid. 412.

1. Photographs.

In premises liability action, photographs taken two weeks after the contested accident did not accurately depict the accident scene, were not relevant and thus inadmissible. Phillips v. F.W. Woolworth Co., 867 S.W.2d 316, 1992 Tenn. App. LEXIS 918 (Tenn. Ct. App. 1992), appeal denied, Phillips v. F. W. Woolworth Co., — S.W.2d —, 1993 Tenn. LEXIS 53 (Tenn. Feb. 22, 1993).

Photographs showing injuries suffered by child-victim were relevant and highly probative in attempted murder case where photographs were offered to show the trier of fact the multiple injuries the child-victim sustained at the hands of the defendants. State v. Griffis, 964 S.W.2d 577, 1997 Tenn. Crim. App. LEXIS 427 (Tenn. Crim. App. 1997).

In a capital murder case, a court did not err by admitting photographs of the victims, where they were relevant in establishing the heinous, atrocious, or cruel aggravating circumstance for both murders, and the photographs were not excessively gruesome or shocking, especially in light of the graphic testimony in the case. State v. Carter, 114 S.W.3d 895, 2003 Tenn. LEXIS 843 (Tenn. 2003), cert. denied, Carter v. Tennessee, 540 U.S. 1221, 124 S. Ct. 1511, 158 L. Ed. 2d 158, 2004 U.S. LEXIS 1692 (2004).

In defendant's murder case, the court properly admitted two photographs that depicted reddish-brown stains on his shoes because, although the investigator admitted that no testing was performed on the shoes and that he could not say that the stains were blood, the photographs were however not unfairly prejudicial, particularly when considered in light of the other evidence at trial. State v. Gann, 251 S.W.3d 446, 2007 Tenn. Crim. App. LEXIS 813 (Tenn. Crim. App. Oct. 16, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 243 (Tenn. Apr. 7, 2008), dismissed, Gann v. Lester, — F. Supp. 2d —, 2016 U.S. Dist. LEXIS 120372 (E.D. Tenn. Sept. 7, 2016).

In defendant's murder trial for the killing of his wife, the trial court did not err in admitting color photographs of the victim's autopsy rather than black and white photographs because the medical examiner testified that the color photographs better demonstrated the extent of the victim's injuries. State v. Brock, 327 S.W.3d 645, 2009 Tenn. Crim. App. LEXIS 496 (Tenn. Crim. App. June 29, 2009), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 56 (Tenn. Jan. 25, 2010), cert. denied, Brock v. Tennessee, , 562 U.S. 850, 131 S. Ct. 101, 178 L. Ed. 2d 64, 2010 U.S. LEXIS 5883 (U.S. 2010).

Trial court did not err by admitting the victims' autopsy photographs into evidence because the injuries depicted appeared to have been cleaned, were not gruesome or horrifying, and showed clear images of the injuries. Although additional photographs generally showed the injuries, the close-up images of the injuries were relevant to assisting the medical examiner explain to the juries the injuries with specificity. State v. Cool, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 691 (Tenn. Crim. App. Sept. 12, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 58 (Tenn. Jan. 18, 2019).

While defendant waived his right to appeal the issue by failing to make a timely objection to the admission of the photograph at trial, notwithstanding waiver, no abuse of discretion was found; the photograph at issue was relevant to an agent's opinion that the revolver found in defendant's girlfriend's car was the same used to shoot the bullets found in the victim and at the scene, and defendant failed to specify any prejudicial effect. State v. Wilson, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 35 (Tenn. Crim. App. Jan. 17, 2019).

Trial court properly exercised its discretion when admitting a photograph of the gunshot wounds, which was relevant to the victim's manner of death; the photograph was taken at the crime scene and contained some blood, but given the circumstances surrounding the victim's death, was properly characterized by the trial court as not unduly gruesome. State v. Wilson, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 35 (Tenn. Crim. App. Jan. 17, 2019).

Trial court did not abuse its discretion by admitting the victim's autopsy photographs into evidence because even though it was undisputed that the victim died from a gunshot wound to the head, the state was still required to prove the defendant shot and killed her. The photographs, which depicted the entrance and exit wounds suffered by the victim, aided in this effort and were relevant to the state's case, only two photographs were entered into evidence and neither was particularly gruesome or inflammatory. State v. Jenkins, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 110 (Tenn. Crim. App. Feb. 15, 2019).

Trial court did not err in admitting five autopsy photographs showing wounds to the victim's right ear, the right side of her head, and her left arm because the photographs assisted the doctor who performed the autopsy in explaining the victim's injuries and supported her conclusion that the cause of death was multiple sharp force injuries; the photographs were not overly gruesome as the wounds had been cleaned; and the probative value of the photographs was not substantially outweighed by the danger of unfair prejudice. State v.

Simpson, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 173 (Tenn. Crim. App. Mar. 18, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 322 (Tenn. July 24, 2019).

Trial court did not err by admitting an autopsy photograph into evidence because an expert in forensic pathology testified that it demonstrated some injuries more clearly than others and was needed to show the full extent of the victim's injuries. State v. Thomas, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 270 (Tenn. Crim. App. Apr. 25, 2019).

Photo of defendant and a codefendant was properly admitted because (1) the photo was relevant, as a witness used the photo to identify the codefendant, and (2) the photo did not depict defendant as a gang member. State v. Toles, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 315 (Tenn. Crim. App. May 17, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 462 (Tenn. Sept. 20, 2019).

Trial court did not abuse its discretion when it admitted a photograph of a fetus, the unborn child of the victim, because the photograph did not depict anything that resembled a complete human lifeform, considering the assistant medical examiner's testimony while reviewing the picture it did not appear that the fetus is even visible in the picture, and the photograph was not graphic or gruesome. State v. Isaac, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 733 (Tenn. Crim. App. Nov. 13, 2019), review denied and ordered not published, — S.W.3d —, 2020 Tenn. LEXIS 145 (Tenn. Apr. 1, 2020).

There was no error in the trial court's decision to admit the frontal autopsy photograph that showed a comprehensive view of the injuries to the victim's throat; the photograph was highly probative of the nature of the victim's injuries, it was offered to illustrate the medical examiner's testimony, it was relevant to the issue of defendant's premeditation and intent, and its probative value was not substantially outweighed by its gruesome or horrifying character. State v. Morgan, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 393 (Tenn. Crim. App. June 5, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 518 (Tenn. Oct. 7, 2020).

Trial court did not err in admitting the eight autopsy photographs that defendant challenged on appeal because they were probative of intent and premeditation; a doctor testified that autopsy photographs helped medical examiners describe a victim's injuries to the jury, and, where the victim sustained multiple wounds, photographs presented in combination with the autopsy report helped to reduce the jury's confusion; defendant testified at trial that he only remembered stabbing the victim three or four times, but he stabbed the victim 21 times; and none of the photographs were particularly gruesome. State v. Gadsden, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 739 (Tenn. Crim. App. Nov. 19, 2020).

2. Expert Testimony.

In a prosecution for aggravated sexual battery, the trial court did not abuse its discretion in ruling inadmissible testimony of a psychologist that defendant did not have the "propensity" to commit crimes involving the sexual abuse of children since the testimony would not substantially assist the jury to understand the proof adduced at the trial. State v. Campbell, 904 S.W.2d 608, 1995 Tenn. Crim. App. LEXIS 189 (Tenn. Crim. App. 1995).

Expert testimony on the "polymerase chain reaction" (PCR) method of DNA analysis was of substantial assistance to the trier of fact as required by Tenn. R. Evid. 401. State v. Begley, 956 S.W.2d 471, 1997 Tenn. LEXIS 522 (Tenn. 1997).

Test in McDaniel is sufficient to allow a trial court to properly evaluate the admissibility of expert testimony on the reliability of eyewitness identification; to the extent that State v. Coley, 32 S.W.3d 831, 2000 Tenn. LEXIS 573 (Tenn. 2000) holds otherwise, it is overruled. State v. Copeland, 226 S.W.3d 287, 2007 Tenn. LEXIS 502 (Tenn. May 23, 2007).

In a consumer protection act case brought by investors, the trial court erred in excluding the investors' expert's opinions regarding an investment advisor's investment advice because: (1) The expert possessed the education and experience that qualified him to render an expert opinion regarding the adequacy of the investment advice; (2) His methodology was sound and reflected the same intellectual rigor that would be required and expected of investment advisors competently practicing their profession; and (3) His testimony would have substantially assisted the triers of fact. Johnson v. John Hancock Funds, 217 S.W.3d 414, 2006 Tenn. App. LEXIS 447 (Tenn. Ct. App. 2006), appeal denied, Johnson v. John Hancock Funds, LLC, — S.W.3d —, 2006 Tenn. LEXIS 1114 (Tenn. Nov. 20, 2006).

In informed consent case, the trial court committed reversible error by excluding the patient's expert testimony regarding undisclosed medical risks that had not materialized because it was relevant in the jury's assessment of what a prudent person would have decided if properly informed of all the significant risks, and the evidence was not inadmissible under Tenn. R. Evid. 403, as it was highly probative and there was not a danger of unfair prejudice, confusion of issues, or undue delay. White v. Beeks, 469 S.W.3d 517, 2015 Tenn. LEXIS 368 (Tenn. May 18, 2015), rehearing denied, — S.W.3d —, 2015 Tenn. LEXIS 693 (Tenn. Aug. 26, 2015).

3. Pretrial Statements.

In a prosecution for first-degree murder, pretrial statements made by defendant to investigating officers which established defendant's motive met the definition of relevancy, and the

probative value of the statements outweighed any danger of unfair prejudice. State v. Gentry, 881 S.W.2d 1, 1993 Tenn. Crim. App. LEXIS 645 (Tenn. Crim. App. 1993).

Defendant's question to a jailer, "Do you honestly think that there is anything wrong with raping a child?" was a statement rather than a question, and given that defendant was a party opponent, his statement was admissible pursuant to Tenn. R. Evid. 803(1.2)(A). Although the statement was highly prejudicial, its probative value was not outweighed by its prejudicial effect. State v. Brown, 375 S.W.3d 565, 2011 Tenn. Crim. App. LEXIS 897 (Tenn. Crim. App. Dec. 6, 2011).

4. Drug Tests.

In a prosecution for possession of cocaine and marijuana, where defendant police officer argued that he found the drugs in the course of his duties and had not yet had the opportunity to take them to the property room, a negative drug test of defendant was relevant; however, the probative value of the test was slight and a ruling that it was inadmissible was not prejudicial error. State v. Stoddard, 909 S.W.2d 454, 1994 Tenn. Crim. App. LEXIS 161 (Tenn. Crim. App. 1994).

5. Evidence of Motive.

Whether the defendant believed he would soon be paroled was relevant evidence on the issue of motive and the defendant's state of mind and was admissible. State v. Wingard, 891 S.W.2d 628, 1994 Tenn. Crim. App. LEXIS 595 (Tenn. Crim. App. 1994).

In defendant's capital murder case, a court erred by excluding the proffered testimony of a witness, as it was relevant to show that another person had the motive and the opportunity to kill the victim; the error was harmless, however, because the other evidence against defendant was overwhelming. State v. Powers, 101 S.W.3d 383, 2003 Tenn. LEXIS 2 (Tenn. 2003), cert. denied, Powers v. Tennessee, 538 U.S. 1038, 123 S. Ct. 2083, 155 L. Ed. 2d 1071, 2003 U.S. LEXIS 3797 (Tenn. May 19, 2003).

6. Condemnation Proceedings.

In a condemnation proceeding against land subject to a leasehold interest, evidence of both the probability of the lease's renewal and of a cancellation provision in the lease was relevant. City of Johnson City v. Outdoor West, 947 S.W.2d 855, 1996 Tenn. App. LEXIS 810 (Tenn. Ct. App. 1996).

7. Victim's Prior Injuries.

To the extent that the state was attempting to prove that defendant was guilty of first-degree murder by aggravated child abuse through his neglect of a child, child's non-fatal bruising was relevant to establish what the defendant had known about her physical condition and to negate any ignorance or mistake on his part as to whether she needed medical attention. State v. Roberson, 988 S.W.2d 690, 1998 Tenn. Crim. App. LEXIS 107 (Tenn. Crim. App. 1998).

8. Background Evidence.

Although Tenn. R. Evid. 401 provides a relatively lenient threshold for admitting evidence, general background evidence used to relate the full story of the offense is rarely probative of an actual material issue at trial. State v. Gilliland, 22 S.W.3d 266, 2000 Tenn. LEXIS 341 (Tenn. 2000).

A general policy that bars background evidence merely because it does not directly bear upon a material issue ignores the fact that such evidence is often crucial to understanding the other material evidence at trial and that the absence of background evidence could have a detrimental effect on the jury's comprehension of the offense in question. State v. Gilliland, 22 S.W.3d 266, 2000 Tenn. LEXIS 341 (Tenn. 2000).

Admission of a child victim's testimony regarding her knowledge of her mother's suspicions about defendant's sexual abuse of the child was irrelevant, pursuant to Tenn. R. Evid. 401, as to whether defendant sexually abused to child and therefore was inadmissible under Tenn. R. Evid. 402; however, because the statement was not central to the case and damaging to defendant, the error in admitting the evidence was harmless pursuant to Tenn. R. Crim. P. 52(a) and T.R.A.P. 36(b). State v. Schiefelbein, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 138 (Tenn. Crim. App. Feb. 8, 2007), modified, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 213 (Tenn. Crim. App. Mar. 7, 2007).

9. Illustrative Cases.

The trial court erred in excluding evidence in informed consent medical malpractice claim regarding surgeon's hand condition leading up to surgery; the evidence went to the very heart of the plaintiff's claim, and was not only relevant on the issue of informed consent but was the very essence of the claim. Hawk v. Chattanooga Orthopaedic Group, P.C., 45 S.W.3d 24, 2000 Tenn. App. LEXIS 482 (Tenn. Ct. App. 2000), review or rehearing denied, — S.W.3d —, 2001 Tenn. LEXIS 145 (Tenn. Feb. 26, 2001).

An unopened, sealed bottle of cognac had no bearing upon whether the defendant was intoxicated while driving on the morning in question; however, although irrelevant, the admission of the cognac bottle was harmless where the defendant admitted that he had been drinking. State v. Korsakov, 34 S.W.3d 534, 2000 Tenn. Crim. App. LEXIS 553 (Tenn. Crim. App. 2000).

In a wrongful death case brought by the parents of a group home resident who died of bacterial meningitis, testimony that the physician retained by the group home told witnesses that the resident died of a seizure and that the

resident's condition had been improving was relevant to show that the physician knew that the physician had breached the standard of care. Rothstein v. Orange Grove Ctr., 60 S.W.3d 807, 2001 Tenn. LEXIS 808 (Tenn. 2001).

In defendant's capital murder case, a court properly allowed evidence of defendant's poverty because the state offered proof that despite the loss of his job without severance pay, defendant had made several cash purchases totaling in excess of $800, had sought to invest $3,000, and had over $1,000 in coins in his possession at the time of his arrest; that defendant had no legitimate source of income following the termination of his employment, coupled with proof of those expenditures shortly after the robbery, was relevant, circumstantial evidence of the commission of the crimes. State v. Reid, 213 S.W.3d 792, 2006 Tenn. LEXIS 1203 (Tenn. 2006), rehearing denied, — S.W.3d —, 2007 Tenn. LEXIS 17, (Tenn. 2007), cert. denied, Reid v. Tennessee, 169 L. Ed. 2d 305, 128 S. Ct. 437, 552 U.S. 974, 2007 U.S. LEXIS 11530 (2007).

Evidence of the prior acquittals of two men defendant claimed were the individuals responsible for a murder as context evidence was inadmissible because the absence of the evidence of the acquittals would not present a chronological void that would confuse the jury since the testimony at trial regarding the course of the investigation of the crime explained the chronological void and included evidence that other suspects were previously tried for the crime; evidence of the outcome of another trial does not assist the jury in its understanding of the events. State v. Turner, 352 S.W.3d 425, 2011 Tenn. LEXIS 960 (Tenn. Oct. 12, 2011).

Trial court applied an incorrect legal standard and erred in admitting the evidence of the prior acquittals of two men defendant implicated as the individuals responsible for a murder for the purpose of demonstrating their credibility because evidence of the prior acquittals was not relevant to the men's truthfulness; the men testified in their previous trial that they did not kill the victim, and if they did, in fact, kill the victim, they would have ample motivation to lie. State v. Turner, 352 S.W.3d 425, 2011 Tenn. LEXIS 960 (Tenn. Oct. 12, 2011).

Trial court erred in admitting into evidence the prior acquittals of two men defendant claimed were the individuals responsible for a murder because defendant had a right to suggest that the men were responsible for the murder; because the jurors in defendant's case could come to a different conclusion concerning the responsibility of the men, the evidence of the acquittals did not demonstrate that it was more or less probable that the men committed the crime and under T.C.A. § 39-11-201(a) was inadmissible to demonstrate their innocence. State v. Turner, 352 S.W.3d 425, 2011 Tenn. LEXIS 960 (Tenn. Oct. 12, 2011).

Because defendant's motion to exclude evidence of the acquittals of two men defendant implicated as the individuals responsible for a murder was made before the men testified, it be premature to admit evidence of the acquittals to demonstrate their truthful character. State v. Turner, 352 S.W.3d 425, 2011 Tenn. LEXIS 960 (Tenn. Oct. 12, 2011).

Defendant's conviction for carjacking was proper because the evidence of his guilt was overwhelming enough to have been the basis for the jury's verdict. Thus, although the statement was not relevant and not admissible, any error was harmless since the erroneously admitted evidence had minimal, if any, impact on the jury's decision to have found him guilty. State v. Moore, 376 S.W.3d 108, 2011 Tenn. Crim. App. LEXIS 839 (Tenn. Crim. App. Nov. 16, 2011).

Evidence of defendant father's prior assaults against defendant mother was irrelevant and improperly admitted because 1) her knowledge that he had a propensity for violence was not an element of the crime of child abuse under former T.C.A. § 39-15-402; 2) such evidence did not tend to show it was more probable that she intended to promote, assist, or benefit from results of the offense under T.C.A. § 39-11-402; and 3) it did not tend to show that it was more probable that she knew he intended to abuse the child, an element of facilitation (T.C.A. § 39-11-403). State v. Gomez, 367 S.W.3d 237, 2012 Tenn. LEXIS 291 (Tenn. Apr. 24, 2012).

Trial court erred in admitting evidence in a medical malpractice case that plaintiff's mother returned to the doctor after plaintiff's birth, which was the subject of the alleged malpractice, as the probative value of this evidence was substantially outweighed by the danger of unfair prejudice. Mayo v. Shine, 392 S.W.3d 61, 2012 Tenn. App. LEXIS 425 (Tenn. Ct. App. June 25, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 807 (Tenn. Oct. 18, 2012).

Acquittal is not evidence of innocence but rather evidence of the failure of the state to prove guilt of a defendant beyond a reasonable doubt. Therefore, the trial court's refusal to inform the jury that defendant had been acquitted of the aggravated robbery charges for lack of corroboration of accomplice testimony was not erroneous. State v. Little, 402 S.W.3d 202, 2013 Tenn. LEXIS 309 (Tenn. Mar. 22, 2013).

Brief references by witnesses to defendant's prior incarceration did not preclude an impartial verdict and did not create a manifest necessity for a new trial. State v. Bell, 480 S.W.3d 486, 2015 Tenn. LEXIS 720 (Tenn. Sept. 10, 2015), cert. denied, Bell v. Tennessee, 195 L. Ed. 2d 221, 136 S. Ct. 2006, — U.S. —, 2016 U.S. LEXIS 3192 (U.S. 2016).

Trial court erred when it refused to allow the defense to cross-examine the murder victim's

spouse about the spouse's affair with the spouse's paramour, because this evidence was part of the defense by defendant to show a motive by the spouse to have murdered the victim. However, given the strength of the evidence against defendant, the error was harmless as the appellate court found that the jury would have convicted defendant of murdering the victim even had the jury been informed about the spouse's affair. State v. Bell, 480 S.W.3d 486, 2015 Tenn. LEXIS 720 (Tenn. Sept. 10, 2015), cert. denied, Bell v. Tennessee, 195 L. Ed. 2d 221, 136 S. Ct. 2006, — U.S. —, 2016 U.S. LEXIS 3192 (U.S. 2016).

Trial court did not abuse its discretion by denying appellant's motion in limine to exclude photographs of the parties' vehicles; they sustained minimal damage, appellant testified regarding the damage to his vehicle and stated that he repaired it himself, and the weight to be given to the photographs introduced and to the testimony was a matter to be determined by the jury. Allen v. Albea, 476 S.W.3d 366, 2015 Tenn. App. LEXIS 241 (Tenn. Ct. App. Apr. 23, 2015).

In a case in which defendant was charged with first degree premeditated murder, which required the state to show that the killing was premeditated and intentional, the evidence that the victim had received a large check days before defendant shot her, that she was planning to leave defendant and use the check to move in with her brother, and that defendant attempted to cash the victim's check following her death was relevant and highly probative regarding whether defendant acted intentionally; and the probative value was not substantially outweighed by the danger of unfair prejudice. State v. Jarman, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 832 (Tenn. Crim. App. Nov. 8, 2018), rev'd, 604 S.W.3d 24, 2020 Tenn. LEXIS 267 (Tenn. July 6, 2020).

Given defendant's admission that the victim's girlfriend agreed to pay him to kill the victim, failed to pay him the entire agreed upon amount, and subsequently gave him speakers that defendant was able to pawn for cash, the trial court properly allowed the state to present testimony and paperwork documenting transactions that had a tendency to show the victim's girlfriend was in need of cash to finish paying defendant, and this evidence was relevant. State v. Wilson, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 35 (Tenn. Crim. App. Jan. 17, 2019).

State used a detective's testimony to show that defendant's lying about his military service, along with other inconsistencies, caused the detective to identify defendant as his primary suspect, and thus Tenn. R. Evid. 404(b) did not bar admission of the testimony; given defendant's claim that the police unfairly targeted him, the detective's testimony as to why he identified defendant as his primary suspect was relevant and highly probative, which was not substantially outweighed by the danger of unfair prejudice. State v. Hendrix, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 304 (Tenn. Crim. App. May 14, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 481 (Tenn. Sept. 18, 2019).

Testimony of an expert in forensic pathology, who performed the victim's autopsy, as to the bruises on the victim's body being not medically consistent with normal injuries for a one-year-old child, the force required to cause such injuries, and whether the victim's injuries could have been caused by defendant's performing CPR was relevant regarding whether the victim's injuries were consistent with an accident, given the defense theory that the victim's injuries resulted from a two-foot fall from an ottoman. State v. Batiz, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 721 (Tenn. Crim. App. Nov. 1, 2019), review denied and ordered not published, — S.W.3d —, 2020 Tenn. LEXIS 140 (Tenn. Mar. 26, 2020).

Admission of the relevant portion of the 911 call, while error, did not undermine the fundamental fairness of the trial; the only contested issue was the level of defendant's culpability, and thus the probative value of the call was far outweighed by the danger of unfair prejudice and needless presentation of cumulative evidence, and the error was harmless as there was overwhelming evidence of defendant's guilt. State v. Wooten, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 12 (Tenn. Crim. App. Jan. 13, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 320 (Tenn. June 3, 2020).

Limits on defendant's cross-examination did not violate the right to confrontation because defendant's questions were repetitive and asked after witnesses answered the question. State v. Abdullah, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 26 (Tenn. Crim. App. Jan. 21, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 255 (Tenn. Apr. 15, 2020).

Defendant's internet searches related to tickling and urination, boiling a silicone toy, talking to a child about masturbation, child nudity at home, and "Bad Dragon Bruce" were relevant and not prejudicial because they showed, inter alia, that defendant had a fetish involving dragons and fantasy creatures, defendant made dragon silicone sex toys available for the victim's use, and defendant instructed the victim regarding the mechanics of masturbation with the sex toys and lubricants. State v. Ledbetter, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 106 (Tenn. Crim. App. Feb. 20, 2020).

Trial court did not plainly err by admitting into evidence a cell phone and corresponding text messages concerning drug transactions because the messages' probative value lay in their meaning when read in context, the probative value of the messages as a whole was not significantly outweighed by the risk of unfair prejudice, and although a witness' personal

problems did not bear on defendant's drug dealing activities, the beginning and end of the message seeking to clarify defendant's articulated price for two ounces of drugs made more sense in the context of the entire message. State v. Austin, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 695 (Tenn. Crim. App. Oct. 27, 2020).

Witness's testimony that the victim told her that the victim held yard sales to raise enough money to purchase a bus ticket in order to send defendant back to Mississippi was not an express declaration of the victim's mental state but was hearsay as it was circumstantial evidence of the victim's feelings toward defendant at the time the statement was made; however, the victim's statement was circumstantial evidence of the her mental state toward defendant at the time the statement was made, and therefore, was admissible as nonhearsay as it was admissible for the circumstantial implication that the victim intended to end her relationship with defendant, and was relevant to refute defendant's claims that he acted without premeditation. State v. Stewart, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 714 (Tenn. Crim. App. Nov. 5, 2020).

10. Burden of Proof.

Relevant evidence need not be sufficient to satisfy a party's burden of proof; rather, each item of proof may make a small, incremental contribution to a party's total efforts to meet its proof obligations. State v. Coulter, 67 S.W.3d 3, 2001 Tenn. Crim. App. LEXIS 485 (Tenn. Crim. App. 2001), overruled in part, State v. Johnson, — S.W.3d —, 2013 Tenn. Crim. App. LEXIS 1051 (Tenn. Crim. App. Dec. 3, 2013).

11. Evidence Properly Included.

In a capital murder case, a bartender's opinion testimony was properly included concerning defendant's actions in a bar two weeks after the murder, where the testimony was helpful to the jury in understanding why the bartender acted as she did while defendant was in the tavern, and the bartender's assessment of defendant's behavior was unlikely to have resulted in any unfair prejudice. State v. Davidson, 121 S.W.3d 600, 2003 Tenn. LEXIS 1007 (Tenn. 2003), cert. denied, Davidson v. Tennessee, 541 U.S. 1049, 158 L. Ed. 2d 743, 124 S. Ct. 2174, 2004 U.S. LEXIS 3512, 72 U.S.L.W. 3711 (2004).

In defendant's criminally negligent homicide case, the trial court did not err in admitting information in the community regarding child car seats where the evidence was relevant to show that defendant was aware, or should have been aware, of the danger to an unrestrained child and its probative value was not outweighed by the danger of unfair prejudice to defendant; the evidence was directly relevant to show that defendant's act of holding her child on her lap was negligent. State v. Jones, 151 S.W.3d 494, 2004 Tenn. LEXIS 992 (Tenn. 2004).

Where defendants were lovers convicted of murdering the woman's husband, evidence of a sign welcoming the woman home found in the lover's residence was relevant because it provided additional evidence of the relationship between defendants and was relevant to motive. Evidence of pry marks on the basement were circumstantial evidence of a staged, forced entry from the basement and were thus relevant. State v. Watson, 227 S.W.3d 622, 2006 Tenn. Crim. App. LEXIS 259 (Tenn. Crim. App. 2006), appeal denied, State v. Brooks, — S.W.3d —, 2006 Tenn. LEXIS 620 (Tenn. July 3, 2006).

Trial court did not abuse its discretion in admitting photographs of the victim because the photos demonstrated where the body was found and the spatter indicated the close range of the fatal shots; all photographs of the victim were relevant and not excessively gruesome so as to incite prejudice toward the victim's wife, who was convicted along with her lover of the murder. State v. Watson, 227 S.W.3d 622, 2006 Tenn. Crim. App. LEXIS 259 (Tenn. Crim. App. 2006), appeal denied, State v. Brooks, — S.W.3d —, 2006 Tenn. LEXIS 620 (Tenn. July 3, 2006).

Although the deceased mother's two children argued at trial that the criminal convictions were irrelevant and that the admission of such evidence was highly prejudicial, the appellate court found that the child's criminal conviction was admissible under Tenn. R. Evid. 404(b) because it was relevant under Tenn. R. Evid. 401 to whether the child had a motive or intent to influence his mother, and the trial court properly balanced the probative value and the prejudicial effect of the evidence pursuant to Tenn. R. Evid. 403. Whether to admit the evidence was within the sound discretion of the trial court and the court did not abuse its discretion when it admitted the evidence; moreover, the trial court gave a limiting instruction that evidence of the crime was only relevant as it pertained to motive and intent to influence the testatrix to change her will. In re Estate of Schisler, 316 S.W.3d 599, 2009 Tenn. App. LEXIS 699 (Tenn. Ct. App. Oct. 19, 2009), cert. denied, Stem v. Wix, 562 U.S. 894, 131 S. Ct. 299, 178 L. Ed. 2d 144, 2010 U.S. LEXIS 6054 (U.S. 2010).

On appeal from defendant's criminal convictions, given the proof of the on-again, off-again nature of the victim's relationship with defendant, the statements that she made shortly before her death about her fear of defendant were relevant and admissible under the state of mind exception to show not only the victim's state of mind at the time she uttered the statements, but also her probable mental state and behavior at the time of her death, including whether she would have been likely to initiate contact with defendant or willingly accompany him in her vehicle, Tenn. R. Evid. 803(3). State

v. Trusty, 326 S.W.3d 582, 2010 Tenn. Crim. App. LEXIS 339 (Tenn. Crim. App. Apr. 23, 2010), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 906 (Tenn. Sept. 27, 2010).

On appeal from his criminal convictions, defendant's argument that the trial court erroneously admitted irrelevant and prejudicial evidence related to the search for the victim's body was without merit. The admission of the officers' testimony served to show how well the victim's body was hidden and was relevant to the issue of premeditation; crime scene photographs were admissible to show the appearance of the crime scene, including the great lengths to which defendant went to conceal the body; the fact that the victim's body was found without socks and that a small, partially-burned sock was discovered on defendant's property soon after her disappearance was admissible as more circumstantial evidence of defendant's premeditation; and the probative value of the evidence was not outweighed by any prejudicial effect. State v. Trusty, 326 S.W.3d 582, 2010 Tenn. Crim. App. LEXIS 339 (Tenn. Crim. App. Apr. 23, 2010), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 906 (Tenn. Sept. 27, 2010).

Admission of a videotape in defendant's trial for first-degree premeditated murder and abuse of a corpse was proper because the videotape displayed the manner in which defendant had disposed of the victim's body, which was relevant to the jury's determination of defendant's guilt of abusing the victim's corpse. It also documented defendant's efforts at concealing the crime, which was relevant to the issue of whether defendant premeditated the victim's murder. State v. Hill, 333 S.W.3d 106, 2010 Tenn. Crim. App. LEXIS 371 (Tenn. Crim. App. May 12, 2010), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 953 (Tenn. Oct. 12, 2010).

In his drug trial, the trial court did not err by allowing the state to introduce 17 firearms, photographs of multiple firearms, and ammunition into evidence at trial because the evidence concerning the weapons found defendant's residence was relevant to support his convictions for possession with intent to deliver 300 grams or more of cocaine, possession with intent to deliver more than 10 pounds but less than 70 pounds of marijuana, and manufacturing 20 or more marijuana plants. Further, even if the evidence was admitted in error, the error was harmless because of the overwhelming evidence against defendant. State v. Hayes, 337 S.W.3d 235, 2010 Tenn. Crim. App. LEXIS 684 (Tenn. Crim. App. Aug. 18, 2010), appeal denied, — S.W.3d —, 2011 Tenn. LEXIS 152 (Tenn. Feb. 17, 2011).

In a disorderly conduct case, the court properly allowed into evidence defendant's use of the word "nigger" to an African-American officer because the use of that word was probative as to the charge; defendant reacted angrily after being told not to park in a prohibited area, directly challenging the authority of the officer. There was a nexus between defendant's initial conduct toward the officer and his later confrontation with the police stationed at the checkpoint. State v. Mitchell, 339 S.W.3d 629, 2011 Tenn. LEXIS 311 (Tenn. Mar. 31, 2011).

Testimony of an abuse victim's teacher was relevant because, prior to the teacher testifying, defendant's attorney put the victim's reputation for truthfulness at issue, particularly in the cross examination of a family therapist who treated the victim. In re Melanie T., 352 S.W.3d 687, 2011 Tenn. App. LEXIS 189 (Tenn. Ct. App. Apr. 15, 2011), appeal denied, — S.W.3d —, 2011 Tenn. LEXIS 836 (Tenn. Aug. 24, 2011).

Where there was evidence that fragments taken from the murder victims were consistent with a .22 bullet, the trial court did not abuse its discretion by admitting defendant's inoperable .22 rifle that was not alleged to be the murder weapon, as this evidence: (1) tended to explain why defendant found it necessary to obtain a rifle from an acquaintance, and (2) suggested that defendant was familiar with a .22 caliber rifle. State v. Sexton, 368 S.W.3d 371, 2012 Tenn. LEXIS 377 (Tenn. May 29, 2012).

Trial court did not commit reversible error when, over defendant's objection, it allowed the state to introduce through a forensic anthropologist, some of the victim's bones, specifically her right humerus, sternum, and forearm, where (1) the witness was able to show the jury several of the victim's injuries by pointing out fractures on the bones themselves; and (2) the witness also was able to demonstrate how the victim's arm bones fit together and how some of her injuries may have been caused through the interaction of the bones. State v. Larkin, 443 S.W.3d 751, 2013 Tenn. Crim. App. LEXIS 297 (Tenn. Crim. App. Mar. 28, 2013).

Court properly admitted "estate planning" documents because the fact that defendant would inherit the murder victim's entire estate, to the exclusion of his daughter, upon his death had the tendency to make the existence of the fact that defendant had a financial motive to kill the victim more probable; the evidence had significant probative value because it established a possible financial motive. State v. Leath, 461 S.W.3d 73, 2013 Tenn. Crim. App. LEXIS 461 (Tenn. Crim. App. June 3, 2013), appeal denied, — S.W.3d —, 2013 Tenn. LEXIS 981 (Tenn. Nov. 13, 2013), cert. denied, Leath v. Tennessee, 189 L. Ed. 2d 173, 134 S. Ct. 2292, — U.S. —, 2014 U.S. LEXIS 3508 (U.S. 2014).

Because a doctor's misdiagnosis of thyroid cancer was relevant to his credibility as an expert and the validity of his opinion as to the issues, the admission of his testimony about the misdiagnosis was not erroneous and did not amount to a substantial error in the admission of evidence warranting a new trial. Payne v.

CSX Transp., Inc., 467 S.W.3d 413, 2015 Tenn. LEXIS 547 (Tenn. July 1, 2015).

Lay witnesses were competent to testify because they had personal knowledge of the presence of asbestos in their workplaces, and regardless of whether their testimony was sufficient to independently satisfy the requirements of a Federal Employer's Liability Act claim, the evidence was relevant in that it made the existence of an injury resulting from asbestos exposure more probable; the rule authorized the admission of this testimony, as the witnesses merely testified to the presence of asbestos without offering a scientific opinion as to whether the condition of the asbestos rendered it capable of causing injury. Payne v. CSX Transp., Inc., 467 S.W.3d 413, 2015 Tenn. LEXIS 547 (Tenn. July 1, 2015).

In defendant's murder case, the trial court did not abuse its discretion by admitting graphic and gruesome autopsy photographs of the victims, which showed the severity of their injuries and the advanced state of decomposition, where they had probative value and relevant to the issues of premeditation, time of death, and aggravating circumstances, and defendant failed to show that their probative value was substantially outweighed by the danger of unfair prejudice. State v. Willis, 496 S.W.3d 653, 2016 Tenn. LEXIS 405 (Tenn. July 6, 2016), cert. denied, Willis v. Tennessee, 197 L. Ed. 2d 466, 137 S. Ct. 1224, — U.S. —, 2017 U.S. LEXIS 1710 (U.S. Mar. 6, 2017).

Testimony of a firearms examiner was sufficiently probative of whether the bullets found in a victim's body were fired from defendant's revolver and thus, material to the issue of defendant's guilt or innocence. State v. Davidson, 509 S.W.3d 156, 2016 Tenn. LEXIS 913 (Tenn. Dec. 19, 2016), cert. denied, Davidson v. Tennessee, 199 L. Ed. 2d 66, 138 S. Ct. 105, 2017 U.S. LEXIS 5551 (U.S. Oct. 2, 2017).

Admission of photographs of the victims taken after their death was not improper, as the photographs were relevant to the issues at trial, showing that the manner in which the rapes and murders were committed was deliberate and premeditated, and, while graphic, were not unnecessarily gruesome or horrifying. State v. Davidson, 509 S.W.3d 156, 2016 Tenn. LEXIS 913 (Tenn. Dec. 19, 2016), cert. denied, Davidson v. Tennessee, 199 L. Ed. 2d 66, 138 S. Ct. 105, 2017 U.S. LEXIS 5551 (U.S. Oct. 2, 2017).

Detective's testimony on gang identification was relevant to connecting defendants' legal names with their gang monikers and confirmation of their gang affiliation, and State v. Bonds, 502 S.W.3d 118, 2016 Tenn. Crim. App. LEXIS 266 (Tenn. Crim. App. Apr. 7, 2016).

Testimony by former employees of the nursing home was relevant, as the witnesses worked at the nursing home around the relevant time period and had personal knowledge of the staffing levels and care provided to patients such as the decedent. Hatfield v. Allenbrooke Nursing & Rehab. Ctr., LLC, — S.W.3d —, 2018 Tenn. App. LEXIS 450 (Tenn. Ct. App. Aug. 6, 2018), appeal denied, Hatfield v. Allenbrooke Nursing & Rehab. Ctr., LLC, — S.W.3d —, 2019 Tenn. LEXIS 74 (Tenn. Jan. 17, 2019).

Trial court did not err by refusing defendant's request to prohibit the medical examiner from referencing a wooden board that was recovered from the crime scene because the evidence did not support a conclusion that the board was used during the assault against the victim, and therefore the jury could not have concluded that it was the murder weapon, as the evidence supported a conclusion that a similar board could have caused the injuries. Likewise, the probative value of the evidence was not substantially outweighed by any unfair prejudice. State v. Cool, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 691 (Tenn. Crim. App. Sept. 12, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 58 (Tenn. Jan. 18, 2019).

Trial court did not err by admitting into evidence statements showing that the victims were hospitalized for smoke inhalation after the fire because it was relevant under Tenn. R. Evid. 401, as it tended to make the existence of one element of the crime of aggravated arson, that one or more persons were present in the building, more probable than it would have been without the evidence. State v. Clark, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 60 (Tenn. Crim. App. Jan. 31, 2019).

In an action for vandalism, the trial court did not err in admitting a landscape company's testimony for repairs into evidence evan though the repairs were completed by the victim's friend, because the testimony was relevant to the establishing the value of the vandalized garden. State v. Goldberg, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 180 (Tenn. Crim. App. Mar. 20, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 541 (Tenn. Dec. 5, 2019).

Trial court did not err by admitting testimony from two witnesses about letters they destroyed before trial because the testimony was relevant as proof of the plan to murder the victims, testimony regarding the witnesses' destruction of the letters was presented at trial, and although the testimony regarding the content of the letters was prejudicial in the sense that the testimony provided evidence against the Defendant, such testimony was not unfairly prejudicial. State v. Bond, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 198 (Tenn. Crim. App. Mar. 28, 2019).

Trial court did not abuse its discretion by admitting defendant's statement "this is for Country" into evidence because the statement was relevant to show defendant's intent, which was an element of the charged offense of first degree murder. State v. Pruitt, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 212 (Tenn. Crim.

App. Apr. 4, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 436 (Tenn. Aug. 19, 2019).

Trial court did not err by admitting into evidence text messages from defendant's cell phone because they were relevant as evidence of defendant's search for the victim in the weeks before the victim's murder. In many of the text messages, defendant specifically referred to the victim by his nickname. State v. Brown, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 220 (Tenn. Crim. App. Apr. 8, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 387 (Tenn. Aug. 15, 2019).

Trial court did not err by admitting into evidence photographs from defendant's cell phone because to establish that the text messages were proof of premeditation and criminal responsibility, the state was required to establish that defendant was actually the person who was in possession of and utilizing the cell phone during this time period, and photographs of defendant sent from the cell phone during the same time period, many of which were sent during text message exchanges indicating that the person sending the photograph and the person depicted in the photograph were one and the same. State v. Brown, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 220 (Tenn. Crim. App. Apr. 8, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 387 (Tenn. Aug. 15, 2019).

Trial court did not err by admitting evidence of defendant's failure to provide the police with information that he had regarding a gang member and was in breach of defendant's agreement with the police because it was relevant to defendant's relationship with the gang member and defendant's utilization of the gang member to assist in committing the offenses, and by refusing to provide this information, defendant helped the gang member avoid detection by the police. State v. Brown, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 220 (Tenn. Crim. App. Apr. 8, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 387 (Tenn. Aug. 15, 2019).

Defendant's removing of his GPS monitoring device a few days prior to the offenses without notifying the police was relevant to the issue of intent and premeditation because it suggested that defendant did so in order to avoid detection so he could commit the murder of the victim. The trial court correctly found that the probative value of such evidence was not outweighed by the danger of unfair prejudice. State v. Brown, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 220 (Tenn. Crim. App. Apr. 8, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 387 (Tenn. Aug. 15, 2019).

Trial court did not err by admitting into evidence a photograph of defendant holding a gun because it was relevant to the issue of defendant's possession of the firearm used in the offenses, as pistol was used to kill the victim and was found at the scene of defendant's accident, a second victim testified that defendant used a black and silver pistol when abducting him, and an agent testified that the black and silver gun that defendant was holding in the photograph was consistent with the black and silver gun used in the commission of the offenses. State v. Brown, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 220 (Tenn. Crim. App. Apr. 8, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 387 (Tenn. Aug. 15, 2019).

Trial court did not err by allowing a witness to testify that she had seen defendant tie knots similar to the ones used to tie the victim because the evidence was relevant to defendant's identity. State v. Hernandez, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 310 (Tenn. Crim. App. May 15, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 470 (Tenn. Sept. 18, 2019).

Trial court did not err by admitting statements about defendant's dream because his statements about his dream included an admission against interest, giving the statements probative value, the statements, which he made consistently to two separate witnesses on two separate occasions, included details about the crime, such as that it was committed with a hammer, and also that defendant became the assailant at some point in time. State v. Hernandez, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 310 (Tenn. Crim. App. May 15, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 470 (Tenn. Sept. 18, 2019).

Trial court did not err by admitting unredacted portions of defendant's interview with police in which he discussed having been trained by the military to be a "killer" because defendant's reference to military service was just a statement of who he was and was not prejudicial. Defendant discussed during the statement of his military training that he had been taught to kill someone using a "Garrote knot" and the victim was found strangled and tied with a series of knots. State v. Hernandez, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 310 (Tenn. Crim. App. May 15, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 470 (Tenn. Sept. 18, 2019).

Trial court did not err by allowing an investigator to testify that he saw the victim crying during her forensic interview because it was relevant to the victim's credibility as a witness. State v. Cooper, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 317 (Tenn. Crim. App. May 21, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 468 (Tenn. Sept. 18, 2019).

Trial court did not abuse its discretion by allowing the victim's son to show the jury his scars that were the result of a water heater explosion because the evidence was minimally relevant to support the son's testimony about the severity of his injuries and to combat the defense's argument that the victim might still be alive, the scars were a visual representation of the injuries described in the son's testimony, and no evidence showed that defendant had

any involvement in the injury. Despite the minimal relevance of the evidence, defendant had not articulated any prejudice he suffered based on the evidence's admission, and the trial court's determination the probative value was not substantially outweighed by the danger of unfair prejudice was supported by the record. State v. Rimmer, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 322 (Tenn. Crim. App. May 21, 2019).

Defendant's motion in limine, requesting that the trial court exclude any information regarding the warrant the officers were trying to serve on a passenger in defendant's vehicle, and specifically the offense charged in the warrant, was properly denied because defendant was not the subject of the warrant; the warrant being served by the officers was relevant to establish why they approached defendant's vehicle and attempted to effectuate the stop in the manner that they did; there was no suggestion during the course of the trial that defendant was implicated in the passenger's crime or that he was guilty solely based on his association with the passenger; and defendant did not explain what the prejudicial effect of the warrant was. State v. Baker, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 341 (Tenn. Crim. App. June 7, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 484 (Tenn. Sept. 20, 2019).

Trial court did not abuse its discretion by admitting the testimony of defendant's co-worker regarding defendant's professed preference for anal sex because it corroborated the victim's testimony that defendant preferred anal sex and he had anal sex with her without her consent, and although the jury may have considered defendant's discussing sexual matters with a co-worker to be unprofessional the evidence was not so unfairly prejudicial that it substantially outweighed the probative value. State v. Gary, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 584 (Tenn. Crim. App. Sept. 18, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 31 (Tenn. Jan. 15, 2020).

Trial court did not err by admitting into evidence a witness's testimony that defendant admitted to using heroin on the day of the collision or the day before the collision because it had a tendency to make the existence of his intoxication at the time of the collision more probable. The evidence did not tend to inflame the jury's passions or appeal to its biases or sympathies but was probative on the issue of whether or not defendant was intoxicated. State v. Dye, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 652 (Tenn. Crim. App. Oct. 15, 2019).

Trial court did not err by admitting syringes into evidence because the presence of the syringes with defendant's tools inside his work bag tended to make his intoxication more probable than it would otherwise be, particularly in light of his acknowledgement of heroin use. The trial court did not abuse its discretion in weighing the probative value against the potential prejudice because the testimony regarding the syringes and the accompanying photographs were not particularly inflammatory but had probative value on the question of intoxication. State v. Dye, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 652 (Tenn. Crim. App. Oct. 15, 2019).

Trial court did not abuse its discretion at defendant's trial for possession of cocaine and marijuana with intent to sell and to deliver by allowing the State of Tennessee to present rebuttal evidence of defendant's later drug transactions because the subsequent convictions occurred within 18 months of the incident at issue, their probative value on the issue of defendant's intent to sell or deliver drugs rather than use drugs for personal use outweighed the danger of unfair prejudice to defendant, and the court gave curative instructions. State v. Carero, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 63 (Tenn. Crim. App. Feb. 3, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 428 (Tenn. July 17, 2020).

Because testimony regarding the uncharged theft of a vehicle involved in the robbery was relevant as contextual background evidence and was accompanied by a thorough limiting instruction, defendant was not unfairly prejudiced by the testimony, and the trial court did not abuse its discretion in admitting the testimony. State v. Dillard, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 259 (Tenn. Crim. App. Apr. 16, 2020).

Statements about the affidavit admitted through the officers' testimonies were properly admitted as non-hearsay and were probative as to the effect the information had on the officers and their actions; therefore, the trial court did not abuse its discretion in denying the defendant's motion in limine. State v. Campbell, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 294 (Tenn. Crim. App. Apr. 24, 2020), review denied and ordered not published, — S.W.3d —, 2020 Tenn. LEXIS 305 (Tenn. Sept. 17, 2020).

Trial court did not abuse its discretion in denying the defendant's motion in limine regarding evidence of his gang and drug activity and the presence of various weapons at the residence, as the information was necessary to show the officers possessed a valid warrant, to explain why they entered the residence in a highly organized and tactical manner, and to provide contextual background information for the jury. State v. Campbell, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 294 (Tenn. Crim. App. Apr. 24, 2020), review denied and ordered not published, — S.W.3d —, 2020 Tenn. LEXIS 305 (Tenn. Sept. 17, 2020).

Trial court did not err in allowing the State to question defendant's wife Johnson regarding her and defendant's responsibilities as foster parents and the questions were relevant to the

wife's credibility and her possible motive to influence the victim to sign an affidavit. State v. Johnson, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 312 (Tenn. Crim. App. Apr. 30, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 548 (Tenn. Sept. 16, 2020).

Because recordings of defendant talking to a jailhouse informant revealed defendant's consciousness of defendant's own guilt, disclosed defendant's motive of killing prostitutes at truck stops, and contradicted defendant's claim of alibi, the recordings and proof defendant's solicitation of the informant to commit murder by killing witnesses were properly admissible. Furthermore, the trial court did not abuse its discretion by determining that the probative value of the evidence outweighed the danger of its unfairly prejudicial effect. State v. Mendenhall, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 343 (Tenn. Crim. App. May 14, 2020).

Trial court did not err by admitting defendant's statement to police without redactions to exclude references to out-of-state bad act evidence to establish defendant's motive for killing prostitutes like the victim, and by extension, to provide contextual background to the jury. Although defendant claimed that defendant did not commit the other murders, defendant implicated defendant in the killings and cover-up. State v. Mendenhall, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 343 (Tenn. Crim. App. May 14, 2020).

Trial court did not err in admitting evidence of another murder to establish defendant's motive for killing prostitutes like the victim, and by extension, to provide contextual background to the jury. Furthermore, the trial court did not abuse its discretion by concluding that the methods used to commit the crimes were sufficiently similar to permit the admission of evidence of the other murder as the methods used in the murders were similar and the perpetrator took extraordinary steps to display the victims in a very demeaning manner. State v. Mendenhall, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 343 (Tenn. Crim. App. May 14, 2020).

Trial court properly determined that aggravated assault accomplished by reckless conduct was a crime of violence, admitted a recording of defendant's 9-1-1 call, and his previous manslaughter conviction after he shot at a vehicle that was occupied by three people because the 9-1-1 recording was relevant to show how the case originated, the officers discovered that defendant possessed a .45-caliber handgun and that he was a convicted felon during their investigation of the call, the trial court provided proper curative instructions to the jury regarding defendant's previous conviction. State v. Brown, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 345 (Tenn. Crim. App. May 15, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 511 (Tenn. Sept. 16, 2020).

Witness was properly allowed to testify in defendant's trial for marijuana related offenses that the witness knew defendant by the nickname of "Weed" because the testimony of the witness was necessary for establishing defendant's identity as a perpetrator and was not unfairly prejudicial so as to outweigh its probative value. Furthermore, any error was harmless in that defendant was convicted because the witness testified that defendant brought marijuana to a car and the police found marijuana and digital scales at defendant's feet. State v. Rogers, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 444 (Tenn. Crim. App. June 24, 2020).

Trial court did not abuse its discretion by admitting the results of defendant's urine test because the presence of illegal substances in defendant's urine was relevant to intoxication as well as to impeach his police statement that he had not taken any drugs other than oxycodone for one week. State v. Franklin, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 511 (Tenn. Crim. App. July 27, 2020).

Trial court did not abuse its discretion by admitting an investigator's testimony regarding the creation and presentation of the photographic lineup because it was relevant, as the primary factual issue to be resolved by the jury was the identity of the shooter, and therefore the steps taken by law enforcement in investigating the case would be of consequence to the determination of the action if they made defendant's identity as the shooter more probable or less probable than it would be without the evidence. Defendant failed to establish that he was prejudiced by the admission of the evidence because the witness' testimony identifying defendant was subsequently admitted. State v. Sims, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 588 (Tenn. Crim. App. Aug. 28, 2020).

Trial court did not abuse its discretion in determining that the evidence of an on-going gang feud between two gangs was relevant because it made defendant's alleged motive for the killing more or less probable than it would be without the evidence. Defendant was directly connected to the shooting at his mother's house and was indirectly connected to the victims in several of the other incidents through his social media account, and because of this connection, the evidence of the gang feud was probative of his motive to target a member of the rival gang. State v. Sims, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 588 (Tenn. Crim. App. Aug. 28, 2020).

Trial court did not err in admitting autopsy photographs of the victim because they were relevant, probative of intent and premeditation, and not unfairly prejudicial. Because defendant was charged with first degree premeditated murder, the State was required to prove that he intentionally killed the victim and that

he acted with premeditation, and the challenged photographs, which depict the manner in which the killing was carried out and the extent of the victim's injuries, were particularly probative of these issues and the photographs were not particularly gruesome and were limited to the specific injuries suffered by the victim. State v. Reed, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 620 (Tenn. Crim. App. Sept. 18, 2020).

Indictment was properly admitted as evidence because, to be convicted of violating the sex offender registry, the State had to prove that defendant's victim in the case requiring him to be on the sex offender registry was a minor under the age of 13, and the indictment demonstrated that the victim was approximately 11 years old when attempted sexual abuse conviction occurred; and defendant did not show how the danger of unfair prejudice substantially outweighed the indictment's probative value as the certified copy of the conviction admitted as evidence reduced the likelihood that the indictment would be used for an improper purpose because it demonstrated he was actually convicted of the lesser offense of attempted sexual abuse. State v. Sullivan, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 22 (Tenn. Crim. App. Jan. 14, 2021).

Evidence of a cell phone tower map that included pie wedges that showed the side of the tower that the calls were routed, but did not indicate how close the relevant cell phones were to the tower, was relevant because defendants' phones pinged off towers at a time and from a direction that showed that the phones were within vicinity to relevant locations, namely the victim's home and locations where the victim's bank card was located; and the data indicated that the phones were pinging off a tower near one defendant's home both before and after the events and that the phones were not using that same tower during the time of the events. State v. Robinson, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 96 (Tenn. Crim. App. Mar. 17, 2021).

12. Evidence Properly Excluded.

Trial court acted within its discretion in limiting the testimony of defendant pursuant to Tenn. R. Evid. 611(a) and Tenn. R. Evid. 401 because the proffered testimony did not have any bearing on any fact that pertained to defendant's guilt or innocence. State v. Mosley, 200 S.W.3d 624, 2005 Tenn. Crim. App. LEXIS 1196 (Tenn. Crim. App. 2005), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 266 (Tenn. 2006).

In an action seeking to establish that a public road extended to a company's northern property line, the adjoining property owners and the city failed to convince the appellate court that the exclusion of disputed evidence affected the jury's verdict; thus, the exclusion of the testimony concerning a desire to purchase the disputed property was not inappropriate. Brandy Hills Estates, LLC v. Reeves, 237 S.W.3d 307, 2006 Tenn. App. LEXIS 794 (Tenn. Ct. App. Dec. 15, 2006), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 607 (Tenn. June 25, 2007).

Failure to consult a mental health expert and to obtain an evaluation of petitioner was deficient performance, as the state was required to prove a premeditated, intentional killing, but defendant was not prejudiced because the doctor's testimony was not admissible and prompt consultation would not have affected the defense; he only said it was a possibility that due to a mental disease, petitioner lacked capacity, and evidence of certain diagnoses was not relevant and admissible without an opinion regarding the ultimate issue of petitioner's capacity to form the required mens rea, such that he was not entitled to post-conviction relief. Williamson v. State, 476 S.W.3d 405, 2015 Tenn. Crim. App. LEXIS 267 (Tenn. Crim. App. Apr. 14, 2015), appeal denied, — S.W.3d —, 2015 Tenn. LEXIS 595 (Tenn. July 21, 2015).

Trial court did not err by excluding defendant's mother's testimony about who shot her apartment because it was not relevant to defendant's criminal trial, as the facts of who shot her apartment were not presented to the jury, and any portion of her testimony that might have included another's statement about who committed the shooting would have been hearsay. State v. Battle, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 673 (Tenn. Crim. App. Aug. 31, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 99 (Tenn. Jan. 18, 2019).

Trial court did not abuse its discretion by determining that the an evidence technician's testimony that he overheard a detective using a racial slur in indicating who committed the crime was not relevant because defendant admitted there was never an African-American suspect. State v. Rimmer, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 322 (Tenn. Crim. App. May 21, 2019).

Trial court did not err by refusing to allow defendant to inquire into the details of the victim's previous arrest, claiming that the evidence was relevant to establish how the county jail came to possess photographs of the victim's tattoos which were used to identify the victim's body, because evidence of the victim's prior arrest was irrelevant in defendant's trial for first degree murder and aggravated assault as the fact that the victim had been previously arrested made no fact of consequence in the defendant's trial more or less likely. State v. Ponder, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 504 (Tenn. Crim. App. Aug. 21, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 559 (Tenn. Dec. 5, 2019).

Trial court did not abuse its discretion excluding evidence of a witness's alleged gang affiliation during defendant's murder trial because it did not have any tendency to make it

more or less likely that defendant shot the two victims. State v. Isaac, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 733 (Tenn. Crim. App. Nov. 13, 2019), review denied and ordered not published, — S.W.3d —, 2020 Tenn. LEXIS 145 (Tenn. Apr. 1, 2020).

Trial court did not abuse its discretion in excluding the testimony sought in cross-examination of a realtor because the testimony—whether the realtor's conduct violated the code of ethics applicable to realtors—did not have a tendency to make the existence of any fact that was of consequence to the determination of the action more probable or less probable. Whether the realtor violated the code of ethics had no bearing on whether the parties had an agreement granting a corporation an ownership interest in a limited liability company. Romglobal, Inc. v. Miller, — S.W.3d —, 2020 Tenn. App. LEXIS 37 (Tenn. Ct. App. Jan. 29, 2020), appeal dismissed, — S.W.3d —, 2020 Tenn. LEXIS 442 (Tenn. July 17, 2020).

Trial court did not abuse its discretion in excluding the negative test to a sexually transmitted disease performed one year after the rape because the evidence was not relevant to defendant's case as he had already admitted he had sex with the victim. State v. Valentine, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 1 (Tenn. Crim. App. Jan. 3, 2020).

Trial court did not abuse its discretion by excluding evidence of domestic violence incidents between the minor sexual assault victim's mother and the mother's paramour because the evidence did not establish any bias in favor of or prejudice against a party or witness. The paramour did not testify, nor was there any suggestion that the paramour had personal knowledge of the offenses, and defendant did not establish any connection between the domestic violence incidents and the victim or defendant, or that the victim was aware of the incidents. State v. Gleason, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 78 (Tenn. Crim. App. Feb. 10, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 350 (Tenn. Aug. 10, 2020).

Trial court did not abuse its discretion in determining that expounded questioning about the sentence a co-defendant faced for the same charges as defendant indirectly and impermissibly exposed the jury to the possible sentence defendant faced because the question was not permissible; although evidence of the exact potential sentence the co-defendant faced was arguably relevant to establish bias, even relevant evidence was inadmissible if rules or laws of general application excluded it. State v. Graham, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 275 (Tenn. Crim. App. Apr. 21, 2020).

Once defendant shot the victim, he had committed a knowing killing and his actions and those of the officers after that point were not relevant to defendant's claim of self-defense; the trial court did not abuse its discretion in excluding the officer's statements. State v. Campbell, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 294 (Tenn. Crim. App. Apr. 24, 2020), review denied and ordered not published, — S.W.3d —, 2020 Tenn. LEXIS 305 (Tenn. Sept. 17, 2020).

Trial court did not abuse its discretion by not permitting defendant to present a police sergeant as a defense witness and by not permitting defendant to testify about previous incidents of violence against defendant in an effort to establish that an individual was present and that defendant acted in self-defense on the night of a shooting because the evidence was irrelevant to the shooting and the jury would have been required to speculate who had been involved in the previous incidents and whether the incidents were connected to the shooting. State v. Corbin, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 664 (Tenn. Crim. App. Oct. 9, 2020).

Administrative judge properly excluded several email conversations containing statements as to the interpretation of the federal federal Deficit Reduction Act as they were irrelevant as to whether the reimbursement rules actually complied with T.C.A. § 71-5-108. Dep't of Fin. & Admin. v. Chattanooga-Hamilton Cty. Hosp. Auth., — S.W.3d —, 2021 Tenn. App. LEXIS 82 (Tenn. Ct. App. Mar. 5, 2021).

13. Evidence Improperly Excluded.

In a death penalty case, a court erred by prohibiting expert testimony on the issue of the reliability of eyewitness identification because the facts, especially on the question of identification, were contested at trial, there were conflicts in the testimony, there were significant challenges to the credibility of practically every state witness other than the law enforcement officers, and some witnesses had prior felony convictions and were evasive, perhaps even untruthful, as to collateral matters. State v. Copeland, 226 S.W.3d 287, 2007 Tenn. LEXIS 502 (Tenn. May 23, 2007).

Although the advice given to defendant real estate agent by her attorney about her disclosure obligations did not alter the fact that the agent was aware of repairs made to the home, the testimony was relevant to the question of whether punitive damages were justified, and evidence tending to reflect on the agent's intent and knowledge should have been admitted for consideration by the jury. Goodale v. Langenberg, 243 S.W.3d 575, 2007 Tenn. App. LEXIS 326 (Tenn. Ct. App. May 23, 2007), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 1063 (Tenn. Nov. 19, 2007).

Finding that the subcontractor was 50 percent at fault in his negligence action against the general contractor and the subcontractor was proper because any alleged marijuana use on the part of a worker did not make any issue before the jury more or less probable. Even if

the evidence offered was considered probative, any probative value of the evidence would have be substantially outweighed by its unfairly prejudicial effect because evidence of that nature would have posed a great risk of allowing the jury to decide the case on purely emotional grounds based on their general contempt of drug use. Indoccio v. M&A Builders, LLC, 372 S.W.3d 112, 2011 Tenn. App. LEXIS 619 (Tenn. Ct. App. Nov. 14, 2011), appeal denied, Indoccio v. M & A Builders, LLC, — S.W.3d —, 2012 Tenn. LEXIS 259 (Tenn. Apr. 11, 2012).

Disclosure to the jury that the state's expert witness's license had been previously suspended and was in probationary status when he evaluated the victim was prejudicial to the state in this rape case, as the information bore on the expert's credibility, and the state failed to establish exclusion of the suspension; the trial court was required to weigh the probative value of the license suspension, not the precipitating acts of misconduct, against the countervailing factors identified in the rule, and erred in failing to do so. State v. Zeigler, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 83 (Tenn. Crim. App. Feb. 7, 2019).

14. Evidence Improperly Included.

In an action in which a jury found that a will that a widow sought to admit to probate was obtained through the undue influence of the widow and that the decedent was not of sound mind when he executed the will, testimony regarding the widow's real property holdings and her late mother's will was irrelevant because it was not suspicious that the widow's mother left her entire estate to her only living child, the mere fact that the widow assisted both her mother and the decedent during their illnesses by taking them to an attorney so that they might execute their wills did not show a common scheme or plan to unduly influence either testator, and evidence of the widow's financial condition was irrelevant to the issues in the case. The erroneous admission of such evidence warranted a new trial under T.R.A.P. 36(b) because the improperly admitted evidence more probably than not prejudiced the jury to the conclusion that the widow was a wealthy woman who was intent on acquiring the decedent's estate through manipulation and subterfuge. In re Estate of Smallman, 398 S.W.3d 134, 2013 Tenn. LEXIS 213 (Tenn. Feb. 26, 2013).

Trial court erred by permitting the state of Tennessee to elicit testimony from a witness that the witness had seen defendant with a gun on the day before the shooting of the victim because whether defendant possessed a gun previously or on the day before the shooting was not relevant to showing whether defendant possessed a gun before arriving at the scene of the shooting of the victim. Furthermore, the error was not harmless. State v. Frazier, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 385 (Tenn. Crim. App. July 1, 2019).

Trial court erred in defendant's trial for first degree premeditated murder by allowing the state of Tennessee to question defendant about the death of a witness to the shooting of the victim because the question was an explicit attempt to show that defendant was involved in the death of the witness which occurred days after the death of the victim. Because the death of the witness was not relevant evidence, the prosecutor's attempt to connect defendant to the death of the witness was not harmless. State v. Frazier, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 385 (Tenn. Crim. App. July 1, 2019).

15. Harmless Error.

Any error in the trial court's denial of defendant's motion in limine to exclude all evidence of sexual contact between defendant and the victim was harmless as defendant did not deny that he had been in a romantic relationship with the victim and also acknowledged that he had been with the victim before her death in the area where the victim's body was found. State v. Pack, 421 S.W.3d 629, 2013 Tenn. Crim. App. LEXIS 848 (Tenn. Crim. App. Sept. 27, 2013).

Even though the postconviction court erred by refusing to admit photographs of an alternate suspect who possessed a firearm linked to the crime because it might have been relevant, given that it could have been compared to the description of the suspect given by the victims, the error was harmless because even with the photographs the court would not likely have reached a different conclusion because it did not undermine the witness's identification of petitioner as the shooter. Clardy v. State, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 779 (Tenn. Crim. App. Oct. 17, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 179 (Tenn. Apr. 12, 2019).

Even though the trial court erred by barring the mother from questioning the father regarding two of his DUI arrests that occurred before the child was born, as the evidence was relevant in the child custody proceeding as it went to the father's decision-making skills, the error was harmless because the fact of the father's DUIs was already in the record based on his answers during direct examination. In re Lennon R., — S.W.3d —, 2019 Tenn. App. LEXIS 256 (Tenn. Ct. App. May 23, 2019).

Even though the trial court erred by admitting into evidence the extraction report from defendant's cell phone that included photographs of defendant with dates spanning from the beginning of June of 2012 to the day of the offenses, as photographs dated prior to the end of July of 2012 when defendant first began sending text messages searching for the victim were not relevant to the issue of whether de-

fendant was the person who was utilizing his cell phone between the end of July until the time of the offenses, the error was harmless because the photographs defendant challenged were copies, close-ups, or similar to the photographs that were properly admitted at trial. State v. Brown, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 220 (Tenn. Crim. App. Apr. 8, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 387 (Tenn. Aug. 15, 2019).

Even though the trial court erred by admitting evidence that the murder victim was a confidential informant for the police, as there was no evidence establishing that defendant was aware of the victim's status as a confidential informant, the error was harmless because other evidence was presented at trial to support premeditation and defendant's involvement in the murder and defense counsel's cross-examination of witnesses at trial established the lack of any connection between defendant and the victim's actions as a confidential informant. State v. Brown, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 220 (Tenn. Crim. App. Apr. 8, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 387 (Tenn. Aug. 15, 2019).

Even though the trial court erred by admitting evidence that defendant and a fellow inmate had been incarcerated in the same facility, as the evidence was too remote to be relevant to a material issue in the case and even if a close connection between the men were proved that connection did not result in a conclusion that a connection existed between defendant and the inmate's relative, the error was harmless because there was overwhelming circumstantial evidence of defendant's guilt. State v. Rimmer, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 322 (Tenn. Crim. App. May 21, 2019).

Even though the trial court erred by admitting into evidence a nine-millimeter handgun and shell casings collected by law enforcement from defendant's ex-stepbrother's residence because it was not relevant, as the TBI conclusively determined it was not the gun used in the shooting in defendant's case, the error was harmless because both the State and defense counsel questioned the investigator about the fact that this gun was determined not to have any association with defendant' case and was returned to the ex-stepbrother. State v. Sims, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 588 (Tenn. Crim. App. Aug. 28, 2020).

16. Tenn. R. Evid. 412.

Exclusion of sexual entries from the victim's social networking page was not an abuse of discretion as even though the entries fell under the purview of Tenn. R. Evid. 412 as they concerned the victim's history of sexual discourse, any error in failing to analyze the evidence under Rule 412 was harmless as the trial court considered the potential for confusion, the minimal probative value of the evidence, and the prejudicial impact on the victim under Tenn. R. Evid. 401 and 403, which analysis was incorporated in Rule 412(d)(4). State v. Nance, 393 S.W.3d 212, 2012 Tenn. Crim. App. LEXIS 316 (Tenn. Crim. App. May 16, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 898 (Tenn. Nov. 27, 2012).

Rule 402. Relevant evidence generally admissible; irrelevant evidence inadmissible. —

All relevant evidence is admissible except as provided by the Constitution of the United States, the Constitution of Tennessee, these rules, or other rules or laws of general application in the courts of Tennessee. Evidence which is not relevant is not admissible.

Advisory Commission Comments. Once evidence satisfies the definition of relevance, it becomes admissible unless a rule excludes it.

Law Reviews. The Nature and Purpose of Evidence Theory, 66 Vand. L. Rev. 547 (2013).

Penile Polygraphy: The Admissibility of Penile-Plethysmograph Results at Sentencing in Tennessee, 72 Vand. L. Rev. 353 (January 2019).

NOTES TO DECISIONS

Analysis

1. Admission of Prior Sex Crimes.
2. Evidence and Competency.
3. Admissibility.
4. Polygraph Evidence.
5. Harmless Error.
6. Evidence Properly Included.
7. Evidence Properly Excluded.
8. Illustrative Cases.

1. Admission of Prior Sex Crimes.

Evidence of a prior sex crime that is necessarily included within the charge of the indictment is also necessarily relevant to issues being tried and, therefore, is admissible. State v.

Rickman, 876 S.W.2d 824, 1994 Tenn. LEXIS 109 (Tenn. 1994).

2. Evidence and Competency.

The rules of evidence should not be applied to limit the admissibility of reliable evidence that is relevant to the issue of the prisoner's competency. Heck Van Tran v. State, 6 S.W.3d 257, 1999 Tenn. LEXIS 602 (Tenn. 1999), cert. denied, Heck Van Tran v. Tennessee, 529 U.S. 1091, 120 S. Ct. 1728, 146 L. Ed. 2d 648, 2000 U.S. LEXIS 2938 (2000).

3. Admissibility.

Trial court did not abuse its discretion by admitting evidence of the five-year-old protective order, because in doing so, the trial court ruled that the evidence was relevant to the state's argument that the victim's desire to obtain custody of the child provided a motive for the murder of the victim by defendant, the victim's wife. State v. Wilson, 164 S.W.3d 355, 2003 Tenn. Crim. App. LEXIS 841 (Tenn. Crim. App. 2003), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 226 (Tenn. Mar. 8, 2004).

In a Consumer Protection Act case brought by investors, the trial court erred in excluding the investors' expert's opinions regarding an investment advisor's investment advice because: (1) The expert possessed the education and experience that qualified him to render an expert opinion regarding the adequacy of the investment advice; (2) His methodology was sound and reflected the same intellectual rigor that would be required and expected of investment advisors competently practicing their profession; and (3) His testimony would have substantially assisted the triers of fact. Johnson v. John Hancock Funds, 217 S.W.3d 414, 2006 Tenn. App. LEXIS 447 (Tenn. Ct. App. 2006), appeal denied, Johnson v. John Hancock Funds, LLC, — S.W.3d —, 2006 Tenn. LEXIS 1114 (Tenn. Nov. 20, 2006).

Although the advice given to defendant real estate agent by her attorney about her disclosure obligations did not alter the fact that the agent was aware of repairs made to the home, the testimony was relevant to the question of whether punitive damages were justified, and evidence tending to reflect on the agent's intent and knowledge should have been admitted for consideration by the jury. Goodale v. Langenberg, 243 S.W.3d 575, 2007 Tenn. App. LEXIS 326 (Tenn. Ct. App. May 23, 2007), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 1063 (Tenn. Nov. 19, 2007).

Admission of a child victim's testimony regarding her knowledge of her mother's suspicions about defendant's sexual abuse of the child was irrelevant, pursuant to Tenn. R. Evid. 401, as to whether defendant sexually abused to child and therefore was inadmissible under Tenn. R. Evid. 402; however, because the statement was not central to the case and damaging to defendant, the error in admitting the evidence was harmless pursuant to Tenn. R. Crim. P. 52(a) and T.R.A.P. 36(b). State v. Schiefelbein, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 138 (Tenn. Crim. App. Feb. 8, 2007), modified, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 213 (Tenn. Crim. App. Mar. 7, 2007).

In a child sexual abuse case, defendant's statement that he told the child-victim that she could not move to the next gymnastic level unless she could perform a back handspring was not offered for its truth, but was offered to show circumstantially that friction developed between the child and defendant regarding gymnastic skills, and thus the statement was important in the fact that it was made, not its truth; however, the error in not admitting the statement was harmless because, in light of other testimony that was essentially the same, the error did not prejudice defendant. State v. Schiefelbein, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 138 (Tenn. Crim. App. Feb. 8, 2007), modified, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 213 (Tenn. Crim. App. Mar. 7, 2007).

In an action stemming from an automobile accident, there was no question that the substance of the two consumer complaints at issue was hearsay and there was likewise no question that the trial court's limiting instruction could have been more artfully worded; however, the manufacturer did not object to either the substance of the limiting instruction or insist that the evidence regarding the two consumer complaints was so prejudicial that it should have been excluded under Tenn. R. Evid. 403, and after considering the trial court's limiting instruction in context, the instruction conveyed to the members of the jury an understanding that they should not take the substance of the consumer complaints as true. Duran v. Hyundai Motor Am., Inc., 271 S.W.3d 178, 2008 Tenn. App. LEXIS 79 (Tenn. Ct. App. Feb. 13, 2008), rehearing denied, 271 S.W.3d 178, 2008 Tenn. App. LEXIS 127 (Tenn. Ct. App. Feb. 27, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 632 (Tenn. Aug. 25, 2008).

In his drug trial, the trial court did not err by allowing the state to introduce 17 firearms, photographs of multiple firearms, and ammunition into evidence at trial because the evidence concerning the weapons found defendant's residence was relevant to support his convictions for possession with intent to deliver 300 grams or more of cocaine, possession with intent to deliver more than 10 pounds but less than 70 pounds of marijuana, and manufacturing 20 or more marijuana plants. Further, even if the evidence was admitted in error, the error was harmless because of the overwhelming evidence against defendant. State v. Hayes, 337 S.W.3d 235, 2010 Tenn. Crim. App. LEXIS 684 (Tenn. Crim. App. Aug. 18, 2010), appeal denied, — S.W.3d —, 2011 Tenn. LEXIS 152 (Tenn. Feb. 17, 2011).

Evidence of the prior acquittals of two men defendant claimed were the individuals responsible for a murder as context evidence was inadmissible because the absence of the evidence of the acquittals would not present a chronological void that would confuse the jury since the testimony at trial regarding the course of the investigation of the crime explained the chronological void and included evidence that other suspects were previously tried for the crime; evidence of the outcome of another trial does not assist the jury in its understanding of the events. State v. Turner, 352 S.W.3d 425, 2011 Tenn. LEXIS 960 (Tenn. Oct. 12, 2011).

Trial court applied an incorrect legal standard and erred in admitting the evidence of the prior acquittals of two men defendant implicated as the individuals responsible for a murder for the purpose of demonstrating their credibility because evidence of the prior acquittals was not relevant to the men's truthfulness; the men testified in their previous trial that they did not kill the victim, and if they did, in fact, kill the victim, they would have ample motivation to lie. State v. Turner, 352 S.W.3d 425, 2011 Tenn. LEXIS 960 (Tenn. Oct. 12, 2011).

Trial court erred in admitting into evidence the prior acquittals of two men defendant claimed were the individuals responsible for a murder because defendant had a right to suggest that the men were responsible for the murder; because the jurors in defendant's case could come to a different conclusion concerning the responsibility of the men, the evidence of the acquittals did not demonstrate that it was more or less probable that the men committed the crime and under T.C.A. § 39-11-201(a) was inadmissible to demonstrate their innocence. State v. Turner, 352 S.W.3d 425, 2011 Tenn. LEXIS 960 (Tenn. Oct. 12, 2011).

Evidence of defendant father's prior assaults against defendant mother was irrelevant and improperly admitted because 1) her knowledge that he had a propensity for violence was not an element of the crime of child abuse under former T.C.A. § 39-15-402; 2) such evidence did not tend to show it was more probable that she intended to promote, assist, or benefit from results of the offense under T.C.A. § 39-11-402; and 3) it did not tend to show it was more probable that she knew he intended to abuse the child, an element of facilitation (T.C.A. § 39-11-403). State v. Gomez, 367 S.W.3d 237, 2012 Tenn. LEXIS 291 (Tenn. Apr. 24, 2012).

In an action in which a jury found that a will that a widow sought to admit to probate was obtained through the undue influence of the widow and that the decedent was not of sound mind when he executed the will, testimony regarding the widow's real property holdings and her late mother's will was irrelevant because it was not suspicious that the widow's mother left her entire estate to her only living child, the mere fact that the widow assisted both her mother and the decedent during their illnesses by taking them to an attorney so that they might execute their wills did not show a common scheme or plan to unduly influence either testator, and evidence of the widow's financial condition was irrelevant to the issues in the case. The erroneous admission of such evidence warranted a new trial under T.R.A.P. 36(b) because the improperly admitted evidence more probably than not prejudiced the jury to the conclusion that the widow was a wealthy woman who was intent on acquiring the decedent's estate through manipulation and subterfuge. In re Estate of Smallman, 398 S.W.3d 134, 2013 Tenn. LEXIS 213 (Tenn. Feb. 26, 2013).

Trial court erred by permitting the state of Tennessee to elicit testimony from a witness that the witness had seen defendant with a gun on the day before the shooting of the victim because whether defendant possessed a gun previously or on the day before the shooting was not relevant to showing whether defendant possessed a gun before arriving at the scene of the shooting of the victim. Furthermore, the error was not harmless. State v. Frazier, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 385 (Tenn. Crim. App. July 1, 2019).

Trial court erred in defendant's trial for first degree premeditated murder by allowing the state of Tennessee to question defendant about the death of a witness to the shooting of the victim because the question was an explicit attempt to show that defendant was involved in the death of the witness which occurred days after the death of the victim. Because the death of the witness was not relevant evidence, the prosecutor's attempt to connect defendant to the death of the witness was not harmless. State v. Frazier, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 385 (Tenn. Crim. App. July 1, 2019).

4. Polygraph Evidence.

Polygraph evidence is inherently unreliable, and therefore irrelevant and inadmissible. State v. Pierce, 138 S.W.3d 820, 2004 Tenn. LEXIS 634 (Tenn. 2004).

5. Harmless Error.

On appeal from his criminal convictions, the appellate court agreed with defendant that his statement about moving firearms to his mother's house should not have been admitted at his trial because it was irrelevant and potentially prejudicial to his case; however, the error was harmless. An agent's testimony that there was no evidence that the weapons were involved in the victim's disappearance should have allayed suspicions on the part of the jury that defendant had moved the weapons for some "sinister" reason and moreover, defendant's claim that the evidence forced him to waive his rights

against self-incrimination was belied by the fact that he mentioned nothing about the weapons during his testimony. State v. Trusty, 326 S.W.3d 582, 2010 Tenn. Crim. App. LEXIS 339 (Tenn. Crim. App. Apr. 23, 2010), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 906 (Tenn. Sept. 27, 2010).

Defendant's conviction for carjacking was proper because the evidence of his guilt was overwhelming enough to have been basis for the jury's verdict. Thus, although statement were not relevant and not admissible, any error was harmless since the erroneously admitted evidence had minimal, if any, impact on the jury's decision to have found him guilty. State v. Moore, 376 S.W.3d 108, 2011 Tenn. Crim. App. LEXIS 839 (Tenn. Crim. App. Nov. 16, 2011).

Even though the trial court erred by admitting a repair invoice into evidence because it did not specify whether those services were related to defendant's brake box and breakaway device or whether those services repaired the specific issues that caused his truck and trailer to be placed out of service and therefore was not relevant, the error was harmless in light of the other evidence against defendant. State v. Miller, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 58 (Tenn. Crim. App. Feb. 3, 2020).

6. Evidence Properly Included.

In a disorderly conduct case, the court properly allowed into evidence defendant's use of the word "nigger" to an African-American officer because the use of that word was probative as to the charge; defendant reacted angrily after being told not to park in a prohibited area, directly challenging the authority of the officer. There was a nexus between defendant's initial conduct toward the officer and his later confrontation with the police stationed at the checkpoint. State v. Mitchell, 339 S.W.3d 629, 2011 Tenn. LEXIS 311 (Tenn. Mar. 31, 2011).

Trial court did not abuse its discretion to allow defendant to cross-examine plaintiff concerning other lawsuits he had filed because the statements made by plaintiff concerning his motive for filing the underlying lawsuit or any other was sufficient to "open the door" for impeachment of plaintiff on cross-examination. Brown v. Christian Bros. Univ., 428 S.W.3d 38, 2013 Tenn. App. LEXIS 512 (Tenn. Ct. App. Aug. 5, 2013), appeal denied, — S.W.3d —, 2014 Tenn. LEXIS 22 (Tenn. Jan. 15, 2014).

Trial court did not commit reversible error when, over defendant's objection, it allowed the state to introduce through a forensic anthropologist, some of the victim's bones, specifically her right humerus, sternum, and forearm, where: (1) The witness was able to show the jury several of the victim's injuries by pointing out fractures on the bones themselves; and (2) The witness also was able to demonstrate how the victim's arm bones fit together and how some of her injuries may have been caused through the interaction of the bones. State v. Larkin, 443 S.W.3d 751, 2013 Tenn. Crim. App. LEXIS 297 (Tenn. Crim. App. Mar. 28, 2013).

Trial court did not err in admitting five autopsy photographs showing wounds to the victim's right ear, the right side of her head, and her left arm because the photographs assisted the doctor who performed the autopsy in explaining the victim's injuries and supported her conclusion that the cause of death was multiple sharp force injuries; the photographs were not overly gruesome as the wounds had been cleaned; and the probative value of the photographs was not substantially outweighed by the danger of unfair prejudice. State v. Simpson, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 173 (Tenn. Crim. App. Mar. 18, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 322 (Tenn. July 24, 2019).

Defendant's motion in limine, requesting that the trial court exclude any information regarding the warrant the officers were trying to serve on a passenger in defendant's vehicle, and specifically the offense charged in the warrant, was properly denied because defendant was not the subject of the warrant; the warrant being served by the officers was relevant to establish why they approached defendant's vehicle and attempted to effectuate the stop in the manner that they did; there was no suggestion during the course of the trial that defendant was implicated in the passenger's crime or that he was guilty solely based on his association with the passenger; and defendant did not explain what the prejudicial effect of the warrant was. State v. Baker, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 341 (Tenn. Crim. App. June 7, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 484 (Tenn. Sept. 20, 2019).

Trial court did not abuse its discretion at defendant's trial for possession of cocaine and marijuana with intent to sell and to deliver by allowing the State of Tennessee to present rebuttal evidence of defendant's later drug transactions because the subsequent convictions occurred within 18 months of the incident at issue, their probative value on the issue of defendant's intent to sell or deliver drugs rather than use drugs for personal use outweighed the danger of unfair prejudice to defendant, and the court gave curative instructions. State v. Carero, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 63 (Tenn. Crim. App. Feb. 3, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 428 (Tenn. July 17, 2020).

Trial court did not err in admitting evidence of another murder to establish defendant's motive for killing prostitutes like the victim, and by extension, to provide contextual background to the jury. Furthermore, the trial court did not abuse its discretion by concluding that the methods used to commit the crimes were sufficiently similar to permit the admission of evidence of the other murder as the methods used

in the murders were similar and the perpetrator took extraordinary steps to display the victims in a very demeaning manner. State v. Mendenhall, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 343 (Tenn. Crim. App. May 14, 2020).

Because recordings of defendant talking to a jailhouse informant revealed defendant's consciousness of defendant's own guilt, disclosed defendant's motive of killing prostitutes at truck stops, and contradicted defendant's claim of alibi, the recordings and proof defendant's solicitation of the informant to commit murder by killing witnesses were properly admissible. Furthermore, the trial court did not abuse its discretion by determining that the probative value of the evidence outweighed the danger of its unfairly prejudicial effect. State v. Mendenhall, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 343 (Tenn. Crim. App. May 14, 2020).

Trial court did not err by admitting defendant's statement to police without redactions to exclude references to out-of-state bad act evidence to establish defendant's motive for killing prostitutes like the victim, and by extension, to provide contextual background to the jury. Although defendant claimed that defendant did not commit the other murders, defendant implicated defendant in the killings and cover-up. State v. Mendenhall, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 343 (Tenn. Crim. App. May 14, 2020).

Trial court properly determined that aggravated assault accomplished by reckless conduct was a crime of violence, admitted a recording of defendant's 9-1-1 call, and his previous manslaughter conviction after he shot at a vehicle that was occupied by three people because the 9-1-1 recording was relevant to show how the case originated, the officers discovered that defendant possessed a .45-caliber handgun and that he was a convicted felon during their investigation of the call, the trial court provided proper curative instructions to the jury regarding defendant's previous conviction. State v. Brown, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 345 (Tenn. Crim. App. May 15, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 511 (Tenn. Sept. 16, 2020).

Witness was properly allowed to testify in defendant's trial for marijuana related offenses that the witness knew defendant by the nickname of "Weed" because the testimony of the witness was necessary for establishing defendant's identity as a perpetrator and was not unfairly prejudicial so as to outweigh its probative value. Furthermore, any error was harmless in that defendant was convicted because the witness testified that defendant brought marijuana to a car and the police found marijuana and digital scales at defendant's feet. State v. Rogers, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 444 (Tenn. Crim. App. June 24, 2020).

Indictment was properly admitted as evidence because, to be convicted of violating the sex offender registry, the State had to prove that defendant's victim in the case requiring him to be on the sex offender registry was a minor under the age of 13, and the indictment demonstrated that the victim was approximately 11 years old when attempted sexual abuse conviction occurred; and defendant did not show how the danger of unfair prejudice substantially outweighed the indictment's probative value as the certified copy of the conviction admitted as evidence reduced the likelihood that the indictment would be used for an improper purpose because it demonstrated he was actually convicted of the lesser offense of attempted sexual abuse. State v. Sullivan, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 22 (Tenn. Crim. App. Jan. 14, 2021).

Evidence of a cell phone tower map that included pie wedges that showed the side of the tower that the calls were routed, but did not indicate how close the relevant cell phones were to the tower, was relevant because defendants' phones pinged off towers at a time and from a direction that showed that the phones were within vicinity to relevant locations, namely the victim's home and locations where the victim's bank card was located; and the data indicated that the phones were pinging off a tower near one defendant's home both before and after the events and that the phones were not using that same tower during the time of the events. State v. Robinson, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 96 (Tenn. Crim. App. Mar. 17, 2021).

7. Evidence Properly Excluded.

Finding that the subcontractor was 50 percent at fault in his negligence action against the general contractor and the subcontractor was proper because any alleged marijuana use on the part of a worker did not make any issue before the jury more or less probable. Even if the evidence offered was considered probative, any probative value of the evidence would have be substantially outweighed by its unfairly prejudicial effect because evidence of that nature would have posed a great risk of allowing the jury to decide the case on purely emotional grounds based on their general contempt of drug use. Indoccio v. M&A Builders, LLC, 372 S.W.3d 112, 2011 Tenn. App. LEXIS 619 (Tenn. Ct. App. Nov. 14, 2011), appeal denied, Indoccio v. M & A Builders, LLC, — S.W.3d —, 2012 Tenn. LEXIS 259 (Tenn. Apr. 11, 2012).

Trial court did not abuse its discretion in excluding the evidence of the settlement between defendant and the county during defendant's forgery trial because it was extremely likely that the county's decision to enter into a settlement was based on defendant's counterclaims without regard to the allegations that defendant had misused her county purchase

card. State v. Finch, 465 S.W.3d 584, 2013 Tenn. Crim. App. LEXIS 1016 (Tenn. Crim. App. Nov. 22, 2013), appeal denied, — S.W.3d —, 2014 Tenn. LEXIS 548 (Tenn. June 24, 2014).

Photo of defendant and defendant's son was properly excluded because the photo was irrelevant. State v. Toles, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 315 (Tenn. Crim. App. May 17, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 462 (Tenn. Sept. 20, 2019).

Trial court did not err by refusing to allow defendant to inquire into the details of the victim's previous arrest, claiming that the evidence was relevant to establish how the county jail came to possess photographs of the victim's tattoos which were used to identify the victim's body, because evidence of the victim's prior arrest was irrelevant in defendant's trial for first degree murder and aggravated assault as the fact that the victim had been previously arrested made no fact of consequence in the defendant's trial more or less likely. State v. Ponder, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 504 (Tenn. Crim. App. Aug. 21, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 559 (Tenn. Dec. 5, 2019).

Trial court did not abuse its discretion by denying defendant's request to present evidence of the victim's gang affiliation because the evidence did not establish that a third party was responsible for the shooting and did not prove a third-party motive for harming the victim. State v. Sorrell, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 510 (Tenn. Crim. App. Aug. 22, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 579 (Tenn. Dec. 4, 2019).

Trial court did not abuse its discretion in excluding the testimony sought in cross-examination of a realtor because the testimony—whether the realtor's conduct violated the code of ethics applicable to realtors—did not have a tendency to make the existence of any fact that was of consequence to the determination of the action more probable or less probable. Whether the realtor violated the code of ethics had no bearing on whether the parties had an agreement granting a corporation an ownership interest in a limited liability company. Romglobal, Inc. v. Miller, — S.W.3d —, 2020 Tenn. App. LEXIS 37 (Tenn. Ct. App. Jan. 29, 2020), appeal dismissed, — S.W.3d —, 2020 Tenn. LEXIS 442 (Tenn. July 17, 2020).

Trial court did not abuse its discretion in determining that expounded questioning about the sentence a co-defendant faced for the same charges as defendant indirectly and impermissibly exposed the jury to the possible sentence defendant faced because the question was not permissible; although evidence of the exact potential sentence the co-defendant faced was arguably relevant to establish bias, even relevant evidence was inadmissible if rules or laws of general application excluded it. State v. Graham, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 275 (Tenn. Crim. App. Apr. 21, 2020).

Trial court did not abuse its discretion by not permitting defendant to present a police sergeant as a defense witness and by not permitting defendant to testify about previous incidents of violence against defendant in an effort to establish that an individual was present and that defendant acted in self-defense on the night of a shooting because the evidence was irrelevant to the shooting and the jury would have been required to speculate who had been involved in the previous incidents and whether the incidents were connected to the shooting. State v. Corbin, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 664 (Tenn. Crim. App. Oct. 9, 2020).

8. Illustrative Cases.

In a case in which defendant was charged with first degree premeditated murder, which required the state to show that the killing was premeditated and intentional, the evidence that the victim had received a large check days before defendant shot her, that she was planning to leave defendant and use the check to move in with her brother, and that defendant attempted to cash the victim's check following her death was relevant and highly probative regarding whether defendant acted intentionally; and the probative value was not substantially outweighed by the danger of unfair prejudice. State v. Jarman, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 832 (Tenn. Crim. App. Nov. 8, 2018), rev'd, 604 S.W.3d 24, 2020 Tenn. LEXIS 267 (Tenn. July 6, 2020).

Photo of defendant and a codefendant was properly admitted because (1) the photo was relevant, as a witness used the photo to identify the codefendant, and (2) the photo did not depict defendant as a gang member. State v. Toles, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 315 (Tenn. Crim. App. May 17, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 462 (Tenn. Sept. 20, 2019).

Limits on defendant's cross-examination did not violate the right to confrontation because defendant's questions were repetitive and asked after witnesses answered the question. State v. Abdullah, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 26 (Tenn. Crim. App. Jan. 21, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 255 (Tenn. Apr. 15, 2020).

Petitioner failed to show that his trial counsel was ineffective for failing to request funds to hire a firearm expert to investigate why the handgun did not discharge during the incident because the chosen defense theory was that petitioner was not present during the offenses and that the witnesses had misidentified petitioner, and based on this theory a munitions expert was unnecessary and irrelevant. Cochran v. State, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 129 (Tenn. Crim. App. Apr. 5, 2021).

There was no plain error in a trial court finding that a printout from a retail store's webpage was not properly authenticated, as there was no testimony by the store's webmaster, nor relevant, because store employees testified that they observed defendant acting suspiciously in the store and that multiple merchandise items were missing from the automotive aisle, surveillance videos depicted defendant removing the merchandise, and defendant admitted to taking the items to a police detective sergeant and offered to return the items to the store. State v. Craig, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 282 (Tenn. Crim. App. Apr. 16, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 530 (Tenn. Aug. 13, 2018).

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time. —

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

Advisory Commission Comments. The Tennessee Supreme Court approved this rule for both civil and criminal cases in *State v. Banks*, 564 S.W.2d 947 (Tenn. 1978).

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), No. 3-16-1.

Law Reviews. Can an Inference be Based on an Inference? (Donald F. Paine), 38 Tenn. B.J. 31 (2002).

Competency and Impeachment of Witnesses (Leo Bearman, Jr.), 57 Tenn. L. Rev. 89 (1989).

I See Dead People: Examining the Admissibility of Living-Victim Photographs in Murder Trials, 69 Vand. L. Rev. 1423 (2016).

The Admissibility of Lay and Expert Opinions (J. Houston Gordon), 57 Tenn. L. Rev. 103 (1989).

The Federal Influence on the Tennessee Hearsay Rule (Alfred H. Knight, III), 57 Tenn. L. Rev. 117 (1989).

The Nature and Purpose of Evidence Theory, 66 Vand. L. Rev. 547 (2013).

The Time is Right to Amend Rule 404(b), 45 U. Mem. L. Rev. 149 (2014).

Warping the Rules: How Some Courts Misapply Generic Evidentiary Rules to Exclude Polygraph Evidence, 59 Vand. L. Rev. 539 (2006).

A Taste of Their Own Medicine: Examining the Admissibility of Experts' Prior Malpractice Under the Federal Rules of Evidence, 71 Vand. L. Rev. 995 (2018).

NOTES TO DECISIONS

ANALYSIS

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1. Application.

A trial court's application of Tenn. R. Evid. 403 should proceed in two steps: (1) It should balance the probative value of the evidence sought to be excluded against the combined weight of the countervailing factors, and if the countervailing factors do not outweigh the probative value of the evidence, the trial court should proceed no further and should deny the motion to exclude the evidence; (2) If, however, the countervailing factors outweigh the probative value of the evidence, the court should proceed to the second step in which it exercises its discretion to decide whether the evidence should be excluded notwithstanding its relevancy. Richardson v. Miller, 44 S.W.3d 1, 2000 Tenn. App. LEXIS 551 (Tenn. Ct. App. 2000).

The trial court misapplied Tenn. R. Evid. 403 in medical malpractice case where the evidence regarding prescription drugs off-label usage was particularly relevant to the physician's decision to continue patient plaintiff on the drug after the patient experienced chest pain, and there was very little basis to support the conclusion that introducing the evidence would have produced any of the countervailing factors in Tenn. R. Evid. 403. Richardson v. Miller, 44 S.W.3d 1, 2000 Tenn. App. LEXIS 551 (Tenn. Ct. App. 2000).

Trial court did not abuse its discretion by denying appellant's motion in limine to exclude photographs of the parties' vehicles; they sustained minimal damage, appellant testified regarding the damage to his vehicle and stated

that he repaired it himself, and the weight to be given to the photographs introduced and to the testimony was a matter to be determined by the jury. Allen v. Albea, 476 S.W.3d 366, 2015 Tenn. App. LEXIS 241 (Tenn. Ct. App. Apr. 23, 2015).

Trial court did not err in admitting five autopsy photographs showing wounds to the victim's right ear, the right side of her head, and her left arm because the photographs assisted the doctor who performed the autopsy in explaining the victim's injuries and supported her conclusion that the cause of death was multiple sharp force injuries; the photographs were not overly gruesome as the wounds had been cleaned; and the probative value of the photographs was not substantially outweighed by the danger of unfair prejudice. State v. Simpson, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 173 (Tenn. Crim. App. Mar. 18, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 322 (Tenn. July 24, 2019).

2. Admissible Evidence.

The trial court erred in excluding evidence in informed consent medical malpractice claim regarding surgeon's hand condition leading up to surgery; the evidence went to the very heart of the plaintiff's claim, and was not only relevant on the issue of informed consent but was the very essence of the claim. Hawk v. Chattanooga Orthopaedic Group, P.C., 45 S.W.3d 24, 2000 Tenn. App. LEXIS 482 (Tenn. Ct. App. 2000), review or rehearing denied, — S.W.3d —, 2001 Tenn. LEXIS 145 (Tenn. Feb. 26, 2001).

In defendant's capital murder case, a court erred by excluding the proffered testimony of a witness, as it was relevant to show that another person had the motive and the opportunity to kill the victim; however, the error was harmless, because the other evidence against defendant was overwhelming. State v. Powers, 101 S.W.3d 383, 2003 Tenn. LEXIS 2 (Tenn. 2003), cert. denied, Powers v. Tennessee, 538 U.S. 1038, 123 S. Ct. 2083, 155 L. Ed. 2d 1071, 2003 U.S. LEXIS 3797 (Tenn. May 19, 2003).

Uncommunicated threat made by a victim is admissible as an exception to the rule excluding hearsay statements as an indication of the victim's state of mind, and evidence showing the victim's status as an aggressor is not excluded by Tenn. R. Evid. 403, even if there is substantial evidence, including a stipulation, that the victim was in fact the aggressor; however, a trial court's failure to admit such a statement did not constitute reversible error, because the outcome of the trial was not affected, where the evidence showed that defendant used more force than necessary to show self-defense. State v. Saylor, 117 S.W.3d 239, 2003 Tenn. LEXIS 861 (Tenn. 2003), cert. denied, Saylor v. Tennessee, 540 U.S. 1208, 124 S. Ct. 1483, 158 L. Ed. 2d 133, 2004 U.S. LEXIS 1500 (2004).

In a capital murder case, a bartender's opinion testimony was properly included concerning defendant's actions in a bar two weeks after the murder, where the testimony was helpful to the jury in understanding why the bartender acted as she did while defendant was in the tavern, and the bartender's assessment of defendant's behavior was unlikely to have resulted in any unfair prejudice. State v. Davidson, 121 S.W.3d 600, 2003 Tenn. LEXIS 1007 (Tenn. 2003), cert. denied, Davidson v. Tennessee, 541 U.S. 1049, 158 L. Ed. 2d 743, 124 S. Ct. 2174, 2004 U.S. LEXIS 3512, 72 U.S.L.W. 3711 (2004).

In the criminal trial of four gang members who engaged in kidnapping and murder, testimony of the events leading up to the murder was crucial to the elements of premeditation and intent; therefore, the trial court did not err in admitting the testimony under Tenn. R. Evid. 403. State v. Mickens, 123 S.W.3d 355, 2003 Tenn. Crim. App. LEXIS 107 (Tenn. Crim. App. 2003), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 805 (Tenn. Sept. 2, 2003).

Trial court did not abuse its discretion by admitting evidence of the five-year-old protective order, because in doing so, the trial court ruled that the evidence was relevant to the state's argument that the victim's desire to obtain custody of the child provided a motive for the murder of the victim by defendant, the victim's wife. State v. Wilson, 164 S.W.3d 355, 2003 Tenn. Crim. App. LEXIS 841 (Tenn. Crim. App. 2003), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 226 (Tenn. Mar. 8, 2004).

In defendant's criminally negligent homicide case, the trial court did not err in admitting information in the community regarding child car seats where the evidence was relevant to show that defendant was aware, or should have been aware, of the danger to an unrestrained child and its probative value was not outweighed by the danger of unfair prejudice to defendant; the evidence was directly relevant to show that defendant's act of holding her child on her lap was negligent. State v. Jones, 151 S.W.3d 494, 2004 Tenn. LEXIS 992 (Tenn. 2004).

Upon retrial of defendant's conviction for felony murder, the state was permitted to introduce evidence of his conviction for aggravated burglary in connection with the crime, but only if the trial court determined that its probative value was not substantially outweighed by the risk of unfair prejudice to the defendant. State v. Scarbrough, 181 S.W.3d 650, 2005 Tenn. LEXIS 1044 (Tenn. 2005).

In a personal injury suit arising out of an automobile collision, prescription records showing that the injured party received multiple pain medications preceding the accident were relevant to the chronic nature of her preexisting condition; the trial court did not abuse its discretion in admitting the prescription records. McPeek v. Lockhart, 174 S.W.3d 751,

2005 Tenn. App. LEXIS 199 (Tenn. Ct. App. 2005), appeal denied, — S.W.3d —, 2005 Tenn. LEXIS 817 (Tenn. 2005).

In a murder case, a court erred by excluding the state's expert's testimony regarding the cause of death (murder or suicide) because the testimony would have provided substantial assistance to the trier of fact, the testimony was not entirely dependent upon statistical studies as the expert specifically contended that his observations, skill, training, and experience were a separate basis for his opinion, and he testified that he had studied many still shots of weapons just after having discharged a bullet and that he had always observed a cloud of soot that was discharged simultaneously with the bullet. State v. Ayers, 200 S.W.3d 618, 2005 Tenn. Crim. App. LEXIS 1108 (Tenn. Crim. App. 2005), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 261 (Tenn. 2006).

In defendant's capital murder case, a court properly allowed evidence of defendant's poverty because the state offered proof that despite the loss of his job without severance pay, defendant had made several cash purchases, had sought to invest cash, and had over one thousand dollars in coins in his possession at the time of his arrest; that defendant had no legitimate source of income following the termination of his employment, coupled with proof of those expenditures shortly after the robbery, was relevant, circumstantial evidence of the commission of the crimes. State v. Reid, 213 S.W.3d 792, 2006 Tenn. LEXIS 1203 (Tenn. 2006), rehearing denied, — S.W.3d —, 2007 Tenn. LEXIS 17, (Tenn. 2007), cert. denied, Reid v. Tennessee, 169 L. Ed. 2d 305, 128 S. Ct. 437, 552 U.S. 974, 2007 U.S. LEXIS 11530 (2007).

Trial court did not err under Tenn. R. Evid. 403 by permitting the state to play for the jury a videotape of defendant and his cellmate conversing in a jail cell while defendant was wearing prison garb because the videotape had probative value in that it assisted the jury in assessing the cellmate's credibility; the jury did not see the videotape until after the cellmate had testified that defendant had been in jail with him, and therefore any prejudicial impact stemming from a visual depiction of defendant in prison garb was minimized. State v. Taylor, 240 S.W.3d 789, 2007 Tenn. LEXIS 1083 (Tenn. Dec. 19, 2007).

Trial court did not err by allowing the testimony from three jurors regarding the will proponent taking the original copy of the purported will at the first trial and evidence regarding the proponent's involvement with drugs and his criminal record because the proponent's credibility was relevant to a number of issues surrounding the formation and execution of the purported will; defendant was a legal proponent of the purported will, was the sole beneficiary, and by his own admission facilitated the drafting and execution of the will on the eve of the decedent's death. Blackburn v. Blackburn, 253 S.W.3d 603, 2007 Tenn. App. LEXIS 692 (Tenn. Ct. App. Nov. 14, 2007), appeal denied, In re Estate of Blackburn, — S.W.3d —, 2008 Tenn. LEXIS 240 (Tenn. Apr. 7, 2008).

In an action stemming from an automobile accident, there was no question that the substance of the two consumer complaints at issue was hearsay and there was likewise no question that the trial court's limiting instruction could have been more artfully worded; however, the manufacturer did not object to either the substance of the limiting instruction or insist that the evidence regarding the two consumer complaints was so prejudicial that it should have been excluded under Tenn. R. Evid. 403, and after considering the trial court's limiting instruction in context, the instruction conveyed to the members of the jury an understanding that they should not take the substance of the consumer complaints as true. Duran v. Hyundai Motor Am., Inc., 271 S.W.3d 178, 2008 Tenn. App. LEXIS 79 (Tenn. Ct. App. Feb. 13, 2008), rehearing denied, 271 S.W.3d 178, 2008 Tenn. App. LEXIS 127 (Tenn. Ct. App. Feb. 27, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 632 (Tenn. Aug. 25, 2008).

During defendant's trial for vehicular assault and aggravated vehicular homicide where trial court admitted the testimony of a deceased witness from the preliminary hearing, trial court's exclusion of a deputy's report detailing the decedent's prior inconsistent statement was improper; statement could have been used to impeach the witness under Tenn. R. Evid. 613 and the probative value of the statement was not substantially outweighed by its danger of unfair prejudice, confusion of the issues, misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence under Tenn. R. Evid. 403. State v. Bowman, 327 S.W.3d 69, 2009 Tenn. Crim. App. LEXIS 35 (Tenn. Crim. App. Jan. 14, 2009), appeal denied, — S.W.3d —, 2009 Tenn. LEXIS 395 (Tenn. June 15, 2009), cert. denied, Bowman v. Tennessee, 175 L. Ed. 2d 388, 130 S. Ct. 559, 2009 U.S. LEXIS 8080 (U.S. 2009).

In defendant's murder trial for the killing of his wife, the trial court did not err in permitting the state to introduce propensity evidence in rebuttal after defendant testified that he had never hit his wife; because defendant put his treatment of the victim at issue, the prosecutor was properly permitted to introduce the testimony of a co-worker of the victim, who testified that defendant had appeared at the workplace on several occasions in a rage, that the victim appeared at work on several occasions and had difficulty walking, that the victim often seemed stiff and was covered with bruises, and that the victim wore long sleeves even in warm weather.

State v. Brock, 327 S.W.3d 645, 2009 Tenn. Crim. App. LEXIS 496 (Tenn. Crim. App. June 29, 2009), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 56 (Tenn. Jan. 25, 2010), cert. denied, Brock v. Tennessee, , 562 U.S. 850, 131 S. Ct. 101, 178 L. Ed. 2d 64, 2010 U.S. LEXIS 5883 (U.S. 2010).

On appeal from his criminal convictions, defendant's argument that the trial court erroneously admitted irrelevant and prejudicial evidence related to the search for the victim's body was without merit. The admission of the officers' testimony served to show how well the victim's body was hidden and was relevant to the issue of premeditation; crime scene photographs were admissible to show the appearance of the crime scene, including the great lengths to which defendant went to conceal the body; the fact that the victim's body was found without socks and that a small, partially-burned sock was discovered on defendant's property soon after her disappearance was admissible as more circumstantial evidence of defendant's premeditation; and the probative value of the evidence was not outweighed by any prejudicial effect. State v. Trusty, 326 S.W.3d 582, 2010 Tenn. Crim. App. LEXIS 339 (Tenn. Crim. App. Apr. 23, 2010), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 906 (Tenn. Sept. 27, 2010).

In a disorderly conduct case, the court properly allowed into evidence defendant's use of the word "nigger" to an African-American officer because the use of that word was probative as to the charge; defendant reacted angrily after being told not to park in a prohibited area, directly challenging the authority of the officer. There was a nexus between defendant's initial conduct toward the officer and his later confrontation with the police stationed at the checkpoint. State v. Mitchell, 339 S.W.3d 629, 2011 Tenn. LEXIS 311 (Tenn. Mar. 31, 2011).

Trial court did not abuse its discretion to allow defendant to cross-exam plaintiff concerning other lawsuits he had filed because the statements made by plaintiff concerning his motive for filing the underlying lawsuit or any other was sufficient to "open the door" for impeachment of plaintiff on cross-examination. Brown v. Christian Bros. Univ., 428 S.W.3d 38, 2013 Tenn. App. LEXIS 512 (Tenn. Ct. App. Aug. 5, 2013), appeal denied, — S.W.3d —, 2014 Tenn. LEXIS 22 (Tenn. Jan. 15, 2014).

Trial court did not commit reversible error when, over defendant's objection, it allowed the state to introduce through a forensic anthropologist, some of the victim's bones, specifically her right humerus, sternum, and forearm, where: (1) The witness was able to show the jury several of the victim's injuries by pointing out fractures on the bones themselves; and (2) The witness also was able to demonstrate how the victim's arm bones fit together and how some of her injuries may have been caused through the interaction of the bones. State v. Larkin, 443 S.W.3d 751, 2013 Tenn. Crim. App. LEXIS 297 (Tenn. Crim. App. Mar. 28, 2013).

Trial court abused its discretion by excluding defendant's voluntary statements made during the post-polygraph interview; the statements amounted to a confession and the probative value was very high, the trial court incorrectly evaluated the danger of unfair prejudice resulting from defendant's presumed response to the evidence, he could provide context for the statements even without mention of the polygraph, and while he could not be required to testify to provide context, the analysis had to focus on his statements, not his reaction to them. State v. McCaleb, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 426 (Tenn. Crim. App. June 1, 2018), rev'd, 582 S.W.3d 179, 2019 Tenn. LEXIS 371 (Tenn. Aug. 21, 2019).

To hold that the presumed need to reference a polygraph examination to establish context of a post-polygraph statement runs afoul of the rule would eviscerate the Tennessee Supreme Court's holding that voluntary statements made during the course of a polygraph examination are admissible; so broad of a holding would cause nearly every voluntary statement made in such a scenario to be inadmissible under the rule and such cannot be the case. State v. McCaleb, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 426 (Tenn. Crim. App. June 1, 2018), rev'd, 582 S.W.3d 179, 2019 Tenn. LEXIS 371 (Tenn. Aug. 21, 2019).

Trial court did not err by allowing a witness to testify that she had seen defendant tie knots similar to the ones used to tie the victim because the evidence was relevant to defendant's identity. State v. Hernandez, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 310 (Tenn. Crim. App. May 15, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 470 (Tenn. Sept. 18, 2019).

Trial court did not err by admitting statements about defendant's dream because his statements about his dream included an admission against interest, giving the statements probative value, the statements, which he made consistently to two separate witnesses on two separate occasions, included details about the crime, such as that it was committed with a hammer, and also that defendant became the assailant at some point in time. State v. Hernandez, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 310 (Tenn. Crim. App. May 15, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 470 (Tenn. Sept. 18, 2019).

Trial court did not err by admitting unredacted portions of defendant's interview with police in which he discussed having been trained by the military to be a "killer" because defendant's reference to military service was just a statement of who he was and was not prejudicial. Defendant discussed during the statement of his military training that he had been taught to kill someone using a "Garrote knot" and the victim was found strangled and

tied with a series of knots. State v. Hernandez, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 310 (Tenn. Crim. App. May 15, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 470 (Tenn. Sept. 18, 2019).

Trial court did not err by admitting evidence related to defendant's prior convictions for aggravated assault and rape of the murder victim because the evidence had high probative value of showing motive, intent, premeditation, and identity, and the probative value of the evidence outweighed the danger of unfair prejudice. The relevant convictions were for violent offenses and involved the victim in the present case, and defendant had been incarcerated for the crimes, and other evidence showed he made incriminating statements to a fellow inmate about his desire to kill the victim. State v. Rimmer, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 322 (Tenn. Crim. App. May 21, 2019).

Trial court did not err by admitting drawings of the backseat of defendant's vehicle because it admitted the evidence based upon a finding that the drawing would assist the jury in understanding where in the backseat the blood was located, and defendant did not ask the agent questions challenging the accuracy of the drawing. State v. Rimmer, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 322 (Tenn. Crim. App. May 21, 2019).

Trial court did not err by admitting evidence of defendant's prior escape attempts, including testimony that two shanks were found in his jail cell because the evidence of the shanks corroborated details of defendant's escape plan that he intended to take a guard hostage and to kill a guard if necessary. The court instructed the jury that it was only to consider this evidence to determine defendant's consciousness of guilt. State v. Rimmer, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 322 (Tenn. Crim. App. May 21, 2019).

Trial court did not abuse its discretion by allowing the victim's son to show the jury his scars that were the result of a water heater explosion because the evidence was minimally relevant to support the son's testimony about the severity of his injuries and to combat the defense's argument that the victim might still be alive, the scars were a visual representation of the injuries described in the son's testimony, and no evidence showed that defendant had any involvement in the injury. Despite the minimal relevance of the evidence, defendant had not articulated any prejudice he suffered based on the evidence's admission, and the trial court's determination the probative value was not substantially outweighed by the danger of unfair prejudice was supported by the record. State v. Rimmer, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 322 (Tenn. Crim. App. May 21, 2019).

Trial court did not err in allowing cumulative testimony during defendant's cross-examination because the State was entitled to cross-examine defendant about every charged instance of abuse and whether he denied each incident. State v. Robinson, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 277 (Tenn. Crim. App. Apr. 21, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 427 (Tenn. Aug. 7, 2020).

Because recordings of defendant talking to a jailhouse informant revealed defendant's consciousness of defendant's own guilt, disclosed defendant's motive of killing prostitutes at truck stops, and contradicted defendant's claim of alibi, the recordings and proof defendant's solicitation of the informant to commit murder by killing witnesses were properly admissible. Furthermore, the trial court did not abuse its discretion by determining that the probative value of the evidence outweighed the danger of its unfairly prejudicial effect. State v. Mendenhall, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 343 (Tenn. Crim. App. May 14, 2020).

Witness was properly allowed to testify in defendant's trial for marijuana related offenses that the witness knew defendant by the nickname of "Weed" because the testimony of the witness was necessary for establishing defendant's identity as a perpetrator and was not unfairly prejudicial so as to outweigh its probative value. Furthermore, any error was harmless in that defendant was convicted because the witness testified that defendant brought marijuana to a car and the police found marijuana and digital scales at defendant's feet. State v. Rogers, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 444 (Tenn. Crim. App. June 24, 2020).

Trial court did not abuse its discretion by admitting the results of defendant's urine test because the presence of illegal substances in defendant's urine was relevant to intoxication as well as to impeach his police statement that he had not taken any drugs other than oxycodone for one week. State v. Franklin, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 511 (Tenn. Crim. App. July 27, 2020).

Trial court did not err by admitting evidence of threats defendant made against his wife and her family prior to the murder because the threats were directed toward the victim both specifically and as a member of the wife's family, and evidence of the threats allowed the State the opportunity to establish the defendant's intent and motive to harm the victim, and the probative value of this evidence was not outweighed by the danger of unfair prejudice. State v. Walton, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 571 (Tenn. Crim. App. Aug. 20, 2020).

Indictment was properly admitted as evidence because, to be convicted of violating the sex offender registry, the State had to prove that defendant's victim in the case requiring him to be on the sex offender registry was a minor under the age of 13, and the indictment

demonstrated that the victim was approximately 11 years old when attempted sexual abuse conviction occurred; and defendant did not show how the danger of unfair prejudice substantially outweighed the indictment's probative value as the certified copy of the conviction admitted as evidence reduced the likelihood that the indictment would be used for an improper purpose because it demonstrated he was actually convicted of the lesser offense of attempted sexual abuse. State v. Sullivan, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 22 (Tenn. Crim. App. Jan. 14, 2021).

Trial court did not err when it denied defendant's motion to exclude evidence about the box containing drugs and a gun because the State did not introduce evidence of the box and its contents to prove that defendant acted in conformity with a character trait involving the propensity to engage in criminal activity as the evidence was offered to show defendant's motive in orchestrating the criminal events when the box was lost; and evidence of the box was introduced to help the jury understand the evidence and the motive behind the events that followed. Further, defendant's motive outweighed any unfair prejudice from the jury's possible inference that defendant engaged in another criminal act. State v. Harris, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 59 (Tenn. Crim. App. Feb. 23, 2021).

Relevant evidence of a cell phone tower map was not misleading because, although the evidence was admitted through a lay witness who admitted that he did not have expertise in cell phone technology, he thoroughly explained, during direct and cross-examination, what the pie shapes on the map depicted and that he could not say how close the cell phones were to the towers when they pinged the towers. State v. Robinson, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 96 (Tenn. Crim. App. Mar. 17, 2021).

3. Inadmissible Evidence.

Trial court erred in admitting pornographic magazines and videotapes that were in defendant's possession that were not identified by either of his victims as items they viewed or looked at with defendant. State v. McCary, 119 S.W.3d 226, 2003 Tenn. Crim. App. LEXIS 17 (Tenn. Crim. App. 2003), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 674 (Tenn. July 7, 2003).

Evidence of the prior acquittals of two men defendant claimed were the individuals responsible for a murder as context evidence was inadmissible because the absence of the evidence of the acquittals would not present a chronological void that would confuse the jury since the testimony at trial regarding the course of the investigation of the crime explained the chronological void and included evidence that other suspects were previously tried for the crime; evidence of the outcome of another trial does not assist the jury in its understanding of the events. State v. Turner, 352 S.W.3d 425, 2011 Tenn. LEXIS 960 (Tenn. Oct. 12, 2011).

Finding that the subcontractor was 50 percent at fault in his negligence action against the general contractor and the subcontractor was proper because any alleged marijuana use on the part of a worker did not make any issue before the jury more or less probable. Even if the evidence offered was considered probative, any probative value of the evidence would have be substantially outweighed by its unfairly prejudicial effect because evidence of that nature would have posed a great risk of allowing the jury to decide the case on purely emotional grounds based on their general contempt of drug use. Indoccio v. M&A Builders, LLC, 372 S.W.3d 112, 2011 Tenn. App. LEXIS 619 (Tenn. Ct. App. Nov. 14, 2011), appeal denied, Indoccio v. M & A Builders, LLC, — S.W.3d —, 2012 Tenn. LEXIS 259 (Tenn. Apr. 11, 2012).

In an aggravated child abuse prosecution, even if evidence of defendant father's assaults against defendant mother was admissible as substantive evidence against her, as any probative value of the evidence was extremely limited, and it was highly prejudicial because it risked introducing extraneous issues and causing the jury to decide the case on an improper basis, it was excludable under Tenn. R. Evid. 403. State v. Gomez, 367 S.W.3d 237, 2012 Tenn. LEXIS 291 (Tenn. Apr. 24, 2012).

Trial court erred in admitting evidence in a medical malpractice case that plaintiff's mother returned to the doctor after plaintiff's birth, which was the subject of the alleged malpractice, as the probative value of this evidence was substantially outweighed by the danger of unfair prejudice. Mayo v. Shine, 392 S.W.3d 61, 2012 Tenn. App. LEXIS 425 (Tenn. Ct. App. June 25, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 807 (Tenn. Oct. 18, 2012).

In defendant's death penalty case, because an out-of-state murder did not qualify as a signature crime, a substantial amount of evidence was presented regarding the prior murder, and the presentation of the evidence lasted two days and included inherently prejudicial testimony about a sexual encounter which was absent from the instant murders, the danger of unfair prejudice created by the detailed evidence of the other murder clearly outweighed any probative value. State v. Jones, 450 S.W.3d 866, 2014 Tenn. LEXIS 669 (Tenn. Sept. 25, 2014).

Admission of an autopsy photograph of the charred body of a victim was erroneous due to the highly prejudicial nature of the photograph, but the error was harmless in light of the photographs admitted to show the crime scene and to assist an expert in forensic pathology in his testimony. State v. Foust, 482 S.W.3d 20,

2015 Tenn. Crim. App. LEXIS 735 (Tenn. Crim. App. Sept. 9, 2015).

Trial court did not abuse its discretion in determining that expounded questioning about the sentence a co-defendant faced for the same charges as defendant indirectly and impermissibly exposed the jury to the possible sentence defendant faced because the question was not permissible; although evidence of the exact potential sentence the co-defendant faced was arguably relevant to establish bias, even relevant evidence was inadmissible if rules or laws of general application excluded it. State v. Graham, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 275 (Tenn. Crim. App. Apr. 21, 2020).

4. Prejudice.

Because there was plainly other evidence establishing both malice and premeditation, physician's testimony describing, in detail, death by drowning, was, in context, not particularly harmful and did not unduly prejudice the trial. State v. Gaylor, 862 S.W.2d 546, 1992 Tenn. Crim. App. LEXIS 748 (Tenn. Crim. App. 1992), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 234 (Tenn. June 7, 1993).

Testimony that described murder victim as lying in a pool of blood an inch deep was not irrelevant, inflammatory or prejudicial. State v. Smith, 857 S.W.2d 1, 1993 Tenn. LEXIS 149 (Tenn. 1993), rehearing denied, — S.W.2d —, 1993 Tenn. LEXIS 248 (Tenn. June 28, 1993), cert. denied, Smith v. Tennessee, 510 U.S. 996, 114 S. Ct. 561, 126 L. Ed. 2d 461, 1993 U.S. LEXIS 7408 (1993), cert. denied, Tennessee v. Bane, 510 U.S. 1040, 114 S. Ct. 682, 126 L. Ed. 2d 650, 1994 U.S. LEXIS 63 (1994).

In a prosecution for murder, evidence of an unremoved bullet in the victim's body from a previous shooting and several scars on his body from prior altercations did not automatically reflect the victim's propensity towards violence and was properly excluded because of its potential for unfair prejudice. State v. Copenny, 888 S.W.2d 450, 1993 Tenn. Crim. App. LEXIS 401 (Tenn. Crim. App. 1993), appeal denied, State v. Copeny, — S.W.2d —, 1993 Tenn. LEXIS 351 (Tenn. 1993).

Post-mortem photographs of victim were properly admitted where, at the guilt phase, the photographs were relevant to the issues of the identity of the perpetrator and the cause of death, as well as necessary to illustrate the testimony of many of the state's experts; at sentencing, the photographs were relevant to establish the especially heinous, atrocious or cruel aggravating circumstance. State v. Cazes, 875 S.W.2d 253, 1994 Tenn. LEXIS 28 (Tenn. 1994), rehearing denied, — S.W.2d —, 1994 Tenn. LEXIS 107 (Tenn. Apr. 4, 1994), cert. denied, Cazes v. Tennessee, 513 U.S. 1086, 115 S. Ct. 743, 130 L. Ed. 2d 644, 1995 U.S. LEXIS 228 (1995).

Testimony of defendant's two previous sexual partners about his propensity to bite his partner during sex was admissible; this evidence was relevant to establish the identity of the person who had raped and murdered victim, and its probative value was not substantially outweighed by its prejudicial effect. State v. Cazes, 875 S.W.2d 253, 1994 Tenn. LEXIS 28 (Tenn. 1994), rehearing denied, — S.W.2d —, 1994 Tenn. LEXIS 107 (Tenn. Apr. 4, 1994), cert. denied, Cazes v. Tennessee, 513 U.S. 1086, 115 S. Ct. 743, 130 L. Ed. 2d 644, 1995 U.S. LEXIS 228 (1995).

Although a videotape of the crime scene was unpleasant because it showed postmortem lividity and some rigor mortis, the trial court did not abuse its discretion in allowing that part of the videotape to be played. State v. Bigbee, 885 S.W.2d 797, 1994 Tenn. LEXIS 277 (Tenn. 1994).

In a prosecution for first degree murder, pretrial statements made by defendant to investigating officers which established defendant's motive met the definition of relevancy and the probative value of the statements outweighed any danger of unfair prejudice. State v. Gentry, 881 S.W.2d 1, 1993 Tenn. Crim. App. LEXIS 645 (Tenn. Crim. App. 1993).

In a prosecution for aggravated assault, the trial court did not abuse its discretion in permitting the jury to view the victim's wounds, where the location of the wounds was relevant in determining the truth of what occurred and the nature and extent of the wounds relevant on the issue of self defense. State v. Hill, 885 S.W.2d 357, 1994 Tenn. Crim. App. LEXIS 73 (Tenn. Crim. App. 1994).

Testimony of the medical examiner as to post-death injuries to the victim in a first-degree murder prosecution was relevant to the establishment of intent and the prejudicial effect did not outweigh its probative value. State v. Barnard, 899 S.W.2d 617, 1994 Tenn. Crim. App. LEXIS 567 (Tenn. Crim. App. 1994).

In an action arising from an automobile-truck collision, the trial court properly prevented reference to traffic violations or criminal convictions of defendant truck driver that occurred after the accident because prejudice to the defendant overcame any probative value they might have. Herbert by Herbert v. Brazeale, 902 S.W.2d 933, 1995 Tenn. App. LEXIS 86 (Tenn. Ct. App. 1995).

Where the victim in a murder prosecution, defendant's infant child, died of malnutrition and dehydration, the physical appearance of the child was an important issue and photographs illustrating the visible signs of malnutrition and dehydration were admissible as probative of the intentional or knowing nature of defendant's conduct. State v. Bordis, 905 S.W.2d 214, 1995 Tenn. Crim. App. LEXIS 146 (Tenn. Crim. App. 1995).

In a prosecution for murder, a photograph of the victim that was not particularly gruesome and that tended to corroborate the statement of

a codefendant was properly admitted. State v. Zirkle, 910 S.W.2d 874, 1995 Tenn. Crim. App. LEXIS 103 (Tenn. Crim. App. 1995), rehearing denied, — S.W.2d —, 1995 Tenn. Crim. App. LEXIS 230 (Tenn. Crim. App. Mar. 21, 1995), appeal denied, — S.W.2d —, 1995 Tenn. LEXIS 481 (Tenn. Aug. 28, 1995), dismissed, Zirkle v. Carlton, — F. Supp. 2d —, 2013 U.S. Dist. LEXIS 123960 (E.D. Tenn. June 12, 2013).

In a prosecution for murder, while use of the defendant's nickname by a witness was prejudicial, where its use was limited to establishing a statement that the defendant made to the witness, the probative value of the testimony clearly outweighed any prejudicial effect. State v. Zirkle, 910 S.W.2d 874, 1995 Tenn. Crim. App. LEXIS 103 (Tenn. Crim. App. 1995), rehearing denied, — S.W.2d —, 1995 Tenn. Crim. App. LEXIS 230 (Tenn. Crim. App. Mar. 21, 1995), appeal denied, — S.W.2d —, 1995 Tenn. LEXIS 481 (Tenn. Aug. 28, 1995), dismissed, Zirkle v. Carlton, — F. Supp. 2d —, 2013 U.S. Dist. LEXIS 123960 (E.D. Tenn. June 12, 2013).

In a prosecution for possession of cocaine with intent to sell, the trial court committed reversible error in admitting testimony of police officer that a confidential informant had told him that defendant was in black car with an eight-ball of cocaine with him; the prejudicial effect of the testimony far outweighed its probative value. State v. Brown, 915 S.W.2d 3, 1995 Tenn. Crim. App. LEXIS 621 (Tenn. Crim. App. 1995).

In a prosecution for vehicular homicide, where it was not stipulated that the infant victim was viable within the meaning of T.C.A. § 39-13-214, testimony of the grandfather of the infant and a photograph were relevant to the issue and the probative value thereof was not outweighed by the danger of unfair prejudice. State v. Williamson, 919 S.W.2d 69, 1995 Tenn. Crim. App. LEXIS 989 (Tenn. Crim. App. 1995).

In a murder prosecution, testimony regarding the victim's statement that he believed defendant was going to kill him was admissible as an exception to the hearsay rule, but was not directly probative on the issue of whether defendant murdered the victim. State v. Bragan, 920 S.W.2d 227, 1995 Tenn. Crim. App. LEXIS 541 (Tenn. Crim. App. 1995), rehearing denied, — S.W.2d —, 1995 Tenn. Crim. App. LEXIS 717 (1995).

In a wrongful death action against a truck driver and the driver's employer, where plaintiff's allegations included a claim of negligent entrustment, plaintiff should have been allowed to introduce evidence of the driver's prior accidents. Woodson v. Porter Brown Limestone Co., 916 S.W.2d 896, 1996 Tenn. LEXIS 96 (Tenn. 1996).

In a felony murder prosecution, where the felony was rape of the victim's wife, it was not prejudicial error to permit the wife to exhibit scars she sustained at the hands of the defendant. State v. Jefferson, 938 S.W.2d 1, 1996 Tenn. Crim. App. LEXIS 317 (Tenn. Crim. App. 1996).

In a prosecution for first-degree murder by aggravated child abuse, evidence of prior injuries to the victim was properly allowed since its admission was not outweighed by the danger of unfair prejudice. State v. Dubose, 953 S.W.2d 649, 1997 Tenn. LEXIS 472 (Tenn. 1997).

Probative value of photographs showing multiple injuries suffered by child-victim at hands of defendants far outweighed their prejudicial effect in that introduction of the photographs was the only medium the state could use to communicate these injuries. State v. Griffis, 964 S.W.2d 577, 1997 Tenn. Crim. App. LEXIS 427 (Tenn. Crim. App. 1997).

A photograph is admissible if it is relevant to an issue in dispute and if its probative value is not outweighed by its prejudicial effect. State v. Vann, 976 S.W.2d 93, 1998 Tenn. LEXIS 513 (Tenn. 1998), rehearing denied, — S.W.2d —, 1998 Tenn. LEXIS 580 (Tenn. Oct. 19, 1998), cert. denied, Vann v. Tennessee, 526 U.S. 1071, 119 S. Ct. 1467, 143 L. Ed. 2d 551, 1999 U.S. LEXIS 2664 (1999).

The prejudice substantially outweighed any probativeness where the trial court admitted into evidence color photographs of a bruised, bloodied, nude infant victim where the medical testimony as to the newborn child's condition was not in dispute. State v. Collins, 986 S.W.2d 13, 1998 Tenn. Crim. App. LEXIS 254 (Tenn. Crim. App. 1998), review or rehearing denied, — S.W.2d —, 1998 Tenn. LEXIS 660 (Tenn. Nov. 2, 1998).

To disallow evidence that goes to the very heart of the defendant's case would deprive defendants of fact testimony of probative value; the fact that it may damage the plaintiff's case involves the "legitimate force" of the testimony, and therefore is not "unfair prejudice" under Tenn. R. Evid. 403. Buddy Lee Attractions, Inc. v. William Morris Agency, Inc., 13 S.W.3d 343, 1999 Tenn. App. LEXIS 638 (Tenn. Ct. App. 1999).

As long as a proper foundation is presented for admission of a photograph into evidence, a defendant cannot complain successfully that the photograph is inadmissible simply because a "better picture" would have been more helpful to the defendant's theory of the case. State v. Harris, 30 S.W.3d 345, 1999 Tenn. Crim. App. LEXIS 1072 (Tenn. Crim. App. 1999).

Photograph had obvious probative value where witnesses used the photograph to aid description about seeing robber exit pharmacy and to aid description of the land and other buildings that were next to the pharmacy; nor was the photograph unfairly prejudicial because it was taken at an angle that made the street in front of the store appear wider than it actually was. State v. Harris, 30 S.W.3d 345,

1999 Tenn. Crim. App. LEXIS 1072 (Tenn. Crim. App. 1999).

Trial court abused its discretion in admitting evidence of defendant's involvement in a prior shooting where the evidence possessed only a modicum of probative value as contextual background evidence and this slight value was clearly outweighed by the danger of unfair prejudice. State v. Gilliland, 22 S.W.3d 266, 2000 Tenn. LEXIS 341 (Tenn. 2000).

The language of Tenn. R. Evid. 403 strongly suggests that relevant evidence should be admitted if the balance between the probative value of the evidence and its prejudicial effect is close. Richardson v. Miller, 44 S.W.3d 1, 2000 Tenn. App. LEXIS 551 (Tenn. Ct. App. 2000).

Probative value of autopsy photographs was not substantially outweighed by the danger of unfair prejudice to the defendant where the trial court individually scrutinized each photo offered by the state, and the photos were not particularly gruesome because the body had been washed by the medical examiner and the victim's eyes and mouth were shut. State v. Price, 46 S.W.3d 785, 2000 Tenn. Crim. App. LEXIS 597 (Tenn. Crim. App. 2000), review or rehearing denied, — S.W.3d —, 2001 Tenn. LEXIS 146 (Tenn. Feb. 26, 2001).

Trial court erred in permitting computer animated visualization to be shown to the jury where the animation was purportedly based on accident reconstructionist's findings and conclusions, but actually presented material information that went beyond the reconstructionist's findings and conclusions. State v. Farner, 66 S.W.3d 188, 2001 Tenn. LEXIS 832 (Tenn. 2001), rehearing denied, 66 S.W.3d 188, 2002 Tenn. LEXIS 20 (Tenn. 2002).

Trial court erred in ruling that defendant's prior controlled substance convictions could be used for impeachment purposes if he testified, since the prior convictions had only a limited relevance to the issue of credibility, and their limited probative value was outweighed by their prejudicial effect, due to their substantial similarity to the charged crime of the unlawful sale of a counterfeit controlled substance; however, the error was harmless, based on the overwhelming and uncontroverted evidence that existed to convict defendant. State v. Waller, 118 S.W.3d 368, 2003 Tenn. LEXIS 1020 (Tenn. 2003).

In a wrongful death case, a court properly denied plaintiff's request to use a prior statement of the doctors' expert witness for impeachment purposes because, although plaintiff made a credible argument that the prior statement was inconsistent with the expert's testimony that his role as an expert witness did not include creating a theory of defense or acting as an advocate, the trial court was concerned with the reliability and probative value of the alleged prior statement; in addition, the trial court concluded that the probative value of the alleged prior statement was substantially outweighed by the risk of unfair prejudice to the defense. Hunter v. Ura, 163 S.W.3d 686, 2005 Tenn. LEXIS 306 (Tenn. 2005), rehearing denied, — S.W.3d —, 2005 Tenn. LEXIS 373 (Tenn. Apr. 27, 2005).

Trial court did not err in excluding evidence of the minor guest's prior experiences with alcohol and evidence of alcohol-related juvenile court citations while admitting evidence of her knowledge of the effects of alcohol because although the trial court erred in holding that the evidence regarding the minor's prior experience was irrelevant, the trial court's exclusion of the evidence was not an abuse of discretion because it was properly excluded as unduly prejudicial under Tenn. R. Evid. 403; also the admission of the minor's juvenile court citations was barred under T.C.A. § 37-1-133(b). Biscan v. Brown, 160 S.W.3d 462, 2005 Tenn. LEXIS 308 (Tenn. 2005).

Defendant's question to a jailer, "Do you honestly think that there is anything wrong with raping a child?" was a statement rather than a question, and given that defendant was a party opponent, his statement was admissible pursuant to Tenn. R. Evid. 803(1.2)(A). Although the statement was highly prejudicial, its probative value was not outweighed by its prejudicial effect. State v. Brown, 375 S.W.3d 565, 2011 Tenn. Crim. App. LEXIS 897 (Tenn. Crim. App. Dec. 6, 2011).

In a first degree murder prosecution, evidence of defendant's sexual abuse of a murder victim's child, proffered to show defendant's motive to kill, should have been excluded under Tenn. R. Evid. 403 because: (1) defendant's motive had been clearly established through other evidence, and (2) the allegations of sexual misconduct were highly inflammatory. State v. Sexton, 368 S.W.3d 371, 2012 Tenn. LEXIS 377 (Tenn. May 29, 2012).

Trial court's contemplation of unfair prejudice may extend beyond merely the impact of a prosecution witness's testimony on direct examination (or the impact of an exhibit admitted through that witness), so a trial court may consider not only the impact of the evidence itself but the impact of potential cross-examination resulting from admission of the evidence, which allows a trial court to recognize and effectuate Tenn. R. Evid. 102 and 106 and an accused's constitutional rights to explain the circumstances surrounding his or her incriminating statements and permits a trial court to exercise discretion in a manner that recognizes the overarching concern of a criminal defendant's fundamental right to a fair trial. State v. McCaleb, 582 S.W.3d 179, 2019 Tenn. LEXIS 371 (Tenn. Aug. 21, 2019).

Court erred in allowing testimony regarding defendant's witness's involvement in chop shops and misdemeanor convictions because defendant's witness played a critical role in the

defense theory—he was the only witness who corroborated defendant's account that he had authority to borrow the tractor, and the multiple errors sent a message to the jury that the witness was a shady character who had attracted the continuing attention of the police for at least thirty years, and the trial court itself connected the witness to a notorious criminal and convicted murderer. State v. Seaton, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 63 (Tenn. Crim. App. Feb. 28, 2021).

5. Undue Delay.

The chancellor did not abuse his judicial discretion by excluding the evidence of plaintiff's alleged prior fraudulent dealings with insurance companies not party to the case, where he determined that to admit all such evidence would confuse the jury and cause undue delay. Otis v. Cambridge Mut. Fire Ins. Co., 850 S.W.2d 439, 1992 Tenn. LEXIS 722 (Tenn. 1992), rehearing denied, — S.W.2d —, 1993 Tenn. LEXIS 142 (Tenn. Mar. 29, 1993).

To ask each juror to read the 350 pages comprising witnesses' statements would have unduly delayed the trial. Doochin v. United States Fidelity & Guar. Co., 854 S.W.2d 109, 1993 Tenn. App. LEXIS 25 (Tenn. Ct. App. 1993).

6. Burden of Proof.

Tenn. R. Evid. 403, by its language, places a heavy burden on the party seeking to exclude the evidence. Roy v. Diamond, 16 S.W.3d 783, 1999 Tenn. App. LEXIS 748 (Tenn. Ct. App. 1999).

Excluding relevant evidence under Tenn. R. Evid. 403 is an extraordinary remedy that should be used sparingly and persons seeking to exclude otherwise admissible and relevant evidence have a significant burden of persuasion. White v. Vanderbilt Univ., 21 S.W.3d 215, 1999 Tenn. App. LEXIS 874 (Tenn. Ct. App. 1999).

7. Relevance.

In a condemnation proceeding against land subject to a leasehold interest, evidence of both the probability of the lease's renewal and of a cancellation provision in the lease was relevant. City of Johnson City v. Outdoor West, 947 S.W.2d 855, 1996 Tenn. App. LEXIS 810 (Tenn. Ct. App. 1996).

Although the advice given to defendant real estate agent by her attorney about her disclosure obligations did not alter the fact that the agent was aware of repairs made to the home, the testimony was relevant to the question of whether punitive damages were justified, and evidence tending to reflect on the agent's intent and knowledge should have been admitted for consideration by the jury. Goodale v. Langenberg, 243 S.W.3d 575, 2007 Tenn. App. LEXIS 326 (Tenn. Ct. App. May 23, 2007), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 1063 (Tenn. Nov. 19, 2007).

Although the deceased mother's two children argued at trial that the criminal convictions were irrelevant and that the admission of such evidence was highly prejudicial, the appellate court found that the child's criminal conviction was admissible under Tenn. R. Evid. 404(b) because it was relevant under Tenn. R. Evid. 401 to whether the child had a motive or intent to influence his mother, and the trial court properly balanced the probative value and the prejudicial effect of the evidence pursuant to Tenn. R. Evid. 403. Whether to admit the evidence was within the sound discretion of the trial court and the court did not abuse its discretion when it admitted the evidence; moreover, the trial court gave a limiting instruction that evidence of the crime was only relevant as it pertained to motive and intent to influence the testatrix to change her will. In re Estate of Schisler, 316 S.W.3d 599, 2009 Tenn. App. LEXIS 699 (Tenn. Ct. App. Oct. 19, 2009), cert. denied, Stem v. Wix, 562 U.S. 894, 131 S. Ct. 299, 178 L. Ed. 2d 144, 2010 U.S. LEXIS 6054 (U.S. 2010).

Court properly admitted "estate planning" documents because the fact that defendant would inherit the murder victim's entire estate, to the exclusion of his daughter, upon his death had the tendency to make the existence of the fact that defendant had a financial motive to kill the victim more probable; the evidence had significant probative value because it established a possible financial motive. State v. Leath, 461 S.W.3d 73, 2013 Tenn. Crim. App. LEXIS 461 (Tenn. Crim. App. June 3, 2013), appeal denied, — S.W.3d —, 2013 Tenn. LEXIS 981 (Tenn. Nov. 13, 2013), cert. denied, Leath v. Tennessee, 189 L. Ed. 2d 173, 134 S. Ct. 2292, — U.S. —, 2014 U.S. LEXIS 3508 (U.S. 2014).

Trial court erred in defendant's trial for first degree premeditated murder by allowing the state of Tennessee to question defendant about the death of a witness to the shooting of the victim because the question was an explicit attempt to show that defendant was involved in the death of the witness which occurred days after the death of the victim. Because the death of the witness was not relevant evidence, the prosecutor's attempt to connect defendant to the death of the witness was not harmless. State v. Frazier, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 385 (Tenn. Crim. App. July 1, 2019).

8. Expert Witnesses.

The rule that disfavors informing the jury that an expert witness was originally retained by the opposing party is most consistent with the balancing requirements of Tenn. R. Evid. 403. White v. Vanderbilt Univ., 21 S.W.3d 215, 1999 Tenn. App. LEXIS 874 (Tenn. Ct. App. 1999).

In informed consent case, the trial court committed reversible error by excluding the patient's expert testimony regarding undisclosed medical risks that had not materialized because it was relevant in the jury's assessment of what a prudent person would have decided if properly informed of all the significant risks, and the evidence was not inadmissible under Tenn. R. Evid. 403, as it was highly probative and there was not a danger of unfair prejudice, confusion of issues, or undue delay. White v. Beeks, 469 S.W.3d 517, 2015 Tenn. LEXIS 368 (Tenn. May 18, 2015), rehearing denied, — S.W.3d —, 2015 Tenn. LEXIS 693 (Tenn. Aug. 26, 2015).

Trial court erred in excluding a expert's testimony because the exclusion more probably than not influenced the jury's verdict where the court based its decision on potential confusion concerns attendant to the proposed testimony, the expert answered the question of whether his opinions were to a reasonable degree of certainty, his proposed testimony was highly probative of whether the caregiver suffered post-traumatic stress disorder as a result of the patient's alleged attack on her and would have included, among other things, a critique of the methodology of the caregiver's expert, and a witness's testimony—that the patient's request to apply lotion to his groin area was for the purpose of sexual gratification—was improperly utilized for propensity evidence. Ellis v. Modi, — S.W.3d —, 2020 Tenn. App. LEXIS 211 (Tenn. Ct. App. May 11, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 576 (Tenn. Sept. 16, 2020).

9. Discretion of Court.

The trial court's admission of evidence under Tenn. R. Evid. 403 will not be disturbed absent an abuse of discretion; this means that if material evidence exists to support the decision, the trial court will be affirmed. State v. Jackson, 52 S.W.3d 661, 2001 Tenn. Crim. App. LEXIS 142 (Tenn. Crim. App. 2001).

Trial court excluding defendant's post-polygraph statements properly considered a possible defense response to admitting the statements and could consider defendant's right to attack the statements' credibility by telling a jury the circumstances under which the statements were made and that attack's possible effects on a trial, as the court properly weighed the statements, finding only some probative value, against possibly admitting inadmissible polygraph proof and a jury's possible misuse of that proof, within the court's discretion when conducting required balancing and supported by record proof. State v. McCaleb, 582 S.W.3d 179, 2019 Tenn. LEXIS 371 (Tenn. Aug. 21, 2019).

10. Photographs.

In a capital murder case, a court did not err by admitting photographs of the victims, where they were relevant in establishing the heinous, atrocious, or cruel aggravating circumstance for both murders, and the photographs were not excessively gruesome or shocking, especially in light of the graphic testimony in the case. State v. Carter, 114 S.W.3d 895, 2003 Tenn. LEXIS 843 (Tenn. 2003), cert. denied, Carter v. Tennessee, 540 U.S. 1221, 124 S. Ct. 1511, 158 L. Ed. 2d 158, 2004 U.S. LEXIS 1692 (2004).

In defendant's murder case, the court properly admitted two photographs that depicted reddish-brown stains on his shoes because, although the investigator admitted that no testing was performed on the shoes and that he could not say that the stains were blood, the photographs were however not unfairly prejudicial, particularly when considered in light of the other evidence at trial. State v. Gann, 251 S.W.3d 446, 2007 Tenn. Crim. App. LEXIS 813 (Tenn. Crim. App. Oct. 16, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 243 (Tenn. Apr. 7, 2008), dismissed, Gann v. Lester, — F. Supp. 2d —, 2016 U.S. Dist. LEXIS 120372 (E.D. Tenn. Sept. 7, 2016).

In defendant's murder trial for the killing of his wife, the trial court did not err in admitting color photographs of the victim's autopsy rather than black and white photographs because the medical examiner testified that the color photographs better demonstrated the extent of the victim's injuries. State v. Brock, 327 S.W.3d 645, 2009 Tenn. Crim. App. LEXIS 496 (Tenn. Crim. App. June 29, 2009), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 56 (Tenn. Jan. 25, 2010), cert. denied, Brock v. Tennessee, , 562 U.S. 850, 131 S. Ct. 101, 178 L. Ed. 2d 64, 2010 U.S. LEXIS 5883 (U.S. 2010).

Trial court did not abuse its discretion when it concluded that the probative value of the autopsy photographs was not substantially outweighed by the danger of unfair prejudice to defendant where: (1) The photographs were unpleasant primarily because of the length of time the victim had been deceased, not because of the injuries being displayed; and (2) The jury knew that defendant was not responsible for the discoloration, decay, or insects visible in the photographs. State v. Larkin, 443 S.W.3d 751, 2013 Tenn. Crim. App. LEXIS 297 (Tenn. Crim. App. Mar. 28, 2013).

In defendant's murder case, the trial court did not abuse its discretion by admitting graphic and gruesome autopsy photographs of the victims, which showed the severity of their injuries and the advanced state of decomposition, where they had probative value and relevant to the issues of premeditation, time of death, and aggravating circumstances, and defendant failed to show that their probative value was substantially outweighed by the danger of unfair prejudice. State v. Willis, 496 S.W.3d 653, 2016 Tenn. LEXIS 405 (Tenn. July 6, 2016), cert. denied, Willis v. Tennessee, 197

L. Ed. 2d 466, 137 S. Ct. 1224, — U.S. —, 2017 U.S. LEXIS 1710 (U.S. Mar. 6, 2017).

Admission of photographs of the victims taken after their death was not improper, as the photographs were relevant to the issues at trial, showing that the manner in which the rapes and murders were committed was deliberate and premeditated, and, while graphic, were not unnecessarily gruesome or horrifying. State v. Davidson, 509 S.W.3d 156, 2016 Tenn. LEXIS 913 (Tenn. Dec. 19, 2016), cert. denied, Davidson v. Tennessee, 199 L. Ed. 2d 66, 138 S. Ct. 105, 2017 U.S. LEXIS 5551 (U.S. Oct. 2, 2017).

While defendant waived his right to appeal the issue by failing to make a timely objection to the admission of the photograph at trial, notwithstanding waiver, no abuse of discretion was found; the photograph at issue was relevant to an agent's opinion that the revolver found in defendant's girlfriend's car was the same used to shoot the bullets found in the victim and at the scene, and defendant failed to specify any prejudicial effect. State v. Wilson, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 35 (Tenn. Crim. App. Jan. 17, 2019).

Trial court properly exercised its discretion when admitting a photograph of the gunshot wounds, which was relevant to the victim's manner of death; the photograph was taken at the crime scene and contained some blood, but given the circumstances surrounding the victim's death, was properly characterized by the trial court as not unduly gruesome. State v. Wilson, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 35 (Tenn. Crim. App. Jan. 17, 2019).

Trial court did not abuse its discretion by admitting the victim's autopsy photographs into evidence because even though it was undisputed that the victim died from a gunshot wound to the head, the state was still required to prove the defendant shot and killed her. The photographs, which depicted the entrance and exit wounds suffered by the victim, aided in this effort and were relevant to the state's case, only two photographs were entered into evidence and neither was particularly gruesome or inflammatory. State v. Jenkins, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 110 (Tenn. Crim. App. Feb. 15, 2019).

Trial court did not err by admitting into evidence a photograph of defendant holding a gun because it was relevant to the issue of defendant's possession of the firearm used in the offenses, as pistol was used to kill the victim and was found at the scene of defendant's accident, a second victim testified that defendant used a black and silver pistol when abducting him, and an agent testified that the black and silver gun that defendant was holding in the photograph was consistent with the black and silver gun used in the commission of the offenses. While the photograph of defendant's holding a firearm may have had some prejudicial effect, defendant did not satisfy his burden of establishing that the prejudicial effect substantially outweighed its probative value. State v. Brown, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 220 (Tenn. Crim. App. Apr. 8, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 387 (Tenn. Aug. 15, 2019).

Trial court did not err by admitting an autopsy photograph into evidence because an expert in forensic pathology testified that it demonstrated some injuries more clearly than others and was needed to show the full extent of the victim's injuries. State v. Thomas, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 270 (Tenn. Crim. App. Apr. 25, 2019).

Photo of defendant holding a gun was admissible because (1) testimony that the photo fairly and accurately represented a photo defendant texted to the victim laid a foundation, (2) defendant admitted police found this gun at defendant's home and that defendant texted the photo to the victim, (3) evidence showed defendant recently bought the gun, making the photo relevant to possession at the relevant time, and (4) the photo showed the gun's similarities to the gun found at defendant's home and corroborated defendant's admission to owning, using, and controlling the gun. State v. Reynolds, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 360 (Tenn. Crim. App. June 25, 2019).

Trial court did not abuse its discretion when it admitted a photograph of a fetus, the unborn child of the victim, because the photograph did not depict anything that resembled a complete human lifeform, considering the assistant medical examiner's testimony while reviewing the picture it did not appear that the fetus is even visible in the picture, and the photograph was not graphic or gruesome. State v. Isaac, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 733 (Tenn. Crim. App. Nov. 13, 2019), review denied and ordered not published, — S.W.3d —, 2020 Tenn. LEXIS 145 (Tenn. Apr. 1, 2020).

Trial court did not err by failing to redact an unknown male from the background of the photograph that defendant's friend used to identify defendant because the meaning of the man's hand sign was unknown to the court, if it possessed any meaning at all, and defendant did not present any evidence explaining the meaning of the hand sign. Therefore, for the court's consideration, the photograph simply depicted a man with his hand raised, and the court failed to see how this unfairly prejudiced defendant. State v. Isaac, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 733 (Tenn. Crim. App. Nov. 13, 2019), review denied and ordered not published, — S.W.3d —, 2020 Tenn. LEXIS 145 (Tenn. Apr. 1, 2020).

Trial court did not err by admitting autopsy photographs into evidence because they were relevant to rebut defendant's assertion that the victim sustained the injuries by falling down the stairs. State v. Lowry, — S.W.3d —, 2020

Tenn. Crim. App. LEXIS 245 (Tenn. Crim. App. Apr. 15, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 581 (Tenn. Sept. 16, 2020).

There was no error in the trial court's decision to admit the frontal autopsy photograph that showed a comprehensive view of the injuries to the victim's throat; the photograph was highly probative of the nature of the victim's injuries, it was offered to illustrate the medical examiner's testimony, it was relevant to the issue of defendant's premeditation and intent, and its probative value was not substantially outweighed by its gruesome or horrifying character. State v. Morgan, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 393 (Tenn. Crim. App. June 5, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 518 (Tenn. Oct. 7, 2020).

Trial court did not abuse its discretion by admitting two photographs of the deceased victims at the crash scene because the photographs of the victims were not gruesome and did not show the extent of their injuries. State v. Franklin, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 511 (Tenn. Crim. App. July 27, 2020).

trial court did not err in admitting autopsy photographs of the victim because they were relevant, probative of intent and premeditation, and not unfairly prejudicial. Because defendant was charged with first degree premeditated murder, the State was required to prove that he intentionally killed the victim and that he acted with premeditation, and the challenged photographs, which depict the manner in which the killing was carried out and the extent of the victim's injuries, were particularly probative of these issues and the photographs were not particularly gruesome and were limited to the specific injuries suffered by the victim, which reduced the risk or prejudice. State v. Reed, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 620 (Tenn. Crim. App. Sept. 18, 2020).

Trial court did not err in admitting the eight autopsy photographs that defendant challenged on appeal because they were probative of intent and premeditation; a doctor testified that autopsy photographs helped medical examiners describe a victim's injuries to the jury, and, where the victim sustained multiple wounds, photographs presented in combination with the autopsy report helped to reduce the jury's confusion; defendant testified at trial that he only remembered stabbing the victim three or four times, but he stabbed the victim 21 times; and none of the photographs were particularly gruesome. State v. Gadsden, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 739 (Tenn. Crim. App. Nov. 19, 2020).

Trial court did not err by admitting a photograph of the victim taken while he was alive because the State offered it to show the victim's appearance before his death. The trial court did not err abuse its discretion because it considered the light in the background and the victim's black clothing but found there was nothing unfairly prejudicial about the photograph. State v. Griffin, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 110 (Tenn. Crim. App. Mar. 24, 2021).

11. Harmless Error.

On appeal from his criminal convictions, the appellate court agreed with defendant that his statement about moving firearms to his mother's house should not have been admitted at his trial because it was irrelevant and potentially prejudicial to his case; however, the error was harmless. An agent's testimony that there was no evidence that the weapons were involved in the victim's disappearance should have allayed suspicions on the part of the jury that defendant had moved the weapons for some "sinister" reason and moreover, defendant's claim that the evidence forced him to waive his rights against self-incrimination was belied by the fact that he mentioned nothing about the weapons during his testimony. State v. Trusty, 326 S.W.3d 582, 2010 Tenn. Crim. App. LEXIS 339 (Tenn. Crim. App. Apr. 23, 2010), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 906 (Tenn. Sept. 27, 2010).

Any error in the trial court's denial of defendant's motion in limine to exclude all evidence of sexual contact between defendant and the victim was harmless as defendant did not deny that he had been in a romantic relationship with the victim and also acknowledged that he had been with the victim before her death in the area where the victim's body was found. State v. Pack, 421 S.W.3d 629, 2013 Tenn. Crim. App. LEXIS 848 (Tenn. Crim. App. Sept. 27, 2013).

Although the trial court erred in admitting the July 5, 2016, social media post as the probative value was substantially outweighed by its prejudicial effect because the post did not specifically refer to the decedent or his brother and was general in nature, the post appeared to be an expression of anger as a result of the death of defendant's mother and grandmother rather than anything connected to the current crimes, the State had already impeached defendant with another post, and there was other evidence establishing that defendant had shot the decedent in the perpetration of an attempted especially aggravated robbery, the error was harmless in light of the overwhelming evidence of defendant's guilt. State v. Ware, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 710 (Tenn. Crim. App. Nov. 7, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 233 (Tenn. Mar. 26, 2020).

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Admission of the relevant portion of the 911 call, while error, did not undermine the fundamental fairness of the trial; the only contested issue was the level of defendant's culpability, and thus the probative value of the call was far outweighed by the danger of unfair prejudice and needless presentation of cumulative evidence, and the error was harmless as there was overwhelming evidence of defendant's guilt. State v. Wooten, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 12 (Tenn. Crim. App. Jan. 13, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 320 (Tenn. June 3, 2020).

12. Tenn. R. Evid. 412.

Exclusion of sexual entries from the victim's social networking page was not an abuse of discretion as even though the entries fell under the purview of Tenn. R. Evid. 412 as they concerned the victim's history of sexual discourse, any error in failing to analyze the evidence under Rule 412 was harmless as the trial court considered the potential for confusion, the minimal probative value of the evidence, and the prejudicial impact on the victim under Tenn. R. Evid. 401 and 403, which analysis was incorporated in Rule 412(d)(4). State v. Nance, 393 S.W.3d 212, 2012 Tenn. Crim. App. LEXIS 316 (Tenn. Crim. App. May 16, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 898 (Tenn. Nov. 27, 2012).

13. Illustrative Cases.

Trial court erred when it refused to allow the defense to cross-examine the murder victim's spouse about the spouse's affair with the spouse's paramour, because this evidence was part of the defense by defendant to show a motive by the spouse to have murdered the victim. However, given the strength of the evidence against defendant, the error was harmless as the appellate court found that the jury would have convicted defendant of murdering the victim even had the jury been informed about the spouse's affair. State v. Bell, 480 S.W.3d 486, 2015 Tenn. LEXIS 720 (Tenn. Sept. 10, 2015), cert. denied, Bell v. Tennessee, 195 L. Ed. 2d 221, 136 S. Ct. 2006, — U.S. —, 2016 U.S. LEXIS 3192 (U.S. 2016).

Trial court did not err by refusing defendant's request to prohibit the medical examiner from referencing a wooden board that was recovered from the crime scene because the evidence did not support a conclusion that the board was used during the assault against the victim, and therefore the jury could not have concluded that it was the murder weapon, as the evidence supported a conclusion that a similar board could have caused the injuries. Likewise, the probative value of the evidence was not substantially outweighed by any unfair prejudice. State v. Cool, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 691 (Tenn. Crim. App. Sept. 12, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 58 (Tenn. Jan. 18, 2019).

Trial court did not err by admitting the victims' autopsy photographs into evidence because the injuries depicted appeared to have been cleaned, were not gruesome or horrifying, and showed clear images of the injuries. Although additional photographs generally showed the injuries, the close-up images of the injuries were relevant to assisting the medical examiner explain to the juries the injuries with specificity. State v. Cool, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 691 (Tenn. Crim. App. Sept. 12, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 58 (Tenn. Jan. 18, 2019).

Trial court did not err by permitting a sergeant to provide expert testimony on the protocols followed by the Tennessee Highway Patrol (THP) because he merely testified based on his own personal experience, he did not specifically provide testimony about the protocols followed by the police department but as to the protocols followed by the THP, and because he had not provided the testimony before he was called in rebuttal it could not be classified as cumulative. State v. Millan, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 810 (Tenn. Crim. App. Nov. 1, 2018).

In a case in which defendant was charged with first degree premeditated murder, which required the state to show that the killing was premeditated and intentional, the evidence that the victim had received a large check days before defendant shot her, that she was planning to leave defendant and use the check to move in with her brother, and that defendant attempted to cash the victim's check following her death was relevant and highly probative regarding whether defendant acted intentionally; and the probative value was not substantially outweighed by the danger of unfair prejudice. State v. Jarman, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 832 (Tenn. Crim. App. Nov. 8, 2018), rev'd, 604 S.W.3d 24, 2020 Tenn. LEXIS 267 (Tenn. July 6, 2020).

Under plain error review, the trial court did not err by failing to exclude defendant's prior statutory rape conviction from admission into evidence during his animal cruelty trial because the conviction was within the 10-year

time limit, the trial court found that it was probative of defendant's credibility, and the conviction's probative value was not substantially outweighed by the danger of unfair prejudice, as the conviction was not similar to cruelty to animals. State v. Edwards, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 842 (Tenn. Crim. App. Nov. 14, 2018).

Trial court did not err by admitting eight crime scene and autopsy photographs because none of the photographs were unduly gruesome and were relevant to support the state's position that the victim was struck from behind and was still alive when his throat was cut. State v. Gregoire, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 126 (Tenn. Crim. App. Feb. 25, 2019).

Trial court did not err by excluding the victim's prior bad acts because the victim's crimes were committed decades before his murder and therefore the evidence's probative effect was substantially outweighed by the danger of unfair prejudice. State v. Gregoire, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 126 (Tenn. Crim. App. Feb. 25, 2019).

Trial court did not err by admitting testimony from two witnesses about letters they destroyed before trial because the testimony was relevant as proof of the plan to murder the victims, testimony regarding the witnesses' destruction of the letters was presented at trial, and although the testimony regarding the content of the letters was prejudicial in the sense that the testimony provided evidence against the Defendant, such testimony was not unfairly prejudicial. State v. Bond, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 198 (Tenn. Crim. App. Mar. 28, 2019).

Trial court did not abuse its discretion in admitting defendant's prior convictions because it complied with the requirements of the rule, and the evidence regarding defendant's mens rea for the offense of failure to appear was not so overwhelming as to make the convictions "needless"; the trial court found, on the record, that the material issue warranting admission of the convictions was proving the required mens rea based upon defendant's prior court experience. State v. Mathis, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 287 (Tenn. Crim. App. May 2, 2019).

State used a detective's testimony to show that defendant's lying about his military service, along with other inconsistencies, caused the detective to identify defendant as his primary suspect, and thus Tenn. R. Evid. 404(b) did not bar admission of the testimony; given defendant's claim that the police unfairly targeted him, the detective's testimony as to why he identified defendant as his primary suspect was relevant and highly probative, which was not substantially outweighed by the danger of unfair prejudice. State v. Hendrix, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 304 (Tenn. Crim. App. May 14, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 481 (Tenn. Sept. 18, 2019).

Defendant's motion in limine, requesting that the trial court exclude any information regarding the warrant the officers were trying to serve on a passenger in defendant's vehicle, and specifically the offense charged in the warrant, was properly denied because defendant was not the subject of the warrant; the warrant being served by the officers was relevant to establish why they approached defendant's vehicle and attempted to effectuate the stop in the manner that they did; there was no suggestion during the course of the trial that defendant was implicated in the passenger's crime or that he was guilty solely based on his association with the passenger; and defendant did not explain what the prejudicial effect of the warrant was. State v. Baker, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 341 (Tenn. Crim. App. June 7, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 484 (Tenn. Sept. 20, 2019).

Trial court did not abuse its discretion by admitting the testimony of defendant's co-worker regarding defendant's professed preference for anal sex because it corroborated the victim's testimony that defendant preferred anal sex and he had anal sex with her without her consent, and although the jury may have considered defendant's discussing sexual matters with a co-worker to be unprofessional the evidence was not so unfairly prejudicial that it substantially outweighed the probative value. State v. Gary, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 584 (Tenn. Crim. App. Sept. 18, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 31 (Tenn. Jan. 15, 2020).

Trial court did not err by admitting into evidence a witness's testimony that defendant admitted to using heroin on the day of the collision or the day before the collision because it had a tendency to make the existence of his intoxication at the time of the collision more probable. The evidence did not tend to inflame the jury's passions or appeal to its biases or sympathies but was probative on the issue of whether or not defendant was intoxicated. State v. Dye, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 652 (Tenn. Crim. App. Oct. 15, 2019).

Trial court did not err by admitting syringes into evidence because the presence of the syringes with defendant's tools inside his work bag tended to make his intoxication more probable than it would otherwise be, particularly in light of his acknowledgement of heroin use. The trial court did not abuse its discretion in weighing the probative value against the potential prejudice because the testimony regarding the syringes and the accompanying photographs were not particularly inflammatory but had probative value on the question of intoxication. State v. Dye, — S.W.3d —, 2019 Tenn. Crim.

App. LEXIS 652 (Tenn. Crim. App. Oct. 15, 2019).

Limits on defendant's cross-examination did not violate the right to confrontation because defendant's questions were repetitive and asked after witnesses answered the question. State v. Abdullah, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 26 (Tenn. Crim. App. Jan. 21, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 255 (Tenn. Apr. 15, 2020).

Trial court did not abuse its discretion by limiting defendant's cross-examination of the victim about text messages exchanged with defendant because the jury had already heard extensive testimony about their exchanges and the remaining messages contained similar content. State v. Wallace, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 94 (Tenn. Crim. App. Feb. 14, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 322 (Tenn. June 5, 2020).

Defendant's internet searches related to tickling and urination, boiling a silicone toy, talking to a child about masturbation, child nudity at home, and "Bad Dragon Bruce" were relevant and not prejudicial because they showed, inter alia, that defendant had a fetish involving dragons and fantasy creatures, defendant made dragon silicone sex toys available for the victim's use, and defendant instructed the victim regarding the mechanics of masturbation with the sex toys and lubricants. State v. Ledbetter, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 106 (Tenn. Crim. App. Feb. 20, 2020).

Even though the trial court erred by excluding evidence of prior bad acts of the victim that defendant sought to introduce to corroborate his claim that the victim was the initial aggressor, because the probative value of the domestic assault charge one month before the shooting was not outweighed by the danger of unfair prejudice, the error was harmless because of other evidence presented at trial regarding the victim's aggressiveness, including the victim's stalking and threatening defendant and the victim's threats and harassment of defendant on the night of the shooting. State v. Smith, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 453 (Tenn. Crim. App. June 30, 2020).

Trial court did not abuse its discretion by admitting an investigator's testimony regarding the creation and presentation of the photographic lineup because it was relevant, as the primary factual issue to be resolved by the jury was the identity of the shooter, and therefore the steps taken by law enforcement in investigating the case would be of consequence to the determination of the action if they made defendant's identity as the shooter more probable or less probable than it would be without the evidence. Defendant failed to establish that he was prejudiced by the admission of the evidence because the witness' testimony identifying defendant was subsequently admitted. State v. Sims, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 588 (Tenn. Crim. App. Aug. 28, 2020).

Danger of unfair prejudice associated with admitting 10 acts of gang violence did not substantially outweigh their probative value because the evidence was specifically tailored to those acts of violence that were directly connected to this specific gang feud, the investigator's testimony and the State's accompanying presentation were fairly straightforward and did not include any overly graphic or salacious details, and the trial court instructed the jury that it could only consider defendant's alleged gang membership for the limited purposes of identity, motive, and intent. State v. Sims, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 588 (Tenn. Crim. App. Aug. 28, 2020).

Trial court did not abuse its discretion by admitting the police department's gang validation form that identified defendant as a member of a particular gang because it was probative as to defendant's identity, motive, and intent. The trial court did not err by finding that the probative value of the gang-affiliation evidence was not outweighed by the danger of unfair prejudice because the section on the defendant's form for "Gang Rank" was blank. State v. Sims, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 588 (Tenn. Crim. App. Aug. 28, 2020).

Trial court did not err in denying defendant's request for a mistrial after the victim inadvertently referenced in narrative form in response to an open-ended question by the State of Tennessee during the victim's testimony that defendant said defendant would kill the victim before defendant returned to jail because the statement was probative of defendant's motive and intent to kidnap the victim to keep the victim from telling anyone about defendant's assault of the victim and the statement was not unduly prejudicial to defendant. State v. Mansir, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 635 (Tenn. Crim. App. Sept. 25, 2020).

Trial court did not abuse its discretion in allowing video deposition of forensic pathologist who performed autopsy on the victim to be entered into evidence, despite the jury's inability to see the face of the witness for a large portion of the deposition, because the display of autopsy photographs in lieu of the face of the witness was not unfairly prejudicial to defendant. Defendant's rights under the Due Process Clause were not violated as defendant and trial counsel were present at the deposition and allowed to cross-examine the witness. State v. Sarden, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 637 (Tenn. Crim. App. Sept. 25, 2020).

Trial court did not abuse its discretion by not permitting defendant to present a police sergeant as a defense witness and by not permitting defendant to testify about previous incidents of violence against defendant in an effort to establish that an individual was present and

that defendant acted in self-defense on the night of a shooting because the evidence was irrelevant to the shooting and the jury would have been required to speculate who had been involved in the previous incidents and whether the incidents were connected to the shooting. State v. Corbin, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 664 (Tenn. Crim. App. Oct. 9, 2020).

Trial court did not plainly err by admitting into evidence a cell phone and corresponding text messages concerning drug transactions because the messages' probative value lay in their meaning when read in context, the probative value of the messages as a whole was not significantly outweighed by the risk of unfair prejudice, and although a witness' personal problems did not bear on defendant's drug dealing activities, the beginning and end of the message seeking to clarify defendant's articulated price for two ounces of drugs made more sense in the context of the entire message. State v. Austin, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 695 (Tenn. Crim. App. Oct. 27, 2020).

Defendant failed to show the trial court abused its discretion by admitting portions of the victim's 9-1-1 calls into evidence, as the victim detailed the attack at trial and explained what was happening during the 9-1-1 calls as they were played for the jury, and defendant failed to establish prejudice or that the combination of proof elicited bias, sympathy, hatred, contempt, retribution, or horror. State v. Estes, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 14 (Tenn. Crim. App. Jan. 6, 2021).

14. Experts, Generally.

Disclosure to the jury that the state's expert witness's license had been previously suspended and was in probationary status when he evaluated the victim was prejudicial to the state in this rape case, as the information bore on the expert's credibility, and the state failed to establish exclusion of the suspension; the trial court was required to weigh the probative value of the license suspension, not the precipitating acts of misconduct, against the countervailing factors identified in the rule, and erred in failing to do so. State v. Zeigler, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 83 (Tenn. Crim. App. Feb. 7, 2019).

Rule 404. Character evidence not admissible to prove conduct; exceptions; other crimes. —

(a) Character Evidence Generally. — Evidence of a person's character or trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of Accused. — In a criminal case, evidence of a pertinent trait of character offered by an accused or by the prosecution to rebut the same or, if evidence of a trait of character of the alleged victim of the crime is offered by the accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of Alleged Victim. — In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of Witness. — Evidence of the character of a witness as provided in Rules 607, 608, and 609.

(b) Other Crimes, Wrongs, or Acts. — Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible for other purposes. The conditions which must be satisfied before allowing such evidence are:

(1) The court upon request must hold a hearing outside the jury's presence;

(2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;

(3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and

(4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice. [As amended by order entered January 31, 2003, and effective July 1, 2003; and by order entered January 8, 2009, effective July 1, 2009.]

Advisory Commission Comments. Part (a) has always been the law in Tennessee for criminal prosecutions.

Tenn. Code Ann. § 40-17-119 [repealed; see 1991 comments] regulates character evidence offered to prove a rape victim's alleged consent.

In civil actions, Tennessee is one of a minority of jurisdictions admitting character evidence in some situations to prove circumstantially conduct involving "moral turpitude." *Spears & Solomon v. International Insurance Co.*, 60 Tenn. 370 (1872). The proposed rule would change that minority position; character would be inadmissible circumstantially in all civil cases. Of course, if character is directly at issue in a civil action, such as in a defamation action, character evidence necessarily is relevant and admissible under Rule 405(b).

The Commission drafted Part (b) in accord with the Supreme Court's pronouncements in *State v. Parton*, 694 S.W.2d 299 (Tenn. 1985). There the Court established precise procedures to emphasize that evidence of other crimes should usually be excluded. In the exceptional case where another crime is arguably relevant to an issue other than the accused's character — issues such as identity (including motive and common scheme or plan), intent, or rebuttal of accident or mistake — the trial judge must first excuse the jury. Then the judge must decide what material issue other than character forms a proper basis for relevancy. If the objecting party requests, the trial judge must state on the record the issue, the ruling, and the reason for ruling the evidence admissible. Finally, the judge must always weigh in the balance probative value and unfair prejudice. If the danger of unfair prejudice outweighs the probative value, the court should exclude the evidence even though it bears on a material issue aside from character. Finally, according to *Parton*, the trial judge must find that the evidence is "clear and convincing" that the defendant committed another crime.

Advisory Commission Comments [1991]. [In place of the second paragraph of earlier language, which is rescinded, insert the following language as the new second paragraph:]

The character of the victim of a sex crime is not governed by Rule 404(a)(2), but rather by Tenn. R. Evid. 412.

Advisory Commission Comments [2003]. The third condition for admitting other crimes, clear and convincing proof, has been required by case law before and after adoption of the Rules of Evidence. This principle was first enunciated in *Wrather v. State*, 179 Tenn. 666 (1943), reversing a mother's conviction for murdering her adult son by arsenic poisoning. Evidence that she killed her father-in-law and brother-in-law with arsenic was not clear and convincing. The Supreme Court again approved this standard in *State v. Parton*, 694 S.W.2d 299 (1985).

Advisory Commission Comments [2005]. The word "person" in Rule 404(b) has been construed to refer solely to the defendant in a criminal prosecution. *State v. Stevens*, 78 S.W.3d 817 (Tenn. 2002).

Advisory Commission Comments [2009]. If the accused attacks the character of the alleged victim, amended Rule 404(a)(1) allows the prosecution to prove the accused's character for the same trait. This is an additional way the accused "opens the door" to character evidence.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 31, 2003, was ratified and approved by 2003 House Resolution 22 and Senate Resolution 10. The order promulgating the 2003 amendment of this rule provided that it take effect on July 1, 2003.

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 8, 2009, was ratified and approved by 2009 House Resolution 14 and Senate Resolution 17. The order promulgating the amendment of this rule provided that it take effect July 1, 2009.

Cross-References. Admissibility of evidence of other crimes, wrongs, or acts of any individual, § 24-7-125.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), No. 3-16-1.

Tennessee Law of Evidence (2nd ed., Cohen, Paine and Sheppeard), Rules 404, 405, 803; §§ 401.1, 404.1 — 404.10, 405.1 — 405.4, 406.1, 412A.2, 608.1, 609.1, 610.3, 803(21).1.

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The Time is Right to Amend Rule 404(b), 45 U. Mem. L. Rev. 149 (2014).

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NOTES TO DECISIONS

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1. Applicability.

In an aggravated child abuse prosecution, Tenn. R. Evid. 404(b) did not sanction the admission of evidence of defendant father's assaults against defendant mother as substantive evidence against her, because a "person" within the meaning of Rule 404(b) is the defendant who allegedly committed the "other crimes, wrongs, or acts." State v. Gomez, 367 S.W.3d 237, 2012 Tenn. LEXIS 291 (Tenn. Apr. 24, 2012).

Trial court, at defendant's new trial, was to determine anew the admissibility of evidence of defendant's drug and alcohol use. In doing so, the court was to recognize that defendant's acquittal of first degree murder meant that premeditation would not be an issue at the new trial. State v. Jackson, 444 S.W.3d 554, 2014 Tenn. LEXIS 619 (Tenn. Aug. 22, 2014).

Information provided by defendant to the police regarding the bad acts of various gang members did not constitute "other crimes, wrongs, or acts" of defendant. State v. Brown, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 220 (Tenn. Crim. App. Apr. 8, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 387 (Tenn. Aug. 15, 2019).

Because defendant's prior convictions were not used for impeachment purposes, Tenn. R. Evid. 609 was not applicable; the applicable rule was Tenn. R. Evid. 404(b) because the state sought to show intent and absence of mistake by showing defendant's familiarity with the court system. State v. Mathis, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 287 (Tenn. Crim. App. May 2, 2019).

Defendants did not show admitting testimony that defendants previously broke into a witness's house violated Tenn. R. Evid. 404(b) because (1) Rule 404(b) did not apply, as Tenn. R. Evid. 613 governed and allowed the witness to explain a prior inconsistent statement, and (2) any error was harmless, as defendants were not prejudiced, since the witness admitted not knowing if defendants broke into the witness's house. State v. Williams, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 518 (Tenn. Crim. App. Aug. 23, 2019), appeal denied, State v. Johnson, — S.W.3d —, 2019 Tenn. LEXIS 573 (Tenn. Dec. 9, 2019).

Defendant's petition for post-conviction relief was properly denied as trial counsel was not ineffective for failing to object to the victim's uncle's testimony that defendant and victim were in bed together on the day of the charged offense because the State did not use that testimony at trial as character or propensity evidence as the testimony appeared to have been offered to provide the jury with a complete version of the events of that day; and counsel did not consider objecting to the testimony as it was admissible. Clymer v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 757 (Tenn. Crim. App. Nov. 30, 2020).

Discussion and contemplation of committing a crime or engaging in criminal wrongdoing did not implicate this rule because it was not a prior bad act and thus, the admissibility of the evidence was governed by the rules of relevancy, and the subject evidence was relevant to establishing defendant's intent, along with the intent of his co-conspirators, to commit the robbery in which the victim was shot. State v. Ellis, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 52 (Tenn. Crim. App. Feb. 11, 2021).

2. Prior Crimes.

In a prosecution for driving under the influence, the state's repeated questions alluding to

defendant's suspended driver license gave rise to an impermissible inference that defendant had a prior DUI conviction, the probative value of which was outweighed by the danger of prejudice to defendant. State v. Fleece, 925 S.W.2d 558, 1995 Tenn. Crim. App. LEXIS 1004 (Tenn. Crim. App. 1995).

When the trial court substantially complies with the procedural requirements of Tenn. R. Evid. 404, its determination will not be overturned absent an abuse of discretion. Thus, although the trial judge did not specifically weigh the probative value of the evidence of other crimes against its potential prejudicial effect in his findings, his earlier comments indicate that he considered the evidence highly probative and therefore, the probative value outweighed the unfair prejudice; State v. Electroplating, Inc., 990 S.W.2d 211, 1998 Tenn. Crim. App. LEXIS 618 (Tenn. Crim. App. 1998), rehearing denied, — S.W.2d —, 1998 Tenn. Crim. App. LEXIS 799 (Tenn. Crim. App. Aug. 7, 1998), overruled in part, State v. King, — S.W.3d —, 2013 Tenn. Crim. App. LEXIS 192 (Tenn. Crim. App. Mar. 4, 2013), overruled in part, State v. King, 432 S.W.3d 316, 2014 Tenn. LEXIS 351 (Tenn. Apr. 23, 2014).

Trial court abused its discretion in admitting evidence of defendant's involvement in a prior shooting where the evidence possessed only a modicum of probative value as contextual background evidence and this slight value was clearly outweighed by the danger of unfair prejudice. State v. Gilliland, 22 S.W.3d 266, 2000 Tenn. LEXIS 341 (Tenn. 2000).

Evidence of a crime for which the defendant was acquitted can never be admissible as evidence of a prior crime in a trial, despite its relevance on issues other than propensity. State v. Shropshire, 45 S.W.3d 64, 2000 Tenn. Crim. App. LEXIS 946 (Tenn. Crim. App. 2000).

Evidence of prior physical abuse committed by a defendant against a victim not per se admissible at trial. State v. Gilley, 173 S.W.3d 1, 2005 Tenn. LEXIS 789 (Tenn. 2005).

In a case in which defendant was charged with first degree premeditated murder, but convicted of the lesser-included offense of voluntary manslaughter, the evidence regarding the assault of which defendant was previously acquitted was admitted in error, and the error was not harmless as the evidence admitted essentially turned into another trial on defendant's alleged assault, for which he had already been acquitted. State v. Jarman, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 832 (Tenn. Crim. App. Nov. 8, 2018), rev'd, 604 S.W.3d 24, 2020 Tenn. LEXIS 267 (Tenn. July 6, 2020).

Defendant's petition for post-conviction relief was properly denied as counsel was not ineffective for failing to seek a hearing to determine which of defendant's prior convictions were admissible impeachment evidence if defendant chose to testify because defendant never intended to testify regardless of which priors could have been used against him at trial; his convictions also could have been admitted as substantive evidence to rebut a claim of self-defense had he testified; and he did not show that he would have testified had counsel conducted a hearing regarding the admissible impeachment convictions and that his testimony would have affected the outcome of his trial. Johnson v. State, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 37 (Tenn. Crim. App. Jan. 17, 2019).

Defendant's petition for post-conviction relief was properly denied as lead counsel was not ineffective because he discussed defendant's voluntary manslaughter conviction with him and determined he did not want the jury to learn about defendant's prior conviction; and trial counsel made a strategic decision not to do anything that might open the door to that prior conviction. Gayden v. State, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 258 (Tenn. Crim. App. Apr. 23, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 303 (Tenn. July 19, 2019).

Trial court did not err in denying the inmate's petition for post-conviction relief, seeking relief from convictions of rape and incest, because trial counsel filed a pretrial motion to exclude evidence of other bad acts, the inmate did not ask trial counsel why he entered into the agreement with the prosecutor, and trial counsel testified that he could not remember why he did not object to the victims' testimony but acknowledged that his decision may have been strategic. Colwell v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 470 (Tenn. Crim. App. July 10, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 574 (Tenn. Oct. 7, 2020).

Trial court did not abuse its discretion by admitting a witness's testimony about defendant's prior shooting of the victim because it was relevant, as it established the relationship between the parties and showed defendant's settled purpose to harm the victim. State v. Stevenson, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 798 (Tenn. Crim. App. Dec. 16, 2020).

3. Other Crimes.

Even though evidence of prior bad acts of defendants was relevant to a material issue in the case, the probative value of the incidents was slight in comparison to prejudicial effect, and admission of such evidence constituted harmful error. State v. Luellen, 867 S.W.2d 736, 1992 Tenn. Crim. App. LEXIS 873 (Tenn. Crim. App. 1992).

Proof required for application of exception to rule prohibiting evidence of other crimes requires finding that "other act" addresses relevant issue such as common scheme or plan and balancing of probative value against unfair prejudicial effect; factors in weighing probative value include prosecution's need for evidence, likelihood defendant committed other crimes,

and degree of its relevance. State v. Edwards, 868 S.W.2d 682, 1993 Tenn. Crim. App. LEXIS 228 (Tenn. Crim. App. 1993).

Admission of prior assault conviction, not to prove that murder conformed to defendant's previous violent behavior, but to rebut evidence that the defendant was a docile person, was proper; admission of probative evidence was not outweighed by the danger of unfair prejudice. State v. Nichols, 877 S.W.2d 722, 1994 Tenn. LEXIS 135 (Tenn. 1994), rehearing denied, — S.W.2d —, 1994 Tenn. LEXIS 202 (1994), cert. denied, Nichols v. Tennessee, 513 U.S. 1114, 115 S. Ct. 909, 130 L. Ed. 2d 791, 1995 U.S. LEXIS 589 (1995).

In a prosecution for murder, testimony of defendant's former girlfriend that she had been seeing the victim and that defendant had threatened her while she was in the victim's vehicle was relevant for the purpose of showing defendant's motive for committing the crime. State v. Copenny, 888 S.W.2d 450, 1993 Tenn. Crim. App. LEXIS 401 (Tenn. Crim. App. 1993), appeal denied, State v. Copeny, — S.W.2d —, 1993 Tenn. LEXIS 351 (Tenn. 1993).

In case where a prior conviction was an element of the offense charged, the probative value of the prior conviction would almost always outweigh any potential prejudice. State v. Wingard, 891 S.W.2d 628, 1994 Tenn. Crim. App. LEXIS 595 (Tenn. Crim. App. 1994).

In a prosecution for conspiring to sell, manufacture or deliver a controlled substance, questioning defendant's wife, a defense witness, as to prior acts of defendant involving drug dealing constituted reversible error. State v. Adkisson, 899 S.W.2d 626, 1994 Tenn. Crim. App. LEXIS 801 (Tenn. Crim. App. 1994).

In a prosecution for aggravated rape and aggravated robbery, evidence of defendant's arrest for trespass and circumstances surrounding it were admissible to show why he was confined in a squad car in the parking lot of the victim's dormitory where he was identified by the victim. State v. Drinkard, 909 S.W.2d 13, 1995 Tenn. Crim. App. LEXIS 183 (Tenn. Crim. App. 1995).

Admission of defendant's 10 year old securities fraud conviction was proper since this evidence was relevant to show that the defendant had guilty knowledge that the interests he was selling were securities; that he knew he was required to register with the securities division; and that he knew he was required to fully disclose to potential participants the prior civil injunctions and criminal conviction when representing his prior success. State v. Brewer, 932 S.W.2d 1, 1996 Tenn. Crim. App. LEXIS 96 (Tenn. Crim. App. 1996).

In a prosecution for aggravated robbery, admission of testimony regarding defendant's involvement in a plan to commit another robbery and in a prior forgery offense was reversible error. State v. Maddox, 957 S.W.2d 547, 1997 Tenn. Crim. App. LEXIS 1348 (Tenn. Crim. App. 1997).

Because the issues to which evidence of other acts may be relevant are not listed by the Advisory Commission so that lawyers and judges would use care in identifying the issues to be addressed by Tenn. R. Evid. 404(b) evidence, in every case in which evidence of other crimes, wrongs or acts is offered, the trial judge should carefully scrutinize the relevance of the evidence and the reasons for which it is being offered. State v. Gilliland, 22 S.W.3d 266, 2000 Tenn. LEXIS 341 (Tenn. 2000).

If evidence that the defendant has committed a crime separate and distinct from the one on trial is relevant to some matter actually in issue in the case on trial, and if its probative value as evidence is not outweighed by its prejudicial effect upon the defendant, then such evidence may be properly admitted. State v. Moss, 13 S.W.3d 374, 1999 Tenn. Crim. App. LEXIS 527 (Tenn. Crim. App. 1999).

Trial courts should take a restrictive approach of Tenn. R. Evid. 404(b) because "other act" evidence carries a significant potential for unfairly influencing a jury. State v. Jones, 15 S.W.3d 880, 1999 Tenn. Crim. App. LEXIS 850 (Tenn. Crim. App. 1999).

Even though defendant's statement to the police concerning his use of marijuana was not admissible at trial pursuant to Tenn. R. Evid. 404(b), the trial court did not err in denying defendant's motion for a mistrial where the court provided a curative instruction to the jury. State v. Carroll, 36 S.W.3d 854, 1999 Tenn. Crim. App. LEXIS 1346 (Tenn. Crim. App. 1999).

The probative value of defendant's extramarital sexual activity before his murder of his wife outweighed its unfair prejudice, under Tenn. R. Evid. 404(b). State v. Robinson, 73 S.W.3d 136, 2001 Tenn. Crim. App. LEXIS 858 (Tenn. Crim. App. 2001).

In defendant's prosecution for the murder of his wife, the prejudicial impact of evidence of his sexual activity in the marital bed after his wife's death did not outweigh its probative value, under Tenn. R. Evid. 404(b). State v. Robinson, 73 S.W.3d 136, 2001 Tenn. Crim. App. LEXIS 858 (Tenn. Crim. App. 2001).

Court affirmed defendant's conviction of attempted child rape, in violation of T.C.A. §§ 39-13-522(a) and 39-12-101; the evidence showed that defendant climbed on top of the victim, who was 11 years old at the time, but defendant was thwarted by another person who pulled defendant off. Given that the next attack was similar in nature and within two weeks of the first attack, and the victim testified that defendant raped the victim during the second attack, it was permissible for the jury to have inferred that defendant intended to rape the victim the first time, and the court noted that Tenn. R. Evid. 404(b) permitted the introduction of sub-

sequent acts to establish one's intent during a prior act in appropriate cases. State v. Elkins, 102 S.W.3d 578, 2003 Tenn. LEXIS 325 (Tenn. 2003), dismissed, Elkins v. Sexton, — F. Supp. 2d —, 2011 U.S. Dist. LEXIS 131508 (E.D. Tenn. Nov. 14, 2011).

Because the aggravated sexual battery convictions, pursuant to T.C.A. §§ 39-2-606(a) (repealed) and 39-13-504(a), involved alleged instances in which the victim's accounts were completely corroborated by a sister who had shared a bed with the victim on the separate occasions, even if the prosecution erred in asking questions which led to a response that defendant had leaned over another sister for a few minutes, pursuant to Tenn. R. Crim. P. 52(a) and T.R.A.P. 36(b), the error did not merit reversal of defendant's conviction based on admission of evidence in violation of Tenn. R. Evid. 404(b). State v. Jordan, 116 S.W.3d 8, 2003 Tenn. Crim. App. LEXIS 301 (Tenn. Crim. App. 2003).

Where defendant was charged in connection with four robberies, trial court improperly consolidated the four charges for trial under Tenn. R. Crim. P. 8(b), as multiple charges and testimony inevitably hung in the backdrop as each particular offense was presented to the jury; based on the impermissible consideration of bad acts evidence under Tenn. R. Evid. 404(b), it was unlikely that the jury examined each charge on its own proof. State v. Dotson, 254 S.W.3d 378, 2008 Tenn. LEXIS 277 (Tenn. Apr. 28, 2008).

Trial court erred by consolidating for trial defendant's offenses of aggravated robbery in one incident and first degree felony murder and especially aggravated robbery in a separate incident because the admission of other wrongs carried with it the inherent risk of the jury convicting defendant of a crime based upon defendant's propensity to commit a crime, rather than the strength of the proof of guilt on the specific charges. State v. Garrett, 331 S.W.3d 392, 2011 Tenn. LEXIS 7 (Tenn. Jan. 24, 2011).

Trial court did not abuse its discretion by refusing to grant defendant's motion for a mistrial based on a witness's testimony regarding defendant's participation in prior drug transactions because the witness volunteered that she recognized defendant's car from prior drug transactions, the state did not ask any further questions about the subject, it was defense counsel who delved into defendant's prior bad acts when cross-examining the witness, and there was an overwhelming amount of other evidence against defendant. State v. Carter, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 188 (Tenn. Crim. App. Mar. 27, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 253 (Tenn. June 19, 2019).

4. —Drug Convictions and Paraphernalia.

A trial court should admit the types of evidence listed in T.C.A. § 39-17-424 to demonstrate that the object at issue is classifiable as "drug paraphernalia" as defined in T.C.A. § 39-17-402, but the court may do so only to the extent that the proffered evidence otherwise meets all of the requirements for admissibility under Tenn. R. Evid. 404(b). State v. Mallard, 40 S.W.3d 473, 2001 Tenn. LEXIS 235 (Tenn. 2001).

Because the evidence of other drug convictions reflected upon the character of the defendant, Tenn. R. Evid. 404(b) governed the procedures for their admission. State v. Mallard, 40 S.W.3d 473, 2001 Tenn. LEXIS 235 (Tenn. 2001).

The only conceivable circumstance in which evidence of prior crimes would have any probative value on whether an object is properly classified as "drug paraphernalia" is to show that the object at issue is capable of being used as drug paraphernalia, as evidenced by the defendant's convictions for uses of the same or similar objects for illicit purposes. State v. Mallard, 40 S.W.3d 473, 2001 Tenn. LEXIS 235 (Tenn. 2001).

Trial court did not err by allowing the state to introduce evidence of defendant's prior felony conviction because the state had to prove that he possessed a firearm and had a previous conviction for a felony drug offense in order to convict him of being a felon in possession of a firearm, defendant refused to stipulate to his status as a felony, and therefore the probative value of the prior conviction outweighed the prejudicial effect. State v. Buchanan, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 105 (Tenn. Crim. App. Feb. 21, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 182 (Tenn. Apr. 11, 2019).

Trial court did not abuse its discretion at defendant's trial for possession of cocaine and marijuana with intent to sell and to deliver by allowing the State of Tennessee to present rebuttal evidence of defendant's later drug transactions because the subsequent convictions occurred within 18 months of the incident at issue, their probative value on the issue of defendant's intent to sell or deliver drugs rather than use drugs for personal use outweighed the danger of unfair prejudice to defendant, and the court gave curative instructions. State v. Carero, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 63 (Tenn. Crim. App. Feb. 3, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 428 (Tenn. July 17, 2020).

5. —Exceptions.

The exceptions to the general rule that testimony of prior bad acts by a defendant when used as substantive evidence of guilt of the crime on trial are not permissible, are when

the evidence is offered to prove the motive of the defendant, his identity, his intent, the absence of mistake, opportunity or as a part of a common scheme or plan. State v. Jones, 15 S.W.3d 880, 1999 Tenn. Crim. App. LEXIS 850 (Tenn. Crim. App. 1999).

6. —Sex Crimes.

Tennessee does not recognize a "sex crimes" exception to the general rule, but it has recognized a narrow special rule which admits prior sex crimes into evidence if they are included in the indictment. State v. Rickman, 876 S.W.2d 824, 1994 Tenn. LEXIS 109 (Tenn. 1994).

Where the indictment charges that sex crimes occurred over a span of time, evidence of unlawful sexual contact between the defendant and the victim allegedly occurring during the time charged in the indictment is admissible; the state, however, must elect at the close of its proof-in-chief as to the particular offense or offenses for which it is seeking a conviction. State v. Rickman, 876 S.W.2d 824, 1994 Tenn. LEXIS 109 (Tenn. 1994).

In a prosecution for sexual battery by means of fraud, admission into evidence of videotapes and a booklet depicting sexually explicit acts by and between males, and the prosecution's argument about the materials and defendant's statement that his roommates were possibly bisexual, constituted reversible error. State v. Tizard, 897 S.W.2d 732, 1994 Tenn. Crim. App. LEXIS 750 (Tenn. Crim. App. 1994).

In a prosecution for aggravated sexual battery, evidence of defendant's previous acts of kissing the victim was relevant to proving his intent in touching the victim for the purpose of sexual gratification or arousal. State v. Hayes, 899 S.W.2d 175, 1995 Tenn. Crim. App. LEXIS 25 (Tenn. Crim. App. 1995).

In a prosecution for rape and incest, it was reversible error to admit uncharged sexual misconduct that was unrelated to any of the counts in the indictment, that was highly prejudicial, and which more probably than not did affect the judgment. State v. Woodcock, 922 S.W.2d 904, 1995 Tenn. Crim. App. LEXIS 982 (Tenn. Crim. App. 1995).

Testimony of a victim as to sexual crimes occurring outside the indicted time frame was more prejudicial than probative and the admission of such testimony was error. State v. Hoyt, 928 S.W.2d 935, 1995 Tenn. Crim. App. LEXIS 965 (Tenn. Crim. App. 1995), overruled in part, Spicer v. State, 12 S.W.3d 438, 2000 Tenn. LEXIS 57 (Tenn. 2000). But see, Spicer v. State, 12 S.W.3d 438, 2000 Tenn. LEXIS 57 (Tenn. 2000).

There is obviously a risk of unfair prejudice when allegations of sexual misconduct are involved; however, where the trial court provided the jury with limiting instructions immediately following the testimony at issue and did so a second time in the general charge, the probative value of the evidence was not outweighed by a danger of unfair prejudice. State v. Moss, 13 S.W.3d 374, 1999 Tenn. Crim. App. LEXIS 527 (Tenn. Crim. App. 1999).

Trial court erred in admitting evidence regarding the numerous sexual assaults defendant committed against the victim, as those assaults were not within the time frame of the four counts of statutory rape on the indictment, and because the state did not elect at the close of its proof the particular incident for which a conviction was sought; however, the error was harmless, as there was sufficient additional evidence to convict defendant. State v. McCary, 119 S.W.3d 226, 2003 Tenn. Crim. App. LEXIS 17 (Tenn. Crim. App. 2003), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 674 (Tenn. July 7, 2003).

In a first degree murder prosecution, the trial court erred in admitting evidence of defendant's sexual abuse of a murder victim's child to show defendant's motive to kill; because of the inherent unreliability of a witness's hearsay recollections of the child's allegations of sexual abuse, defendant's commission of that crime was not proven by clear and convincing evidence. State v. Sexton, 368 S.W.3d 371, 2012 Tenn. LEXIS 377 (Tenn. May 29, 2012).

Trial court properly admitted testimony of defendant's internet search history because the search terms, "young amateur sex" and "nude teen sex," were suggestive of someone interested in finding sexually explicit images of minors, was relevant and probative to the issue of defendant's intent and knowledge, and was not outweighed by the danger of unfair prejudice. State v. Norton, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 149 (Tenn. Crim. App. Mar. 8, 2019).

7. Victim's Reputation for Peacefulness.

In a prosecution for murder, where defendant had not proffered evidence that victim was the first aggressor, introduction by the state of testimony that the victim had never carried a gun was improper and irrelevant. State v. Copenny, 888 S.W.2d 450, 1993 Tenn. Crim. App. LEXIS 401 (Tenn. Crim. App. 1993), appeal denied, State v. Copeny, — S.W.2d —, 1993 Tenn. LEXIS 351 (Tenn. 1993).

Erroneous admission of evidence of a victim's reputation for peacefulness before defendant alleged the victim was an initial aggressor was harmless because the evidence would have been admissible after defendant testified the victim was the initial aggressor. State v. Toles, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 315 (Tenn. Crim. App. May 17, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 462 (Tenn. Sept. 20, 2019).

8. Previous Attempts.

Where the defendant was being tried for first degree murder, evidence of the defendant's pre-

vious attempts to hire various individuals to kill his wife would be admissible on the issue of intent. State v. Stephenson, 878 S.W.2d 530, 1994 Tenn. LEXIS 143 (Tenn. 1994), rehearing denied, — S.W.2d —, 1994 Tenn. LEXIS 203 (Tenn. June 20, 1994), overruled, State v. Mitchell, 137 S.W.3d 630, 2003 Tenn. Crim. App. LEXIS 670 (Tenn. Crim. App. 2003).

The trial court did not err in permitting testimony regarding injuries suffered by abused child two years prior to his death although the defendant had not been convicted of inflicting those injuries. State v. Lacy, 983 S.W.2d 686, 1997 Tenn. Crim. App. LEXIS 1175 (Tenn. Crim. App. 1997).

9. Violent Acts of Victim.

Specific violent acts of the victim are admissible to corroborate the defendant's assertion that the victim was the aggressor, but these acts are not admissible to prove the victim acted in accordance with a character trait. State v. Furlough, 797 S.W.2d 631, 1990 Tenn. Crim. App. LEXIS 293 (Tenn. Crim. App. 1990).

Where criminal defendant never showed he knew of any prior violent acts of the deceased victim which would have stirred him to fear the victim, he was not entitled to introduce proof of prior disorderly conduct convictions of the victim to establish a character trait under Tenn. R. Evid. 404(a)(2). State v. West, 825 S.W.2d 695, 1992 Tenn. Crim. App. LEXIS 62 (Tenn. Crim. App. 1992).

In a murder trial, it was proper to exclude testimony of defendant's witness as to a specific instance of violent conduct by the victim, offered to prove first aggression by the victim, since the testimony amounted to character evidence of the victim's propensity for violence and could only be presented in the form of opinion or reputation evidence. State v. Ray, 880 S.W.2d 700, 1993 Tenn. Crim. App. LEXIS 253 (Tenn. Crim. App. 1993).

In a prosecution for aggravated assault, the victim's convictions for assault and prior bad acts involving violence were admissible to corroborate the defendant's theory that the victim was the initial aggressor in the affray and the fact that the defendant was unaware of the victim's prior convictions and bad acts prior to their encounter did not affect the admissibility of this evidence to establish that the victim was the initial aggressor. State v. Hill, 885 S.W.2d 357, 1994 Tenn. Crim. App. LEXIS 73 (Tenn. Crim. App. 1994).

In a prosecution for aggravated assault, the trial court's ruling that the defendant could not ask the victim about his prior convictions for assault or recent prior bad acts involving violent conduct unless the victim admitted he was the initial aggressor was erroneous. State v. Hill, 885 S.W.2d 357, 1994 Tenn. Crim. App. LEXIS 73 (Tenn. Crim. App. 1994).

In a murder prosecution, evidence that the victim had committed an assault on a third person five and one-half years before the shooting, considered with the fact that the victim had brutally beaten defendant two years before the shooting, should have been admitted as probative on the issue of first aggressor, and, while prejudicial to the state's theory, would not have been unduly prejudicial. State v. Ruane, 912 S.W.2d 766, 1995 Tenn. Crim. App. LEXIS 584 (Tenn. Crim. App. 1995).

Although defendant should have been allowed to testify that he feared the victim based on the victim's past physical abuse of his wife as this rule did not apply because defendant was not arguing that he should have been allowed to testify that the victim was a violent person and was acting in conformity with a propensity for violence on the day of the shooting, defendant was not entitled to post-conviction relief based on ineffective assistance of counsel because defendant never testified at the hearing that he feared the victim at all. Gayden v. State, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 258 (Tenn. Crim. App. Apr. 23, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 303 (Tenn. July 19, 2019).

Defendant's petition for post-conviction relief was properly denied as trial counsel were not ineffective for failing to make offers of proof at trial about the victim's reputation for violence in the neighborhood and the victim's prior acts of abuse toward his wife, based on the fact that the evidence would have supported defendant's claim of self-defense and defense of another, as the wife and her son did testify on direct and cross-examination at trial that the victim was the first aggressor before the shooting. Gayden v. State, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 258 (Tenn. Crim. App. Apr. 23, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 303 (Tenn. July 19, 2019).

Petitioner failed to show that his counsel was ineffective for failing to investigate and introduce evidence of the victim's criminal history and prior bad acts to corroborate petitioner's fear of the victim and bolster his self-defense theory because counsel repeatedly testified that petitioner was not aware of any criminal history of the victim at the time of the offense and petitioner failed to provide any testimony explaining the underlying nature, circumstances, or outcome of the offenses listed in the victim's criminal history. White v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 61 (Tenn. Crim. App. Feb. 3, 2020).

Even though the trial court erred by excluding evidence of prior bad acts of the victim that defendant sought to introduce to corroborate his claim that the victim was the initial aggressor, because the probative value of the domestic assault charge one month before the shooting was not outweighed by the danger of unfair prejudice, the error was harmless because of other evidence presented at trial regarding the victim's aggressiveness, including the victim's

stalking and threatening defendant and the victim's threats and harassment of defendant on the night of the shooting. State v. Smith, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 453 (Tenn. Crim. App. June 30, 2020).

10. Character of Accused.

Evidence may be introduced through the testimony of character witnesses who testify about a pertinent character trait or through the testimony of the defendant testifying personally. It is not necessary for the defendant to take the stand before being allowed to present evidence of a pertinent character trait. State v. Phipps, 883 S.W.2d 138, 1994 Tenn. Crim. App. LEXIS 298 (Tenn. Crim. App. 1994).

In a prosecution for murder arising from the death of defendant's infant child caused by malnutrition and dehydration, it was reversible error for the trial court to admit portions of defendant's pretrial statements pertaining to prior socializing at bars and sexual misconduct involving himself and his wife. State v. Bordis, 905 S.W.2d 214, 1995 Tenn. Crim. App. LEXIS 146 (Tenn. Crim. App. 1995).

In a prosecution for first-degree murder by aggravated child abuse, evidence of prior injuries to the victim which did not show the identity of the person who caused the injuries was not inadmissible under Tenn. R. Evid. 404 since the evidence did not reflect upon the character of defendant. State v. Dubose, 953 S.W.2d 649, 1997 Tenn. LEXIS 472 (Tenn. 1997).

Appellate court was correct when it determined that the trial court erred by admitting evidence of defendant's possession of child pornography under Tenn. R. Evid. 404(b) because a jury could infer from this evidence that defendant had a propensity to commit child rape; however, the appellate court erred when it determined that the error was harmless under T.R.A.P. 36(b) because the evidence undermined the fairness of defendant's trial and more probably than not affected the jury's assessment of the credibility of the witnesses and affected the verdict. State v. Rodriguez, 254 S.W.3d 361, 2008 Tenn. LEXIS 274 (Tenn. Apr. 24, 2008).

Tenn. R. Evid. 404(b) applies only to evidence of other acts of a person, not to "character" evidence of an inanimate object. Sparks v. Mena, 294 S.W.3d 156, 2008 Tenn. App. LEXIS 65 (Tenn. Ct. App. Feb. 6, 2008).

Defendant's question to a jailer, "Do you honestly think that there is anything wrong with raping a child?" was a statement rather than a question, and given that defendant was a party opponent, his statement was admissible pursuant to Tenn. R. Evid. 803(1.2)(A). Although the statement was highly prejudicial, its probative value was not outweighed by its prejudicial effect. Tenn. R. Evid. 404 did not apply because the statement did not involve a prior bad act. State v. Brown, 375 S.W.3d 565, 2011 Tenn. Crim. App. LEXIS 897 (Tenn. Crim. App. Dec. 6, 2011).

Petitioner was properly denied post-conviction relief; testimony about his having driven around after the death of his first child in 1994 would have opened the door for the state to introduce possible evidence of his bad character, and counsel made an informed strategic and tactical decision not to call two witnesses to testify regarding petitioner's actions after the victim's death. Lewis v. State, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 683 (Tenn. Crim. App. Sept. 7, 2018), review denied and ordered not published, — S.W.3d —, 2019 Tenn. LEXIS 15 (Tenn. Jan. 16, 2019).

Trial court properly excluded the character evidence testimony of the fourth defendant's mother at trial because she testified she was unaware of her son's participation in the BDSM (bondage and discipline, dominance and submission, and sadism and masochism) community, and her testimony failed to address any of the facts at issue in the case as she had no knowledge of the events leading to the victim's death and her testimony merely suggested she believed her son to be a good person; and, although the mother had knowledge of her son's educational, medical, and criminal history, her testimony regarding the same did not relate to the crimes for which he was charged. State v. Reynolds, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 864 (Tenn. Crim. App. Nov. 28, 2018), review denied and ordered not published, — S.W.3d —, 2019 Tenn. LEXIS 162 (Tenn. Apr. 11, 2019).

Photo of defendant and a codefendant was properly admitted because (1) the photo was relevant, as a witness used the photo to identify the codefendant, and (2) the photo did not depict defendant as a gang member. State v. Toles, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 315 (Tenn. Crim. App. May 17, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 462 (Tenn. Sept. 20, 2019).

Before allowing cross-examination about specific instances of defendant's violent conduct, the trial court failed to determine that a reasonable factual basis existed and that the probative value outweighed the prejudicial effect, plus after defendant denied threatening to kill a detective, the trial court improperly permitted extrinsic evidence to prove this took place; while the trial court erred, the error was harmless as the proof supported defendant's conviction and he opened the door for the State to offer the evidence. State v. Land, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 99 (Tenn. Crim. App. Feb. 19, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 364 (Tenn. July 20, 2020).

Defendant's lengthy direct examination testimony regarding the victim's violent tendencies and specific instances in which the victim

was violent towards defendant and others was evidence of the victim's character for violent behavior to help show the victim was the aggressor, which opened the door for the State to offer evidence of the same trait of character of the accused. State v. Land, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 99 (Tenn. Crim. App. Feb. 19, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 364 (Tenn. July 20, 2020).

11. Testimony by Previous Victim.

It was error to allow prosecution witness to testify about the defendant having previously given her a pill and about the pill's effect on her. Such testimony constituted inadmissible proof of other crimes, wrongs and acts tending only to show that he had bad or irresponsible tendencies, and was not probative of defendant's knowledge about the effects of the drug in question at the time of alleged murder victim's death. State v. Shepherd, 862 S.W.2d 557, 1992 Tenn. Crim. App. LEXIS 833 (Tenn. Crim. App. 1992), rehearing denied, 862 S.W.2d 557, 1992 Tenn. Crim. App. LEXIS 894 (Tenn. Crim. App. 1992), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 120 (Tenn. Mar. 22, 1993).

Where the state alleged that defendant had unsuccessfully utilized the same scheme in selecting and approaching witness as he subsequently used, and which accomplished its purpose, against the victim, it appeared that a common scheme or plan may have linked these incidents, and the court did not err in allowing the witness to testify as to the first encounter. State v. Gregory, 862 S.W.2d 574, 1993 Tenn. Crim. App. LEXIS 295 (Tenn. Crim. App. 1993).

Trial court erred in excluding a expert's testimony because the exclusion more probably than not influenced the jury's verdict where the court based its decision on potential confusion concerns attendant to the proposed testimony, the expert answered the question of whether his opinions were to a reasonable degree of certainty, his proposed testimony was highly probative of whether the caregiver suffered post-traumatic stress disorder as a result of the patient's alleged attack on her and would have included, among other things, a critique of the methodology of the caregiver's expert, and a witness's testimony—that the patient's request to apply lotion to his groin area was for the purpose of sexual gratification—was improperly utilized for propensity evidence. Ellis v. Modi, — S.W.3d —, 2020 Tenn. App. LEXIS 211 (Tenn. Ct. App. May 11, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 576 (Tenn. Sept. 16, 2020).

12. State's Rebuttal.

An accused may affirmatively choose to place his or her character in issue, but only after the defendant has done so may the state present its own character evidence in rebuttal. State v. West, 844 S.W.2d 144, 1992 Tenn. LEXIS 657 (Tenn. 1992).

Trial court found that the evidence concerning defendant's earlier sexual offenses committed against a minor victim was relevant to establish defendant's identity as the perpetrator to the later offenses because he denied that he committed the offenses against the victim and it was his theory of defense that the victim learned about the types of sexual activities from her grandfather, not defendant; because the jury was left with the clear implication that the victim's grandfather was the first person to sexually abuse her and the first person to provide her with a knowledge of sexual matters, the state was entitled to rebut that evidence with evidence of prior sexual offenses defendant committed against the victim. State v. Osborne, 251 S.W.3d 1, 2007 Tenn. Crim. App. LEXIS 689 (Tenn. Crim. App. Aug. 28, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 59 (Tenn. Jan. 28, 2008).

In defendant's murder trial for the killing of his wife, the trial court did not err in permitting the state to introduce propensity evidence in rebuttal after defendant testified that he had never hit his wife; because defendant put his treatment of the victim at issue, the prosecutor was properly permitted to introduce the testimony of a co-worker of the victim, who testified that defendant had appeared at the workplace on several occasions in a rage, that the victim appeared at work on several occasions and had difficulty walking, that the victim often seemed stiff and was covered with bruises, and that the victim wore long sleeves even in warm weather. State v. Brock, 327 S.W.3d 645, 2009 Tenn. Crim. App. LEXIS 496 (Tenn. Crim. App. June 29, 2009), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 56 (Tenn. Jan. 25, 2010), cert. denied, Brock v. Tennessee, , 562 U.S. 850, 131 S. Ct. 101, 178 L. Ed. 2d 64, 2010 U.S. LEXIS 5883 (U.S. 2010).

13. Harmless Error.

Where defendant in murder trial never made an issue of his good character, the trial court erred by allowing the state to attempt to show his propensity for violence by questioning him about his "peaceful" nature and about his prior threat; however, the error was harmless. State v. West, 844 S.W.2d 144, 1992 Tenn. LEXIS 657 (Tenn. 1992).

Although victim's testimony about defendant's prior attempts of sexual battery lacked any significant probative value as to the crime alleged, and showed only a propensity on the part of the defendant to have committed the crime, where the testimony was first elicited by the defense, and no objection was made, the error in allowing the state to elicit further testimony as to the prior incident was harmless in the context of the entire trial. State v. Williams, 851 S.W.2d 828, 1992 Tenn. Crim. App. LEXIS 548 (Tenn. Crim. App. 1992), appeal denied, — S.W.2d —, 1992 Tenn. LEXIS 594 (Tenn. Oct. 26, 1992).

Testimony was admissible even though it concerned prior criminal conduct not alleged in the indictment. State v. Little, 854 S.W.2d 643, 1992 Tenn. Crim. App. LEXIS 404 (Tenn. Crim. App. 1992).

Although testimony involving drug use, "satanic" sketches and listening to rock music, while corroborating statements made by the accomplice, should not have been admitted, there was no harmful error since a witness' testimony had already presented these features of the defendant's character. State v. Caughron, 855 S.W.2d 526, 1993 Tenn. LEXIS 189 (Tenn. 1993), cert. denied, Caughron v. Tennessee, 510 U.S. 979, 114 S. Ct. 475, 126 L. Ed. 2d 426, 1993 U.S. LEXIS 7207 (1993).

Where the trial court erred in not severing one count of child rape from the other counts, the error was harmless as defendant was acquitted of two of the three counts, and the evidence was sufficient to support a guilty verdict on the remaining count. State v. Moore, 6 S.W.3d 235, 1999 Tenn. LEXIS 574 (Tenn. 1999).

Trial court did not err by admitting statements on the videotape of defendant's stop indicating that defendant's vehicle would be seized; the appellate court was unable to conclude that it was a second or subsequent DUI based upon the information, and any error was harmless since defendant was convicted of DUI per se. State v. Greenwood, 115 S.W.3d 527, 2003 Tenn. Crim. App. LEXIS 243 (Tenn. Crim. App. 2003), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 830 (Tenn. Sept. 8, 2003).

Even assuming it was error for the trial court to admit the officer's testimony about defendant's prior incarceration, the error was harmless because the officer neither informed the jury of the crime for which defendant had been incarcerated nor implied that the jury should consider defendant's prior incarceration as evidence of guilt; the trial court gave a limiting instruction, which cautioned the jury not to consider defendant's prior incarceration as evidence of guilt; and the testimony was at most cumulative to evidence already properly admitted from multiple prior witnesses. State v. Dotson, 450 S.W.3d 1, 2014 Tenn. LEXIS 694 (Tenn. Sept. 30, 2014), cert. denied, Dotson v. Tennessee, 191 L. Ed. 2d 565, 135 S. Ct. 1535, 575 U.S. 906, 2015 U.S. LEXIS 1830 (U.S. 2015).

Even though the trial court erred by admitting evidence of defendant's use of pornography, as the jury could have inferred that he was inclined to commit more serious sexual misconduct and the state used the evidence to impugn defendant's character for truthfulness, the error was harmless because there was other evidence that defendant had not always told the truth and the evidence included defendant's detailed confession, which closely tracked the victims' testimony. State v. Clark, 452 S.W.3d 268, 2014 Tenn. LEXIS 913 (Tenn. Nov. 10, 2014), rehearing denied, — S.W.3d —, 2014 Tenn. LEXIS 1028 (Tenn. Dec. 4, 2014), cert. denied, Clark v. Tennessee, 135 S. Ct. 2846, 192 L. Ed. 2d 882, 2015 U.S. LEXIS 3937 (U.S. June 15, 2015).

In a case in which defendant was charged with first degree premeditated murder, but convicted of the lesser-included offense of voluntary manslaughter, any link between threats against the victim's sister and the victim's death was speculative and too far removed to be relevant; although that error alone might have been harmless, when viewed in conjunction with the erroneous admission of the prior alleged 2013 assault, the error in admitting the prior threats against the victim's sister was not harmless. State v. Jarman, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 832 (Tenn. Crim. App. Nov. 8, 2018), rev'd, 604 S.W.3d 24, 2020 Tenn. LEXIS 267 (Tenn. July 6, 2020).

14. Evidence Properly Included.

The probative value of witness' statements was significant where the incidents related by the witness were corroborated by the defendant's admission in his journal; consequently, the trial court's ruling that the probative value of witness' testimony was not outweighed by the danger of unfair prejudice properly complied with the requirements of Tenn. R. Evid. 404(b). State v. Moss, 13 S.W.3d 374, 1999 Tenn. Crim. App. LEXIS 527 (Tenn. Crim. App. 1999).

In a murder case, a court properly admitted evidence of a prior attack by defendant, where it instructed the jury that the evidence could be considered for the limited purpose of determining whether it tended to show a motive. Contrary to defendant's assertion, the instruction did not invite the jury to consider the attack as propensity evidence. State v. Leach, 148 S.W.3d 42, 2004 Tenn. LEXIS 741 (Tenn. 2004), rehearing denied, — S.W.3d —, 2004 Tenn. LEXIS 955 (Tenn. Nov. 8, 2004), cert. denied, Leach v. Tennessee, 544 U.S. 966, 125 S. Ct. 1739, 161 L. Ed. 2d 610, 2005 U.S. LEXIS 3045 (2005).

In defendant's capital murder case, a court properly allowed evidence that, shortly after the crimes, he possessed a small caliber, automatic handgun and a double-bladed knife because the testimony that the witness saw defendant in the possession of weapons similar to those used in the crimes did not necessarily constitute evidence of a bad act, and because of the weapons' similarity to those described by the victim, the evidence was especially probative as to the identity of the perpetrator. State v. Reid, 213 S.W.3d 792, 2006 Tenn. LEXIS 1203 (Tenn. 2006), rehearing denied, — S.W.3d —, 2007 Tenn. LEXIS 17, (Tenn. 2007), cert. denied, Reid v. Tennessee, 169 L. Ed. 2d 305, 128 S. Ct. 437, 552 U.S. 974, 2007 U.S. LEXIS 11530 (2007).

Although the deceased mother's two children argued at trial that the criminal convictions were irrelevant and that the admission of such evidence was highly prejudicial, the appellate court found that the child's criminal conviction was admissible under Tenn. R. Evid. 404(b) because it was relevant under Tenn. R. Evid. 401 to whether the child had a motive or intent to influence his mother, and the trial court properly balanced the probative value and the prejudicial effect of the evidence pursuant to Tenn. R. Evid. 403. Whether to admit the evidence was within the sound discretion of the trial court and the court did not abuse its discretion when it admitted the evidence; moreover, the trial court gave a limiting instruction that evidence of the crime was only relevant as it pertained to motive and intent to influence the testatrix to change her will. In re Estate of Schisler, 316 S.W.3d 599, 2009 Tenn. App. LEXIS 699 (Tenn. Ct. App. Oct. 19, 2009), cert. denied, Stem v. Wix, 562 U.S. 894, 131 S. Ct. 299, 178 L. Ed. 2d 144, 2010 U.S. LEXIS 6054 (U.S. 2010).

Evidence of the fight on a highway, the trailer arson, and another victim's murder was introduced to prove the sequence of events that occurred prior to the victim's murder in the case at issue and the identity of his murderers; the evidence of the altercation and arson preceding the victim's death was properly admitted as circumstantial proof which bore on the issue of intent and the identity of the perpetrators of the victim's murder and the evidence of the other victim's murder was relevant to prove the perpetrators of the victim's murder in the case at issue based upon the circumstances and events that occurred over the course of the weekend. Thus, any prejudicial effect of the proof of all three crimes or acts was outweighed by the probative value of that evidence and was necessary to support the state's burden of proof; further, the amount of evidence and the number of witnesses used were necessary to introduce all of the relevant evidence and to enable the state to carry its burden of proof. Sutton v. Bell, 683 F. Supp. 2d 640, 2010 U.S. Dist. LEXIS 5292 (E.D. Tenn. Jan. 22, 2010).

Prosecutor's and the witnesses's references to defendant's being on a "can crew" were ambiguous and did not clearly indicate that defendant had previously engaged in a crime or other wrongful act; the references to the can crew were not elicited to prove a character trait possessed by defendant but were elicited in conjunction with establishing the perpetrator's identity. The trial court properly instructed the jury not to draw any inferences about defendant from the references to the can crew. State v. Parker, 350 S.W.3d 883, 2011 Tenn. LEXIS 881 (Tenn. Sept. 23, 2011).

Trial court did not abuse its discretion by overruling the defense objection to the officer's testimony about defendant's prior incarceration because his testimony was offered to inform the jury of defendant's familiarity with the criminal justice system so that the jury could better evaluate the integrity of defendant's confession; the officer did not mention the crime, or discuss how long defendant had been incarcerated, or disclose when defendant was released from incarceration; and numerous other witnesses had already testified about defendant's prior incarceration. State v. Dotson, 450 S.W.3d 1, 2014 Tenn. LEXIS 694 (Tenn. Sept. 30, 2014), cert. denied, Dotson v. Tennessee, 191 L. Ed. 2d 565, 135 S. Ct. 1535, 575 U.S. 906, 2015 U.S. LEXIS 1830 (U.S. 2015).

In a premeditated first degree murder case, the trial court did not abuse its discretion in concluding that evidence of defendant's internet history, which included pornographic websites depicting women being raped, was admissible because the evidence that defendant planned and carried out staging the crime scene to make it appear that the victim had been raped in order to deflect suspicion from himself was highly probative of defendant's intent to kill the victim; defendant was not on trial for a sex crime; and the negative results of the rape kit, the placement of the victim's clothing, and the lack of injuries to her torso or legs all suggested that the victim was not raped. State v. Giles, 493 S.W.3d 504, 2016 Tenn. Crim. App. LEXIS 178 (Tenn. Crim. App. Mar. 10, 2016).

Trial court did not abuse its discretion in admitting a juvenile summons because it substantially complied with the rule's procedural requirements; the juvenile summons had substantial probative value because it helped establish defendant's identity as one of the perpetrators of the first degree felony murder. State v. Collins, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 295 (Tenn. Crim. App. Apr. 18, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 489 (Tenn. Aug. 8, 2018), cert. denied, Collins v. Tennessee, 139 S. Ct. 649, 202 L. Ed. 2d 498, -- U.S. --, 2018 U.S. LEXIS 7182 (U.S. Dec. 10, 2018).

Trial court did not abuse its discretion by permitting the state to introduce evidence of the 2012 and 2013 sales tax assessments issued to defendant's store by the Retail Accountability Program during defendant's trial for money laundering, among other crimes, because evidence that defendant continued to under report his gross sales and underpay his sales tax even after a meeting with an agent tended to establish that he acted intentionally and that his failure to remit the appropriate amount of sales tax was not the result of an accounting mistake or misunderstanding. State v. Burkes, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 371 (Tenn. Crim. App. May 14, 2018), cert. denied, Burkes v. Tennessee, 206 L. Ed. 2d 220, 140 S.

Ct. 1225, — U.S. —, 2020 U.S. LEXIS 903 (U.S. Feb. 24, 2020).

Trial court committed no error with regard to a witness's identification testimony because after the trial court sustained defendant's objection and instructed the jury to disregard the witness's response, the witness testified that he had seen defendant in person on three previous occasions, and defendant did not object to that testimony and did not ask for a jury-out hearing. State v. Jones, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 479 (Tenn. Crim. App. June 28, 2018), aff'd, 589 S.W.3d 747, 2019 Tenn. LEXIS 505 (Tenn. Nov. 13, 2019).

Trial court did not err by refusing to exclude a detective's testimony about his duty assignment because the detective did not testify that defendant was a repeat offender, only that he was himself assigned to the repeat offender squad at the time of trial. State v. Jones, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 479 (Tenn. Crim. App. June 28, 2018), aff'd, 589 S.W.3d 747, 2019 Tenn. LEXIS 505 (Tenn. Nov. 13, 2019).

Trial court committed no error with regard to a witness's identification testimony because it issued a curative instruction at defendant's request, and defendant did not request a jury-out hearing and did not object after the curative instruction. State v. Jones, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 479 (Tenn. Crim. App. June 28, 2018), aff'd, 589 S.W.3d 747, 2019 Tenn. LEXIS 505 (Tenn. Nov. 13, 2019).

Trial court did not err in admitting prior act evidence because the testimony of the challenged witnesses, including tesitmony regarding defendant's prior attack on the victim and defendant's affair with the victim, was relevant to a material issue in the case, including identity, premeditation, intent, and/or motive. State v. Smoot, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 739 (Tenn. Crim. App. Oct. 1, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 77 (Tenn. Jan. 16, 2019).

Trial court did not abuse its discretion in allowing the state to introduce evidence of defendant's gang affiliation and rank over codefendant to help establish defendant's identity and to provide contextual background and a completion of the story because, while the planning and execution of the robbery might not have been in furtherance of a gang mission or to otherwise benefit the gang, the fact that the three people involved happened to all be members of the same gang explained why they would come together to commit the robbery; and codefendant's affiliation with defendant through the gang made it more likely that her identification of him was accurate. State v. Lester, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 889 (Tenn. Crim. App. Dec. 10, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 201 (Tenn. Apr. 11, 2019).

Trial court did not err by admitting evidence of two prior drug purchases the victim made for defendant because it was relevant to show the arrangement between the victim and defendant regarding drug transactions and why the transaction immediately preceding the shooting might have resulted in defendant's shooting the victim. The evidence was not unduly prejudicial as the case was replete with evidence of drug activity and defendant was not charged a drug crime. State v. Ward, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 202 (Tenn. Crim. App. Apr. 1, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 331 (Tenn. July 18, 2019).

Trial court did not err by admitting evidence that defendant was incarcerated on a probation violation because it was relevant as contextual evidence to explain why he was wearing a GPS monitoring device and why he agreed to act as a confidential informant, and it was relevant to the charge of defendant's failure to appear in court on the day of the other offenses. State v. Brown, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 220 (Tenn. Crim. App. Apr. 8, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 387 (Tenn. Aug. 15, 2019).

Trial court did not err by admitting evidence of defendant's failure to provide the police with information that he had regarding a gang member and was in breach of defendant's agreement with the police because it was relevant to defendant's relationship with the gang member and defendant's utilization of the gang member to assist in committing the offenses, and by refusing to provide this information, defendant helped the gang member avoid detection by the police. State v. Brown, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 220 (Tenn. Crim. App. Apr. 8, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 387 (Tenn. Aug. 15, 2019).

Trial court did not abuse its discretion in admitting defendant's prior convictions because it complied with the requirements of the rule, and the evidence regarding defendant's mens rea for the offense of failure to appear was not so overwhelming as to make the convictions "needless"; the trial court found, on the record, that the material issue warranting admission of the convictions was proving the required mens rea based upon defendant's prior court experience. State v. Mathis, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 287 (Tenn. Crim. App. May 2, 2019).

State used a detective's testimony to show that defendant's lying about his military service, along with other inconsistencies, caused the detective to identify defendant as his primary suspect, and thus Tenn. R. Evid. 404(b) did not bar admission of the testimony; given defendant's claim that the police unfairly targeted him, the detective's testimony as to why he identified defendant as his primary suspect was relevant and highly probative, which was not substantially outweighed by the danger of

unfair prejudice. State v. Hendrix, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 304 (Tenn. Crim. App. May 14, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 481 (Tenn. Sept. 18, 2019).

Trial court did not err by admitting evidence related to his prior convictions for aggravated assault and rape of the murder victim because the evidence had high probative value of showing motive, intent, premeditation, and identity, and the probative value of the evidence outweighed the danger of unfair prejudice. The relevant convictions were for violent offenses and involved the victim in the present case, and defendant had been incarcerated for the crimes, and other evidence showed he made incriminating statements to a fellow inmate about his desire to kill the victim. State v. Rimmer, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 322 (Tenn. Crim. App. May 21, 2019).

Trial court did not err by admitting evidence of defendant's prior escape attempts, including testimony that two shanks were found in his jail cell because the evidence of the shanks corroborated details of defendant's escape plan that he intended to take a guard hostage and to kill a guard if necessary. The court instructed the jury that it was only to consider this evidence to determine defendant's consciousness of guilt. State v. Rimmer, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 322 (Tenn. Crim. App. May 21, 2019).

Although evidence of defendant's threat approximately two or three hours before the assault did not constitute a prior bad act, even if the evidence constituted a prior bad act, the record would support a finding that it was admissible to show defendant's intent when he entered the victim's house because a conviction for especially aggravated burglary required the state to prove that defendant entered the victim's house with intent to commit a felony, theft or assault. State v. Fykes, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 441 (Tenn. Crim. App. July 22, 2019).

Trial court did to err by admitting evidence of three prior incidents of domestic violence involving himself and the victim because they were highly probative of defendant's hostility toward the victim, malice, intent, and a settled purpose to harm the victim. Motive was a material issue at trial because it was circumstantial evidence of defendant's intent and his identity as the perpetrator. State v. Olivera, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 447 (Tenn. Crim. App. July 26, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 580 (Tenn. Dec. 5, 2019).

Trial court did not err by permitting a witness to testify about the two prior encounters between defendant and the victim because evidence that the victim and defendant had quarreled on two previous occasions and that defendant held a gun during one of the quarrels was relevant to establish defendant's motive for killing the victim and that he premeditated the victim's murder. State v. Watison, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 552 (Tenn. Crim. App. Aug. 30, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 47 (Tenn. Jan. 17, 2020).

In a case in which defendant was convicted of assault by offensive touching and sexual battery by an authority figure, the videotapes, showing the victim, one of defendant's granddaughters, swimming in the pool with her bathing suit pulled down, and the victim and her cousin changing out of their swimsuits in defendant's back yard, were admissible because the evidence was relevant to defendant's intent; the videotapes were probative of his interest in the young girls' bare bodies; and the defense theory was that defendant videotaped the victim and her cousin to show the victim's parents that she was out of control, making the videotapes highly probative and minimizing any prejudice resulting from their admission. State v. Melton, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 629 (Tenn. Crim. App. Oct. 7, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 103 (Tenn. Feb. 21, 2020).

Trial court did not err by admitting defendant's prior bad acts into evidence because evidence that defendant's livelihood was based on his continued act of prostituting the victim was relevant to his motive and intent for committing the sex trafficking and assault offenses. In addition, evidence that defendant had previously physically abused the victim and routinely threatened her with a gun was relevant to explain why the victim had not left defendant even though she testified that she was not physically restrained. State v. Jeffries, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 637 (Tenn. Crim. App. Oct. 10, 2019).

Trial court did not err by refusing to sever defendant's sexual crimes from the assault crimes because defendant's physical abuse of the victim was part of his continuing plan to subdue the victim in order to profit from her prostitution, the offenses were properly admissible under Tenn. R. Evid. 404(b) as the elements of the alternative sex trafficking charge explicitly made the assault relevant and the sex trafficking and promoting prostitution charges were relevant to defendant's motive and intent in the assault offenses. State v. Jeffries, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 637 (Tenn. Crim. App. Oct. 10, 2019).

Trial court did not err when it allowed the physician to testify about defendant grooming the victim for sexual abuse. State v. Wallace, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 94 (Tenn. Crim. App. Feb. 14, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 322 (Tenn. June 5, 2020).

Trial court properly determined that the probative value of the evidence was not outweighed by the danger of unfair prejudice be-

cause defendant did not address the probative value of the evidence as it related to the issues of premeditation, intent, and lack of mistake or accident, defendant attempted to show that the shooting was accidental, and evidence of his history of abusing the victim was probative to establish that the shooting was not accidental but was premeditated and intentional. State v. Fisher, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 155 (Tenn. Crim. App. Feb. 28, 2020).

Because defendant did not testify, the State could not impeach her testimony with evidence that she was on probation; instead, the evidence of her probation and the probation conditions was properly admitted as substantive evidence to explain her son's involvement in the offenses, not as impeachment evidence. State v. Jives-Nealy, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 156 (Tenn. Crim. App. Feb. 28, 2020), appeal denied, State v. Jives-Nealy, — S.W.3d —, 2020 Tenn. LEXIS 319 (Tenn. Aug. 11, 2020).

Evidence of defendant's probation and probation conditions were undoubtedly probative to help explain the added involvement of her son in the crime, and because the nature of defendant's underlying conviction was never revealed, the danger of unfair prejudice was drastically reduced; thus, the trial court's ruling did not amount to an abuse of discretion. State v. Jives-Nealy, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 156 (Tenn. Crim. App. Feb. 28, 2020), appeal denied, State v. Jives-Nealy, — S.W.3d —, 2020 Tenn. LEXIS 319 (Tenn. Aug. 11, 2020).

Detective's testimony that defendant had a red blood-like fluid on his hands when arrested and, during a search of the residence, the detective found two handguns covered in a similar blood-like fluid in the same room as defendant's clothes was permissible because the handguns matched the description of the guns used in the robbery and the evidence of a blood-like fluid on defendant's hands and on the handguns connected defendant to the handguns. State v. Dillard, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 259 (Tenn. Crim. App. Apr. 16, 2020).

In a case in which defendant was convicted of unlawful photography and attempted sexual battery, defendant's statement that he did not grab the victim's behind and that he had been frequently videoing blonde-haired women was properly admitted into evidence as his identity was placed at issue because there was no surveillance video obtainable from the store, the identification of defendant rested solely on the victim's and her mother's testimony, and the reliability of their testimony was challenged by the defense; and his statement provided evidence that defendant filmed the victim for the purpose of sexual arousal or gratification. State v. Lambert, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 304 (Tenn. Crim. App. Apr. 28, 2020).

Trial court did not err by allowing the State to introduce propensity evidence of an unindicted sale of a quantity of controlled substance by defendant within a year before the alleged offense because the trial court held a hearing outside the jury's presence and found that a material issue existed other than conduct conforming with a character trait, namely defendant's intent to possess the crack cocaine with the intent to sell, the trial court found that the State had established the sale by clear and convincing evidence, and the trial court found that the probative value of the prior sale was not outweighed by the danger of unfair prejudice. State v. Jones, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 313 (Tenn. Crim. App. Apr. 30, 2020).

Trial court did not err in admitting evidence of another murder to establish defendant's motive for killing prostitutes like the victim, and by extension, to provide contextual background to the jury. Furthermore, the trial court did not abuse its discretion by concluding that the methods used to commit the crimes were sufficiently similar to permit the admission of evidence of the other murder as the methods used in the murders were similar and the perpetrator took extraordinary steps to display the victims in a very demeaning manner. State v. Mendenhall, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 343 (Tenn. Crim. App. May 14, 2020).

Because recordings of defendant talking to a jailhouse informant revealed defendant's consciousness of defendant's own guilt, disclosed defendant's motive of killing prostitutes at truck stops, and contradicted defendant's claim of alibi, the recordings and proof defendant's solicitation of the informant to commit murder by killing witnesses were properly admissible. Furthermore, the trial court did not abuse its discretion by determining that the probative value of the evidence outweighed the danger of its unfairly prejudicial effect. State v. Mendenhall, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 343 (Tenn. Crim. App. May 14, 2020).

Trial court did not err by admitting defendant's statement to police without redactions to exclude references to out-of-state bad act evidence to establish defendant's motive for killing prostitutes like the victim, and by extension, to provide contextual background to the jury. Although defendant claimed that defendant did not commit the other murders, defendant implicated defendant in the killings and cover-up. State v. Mendenhall, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 343 (Tenn. Crim. App. May 14, 2020).

Trial court did not abuse its discretion by admitting defendant's statement to defendant's spouse that defendant had been previously incarcerated and therefore knew people who could put a bomb in the spouse's car because it was an important part of the State of Tennes-

see's proof. Furthermore, it was highly probative of defendant's intent to coerce defendant's spouse to drop the charges against defendant and of whether the spouse's fear of defendant's threat was reasonable. State v. Jackson, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 353 (Tenn. Crim. App. May 14, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 454 (Tenn. Aug. 5, 2020).

Trial court properly sentenced defendant to seven years in the Department of Correction after a jury convicted him of felony theft of property over $10,000 because, given defendant's confusing and hard to believe depiction of the events in his statement, the evidence showed that defendant knew what package thefts entailed, the trial court gave jury instructions regarding the proper consideration of any evidence of prior crimes defendant might have committed, and the victim qualified as "owner" within the terms of the statute where she constructively possessed the package that was stolen from her doorstep, and the stolen items were posted for sale under defendant's social media account. State v. Bennett, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 488 (Tenn. Crim. App. July 16, 2020).

Trial court did not err by admitting evidence of threats defendant made against his wife and her family prior to the murder because the threats were directed toward the victim both specifically and as a member of the wife's family, and evidence of the threats allowed the State the opportunity to establish the defendant's intent and motive to harm the victim, and the probative value of this evidence was not outweighed by the danger of unfair prejudice. State v. Walton, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 571 (Tenn. Crim. App. Aug. 20, 2020).

Trial court did not abuse its discretion by admitting the police department's gang validation form that identified defendant as a member of a particular gang because it was probative as to defendant's identity, motive, and intent. The trial court did not err by finding that the probative value of the gang-affiliation evidence was not outweighed by the danger of unfair prejudice because the section on the defendant's form for "Gang Rank" was blank. State v. Sims, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 588 (Tenn. Crim. App. Aug. 28, 2020).

Trial court did not err in admitting evidence of escape attempts because it was relevant to establish consciousness of guilt. State v. Rimmer, — S.W.3d —, 2021 Tenn. LEXIS 71 (Tenn. Apr. 16, 2021).

Trial court did not err in admitting evidence of defendant's prior convictions for rape and aggravated assault of the victim because it was probative of identity, motive, intent, and premeditation, and the trial court acted to mitigate the risk of unfair prejudice by excluding evidence of the details of the prior offenses. State v. Rimmer, — S.W.3d —, 2021 Tenn. LEXIS 71 (Tenn. Apr. 16, 2021).

Trial court did not err when it denied defendant's motion to exclude evidence about the box containing drugs and a gun because the State did not introduce evidence of the box and its contents to prove that defendant acted in conformity with a character trait involving the propensity to engage in criminal activity as the evidence was offered to show defendant's motive in orchestrating the criminal events when the box was lost; and evidence of the box was introduced to help the jury understand the evidence and the motive behind the events that followed. Further, defendant's motive outweighed any unfair prejudice from the jury's possible inference that defendant engaged in another criminal act. State v. Harris, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 59 (Tenn. Crim. App. Feb. 23, 2021).

Evidence that defendant gave a state trooper incorrect identifying information during a traffic stop was admissible at defendant's trial for driving under the influence (DUI) because the evidence was relevant to defendant's impairment for DUI. While such evidence may have been somewhat prejudicial, the probative value of the evidence was not outweighed by the danger of unfair prejudice. State v. Shumacker, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 60 (Tenn. Crim. App. Feb. 24, 2021).

Trial court did not abuse its discretion in admitting evidence of first defendant's prior arrest to show motive and intent because the prior arrest was introduced to help the jury understand the evidence and the motive behind the events that followed. State v. Williams, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 98 (Tenn. Crim. App. Mar. 19, 2021).

Trial court did not err by admitting evidence that defendant previously solicited others to commit a robbery because they were part of a continuing plan to have someone rob the victim of his drugs and money, it was relevant to the issue of intent and the State's theory of criminal responsibility, and the probative value of the evidence was great given the defense that defendant was not involved in the home invasion and the victim's death. State v. Perry, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 105 (Tenn. Crim. App. Mar. 23, 2021).

15. Evidence Properly Excluded.

The chancellor did not abuse his judicial discretion by excluding the evidence of plaintiff's alleged prior fraudulent dealings with insurance companies not party to the case, where he determined that to admit all such evidence would confuse the jury and cause undue delay. Otis v. Cambridge Mut. Fire Ins. Co., 850 S.W.2d 439, 1992 Tenn. LEXIS 722 (Tenn. 1992), rehearing denied, — S.W.2d —, 1993 Tenn. LEXIS 142 (Tenn. Mar. 29, 1993).

In a wrongful death action against a truck driver and the driver's employer, where plaintiff's allegations included a claim of negligent entrustment, evidence that the driver was conscientious in the care and maintenance of his truck, and testimony that the driver had avoided a rear-end collision moments before the accident in the case were not admissible. Woodson v. Porter Brown Limestone Co., 916 S.W.2d 896, 1996 Tenn. LEXIS 96 (Tenn. 1996).

Trial court did not abuse its discretion in defendant's murder trial by prohibiting defense counsel from questioning a witness about the victim being known as a burglar, when the state of Tennessee's theory was that defendant killed the victim in retaliation for the victim burglarizing defendant's home and defendant sought to present evidence that other people may have wanted to retaliate against the victim for breaking into their homes, as the court did not find the proof of the victim's committing other burglaries to be clear and convincing. State v. Buckingham, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 637 (Tenn. Crim. App. Aug. 20, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 70 (Tenn. Jan. 16, 2019).

Trial court properly determined that this rule excluded evidence of the victim's sister's unrelated allegations of sexual abuse, properly finding that allegations irrelevant because there was no factual basis to conclude that they were false State v. Blackwell, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 353 (Tenn. Crim. App. June 13, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 334 (Tenn. June 5, 2020).

Trial court properly determined that this rule excluded evidence of the victim's sister's unrelated allegations of sexual abuse, properly finding that allegations irrelevant because there was no factual basis to conclude that they were false State v. Blackwell, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 353 (Tenn. Crim. App. June 13, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 334 (Tenn. June 5, 2020).

16. Evidence Improperly Included.

Court properly allowed testimony that the witness had previously stated that she was "scared" of defendant because it was not evidence of a prior bad act; the witness did not testify as to any prior acts committed by defendant, and her testimony only created an inference of some possible, undefined prior bad act. The witness testified that defendant had never done anything to her or had any altercations with her. State v. Leath, 461 S.W.3d 73, 2013 Tenn. Crim. App. LEXIS 461 (Tenn. Crim. App. June 3, 2013), appeal denied, — S.W.3d —, 2013 Tenn. LEXIS 981 (Tenn. Nov. 13, 2013), cert. denied, Leath v. Tennessee, 189 L. Ed. 2d 173, 134 S. Ct. 2292, — U.S. —, 2014 U.S. LEXIS 3508 (U.S. 2014).

In defendant's death penalty case, because an out-of-state murder did not qualify as a signature crime the court erred by allowing the proof of the third murder; while there were similarities between the murders, those similarities failed to establish a modus operandi that was comparable to a signature. The erroneous admission of the evidence surrounding the other murder more probably than not affected the outcome of the trial and therefore, it was not harmless. State v. Jones, 450 S.W.3d 866, 2014 Tenn. LEXIS 669 (Tenn. Sept. 25, 2014).

Circuit court erred in by admitting evidence of defendant's other crimes because the evidence of his identity, while legally sufficient, was not insurmountable where the photographic lineups were less than 100 percent conclusive, and only one witness was 100 percent sure of her identification at trial, and the "other crimes" evidence was not relevant to a material issue other than defendant's character inasmuch as the only evidence that was relevant was the physical evidence recovered—a check—not the circumstances surrounding its recovery, and the prejudicial effect of defendant's involvement in subsequent burglaries blurred the jury's view of the weak evidence of his identity. State v. Cox, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 141 (Tenn. Crim. App. Mar. 6, 2019).

In an unlawful photography case, defendant's statement that he filmed women was improperly admitted into evidence because defendant's identity was not an issue as he was captured on a store's surveillance video and conclusively identified by the victim; he did not make the issue of motive material; nothing in his statement suggested that his conduct was motivated by a desire for sexual gratification; he did not assert either accident or mistake of fact as a defense to the charged offense; and the State's argument that his admission to videotaping other women proved that either a photograph or video existed, despite that no video or photograph of the victim was ever recovered, was precisely the type of inference prohibited by this rule. State v. Lambert, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 303 (Tenn. Crim. App. Apr. 28, 2020).

In an unlawful photography case, the trial court erred by admitting defendant's statement that he filmed women into evidence because his identity was not an issue as he was captured on a store's surveillance video and conclusively identified by the victim; he did not make the issue of motive material; nothing in the statement suggested that defendant's conduct was motivated by a desire for sexual gratification; he did not assert either accident or mistake of fact as a defense to the charged offense; and the State wanted to admit defendant's statement to prove that since he had videotaped other women, he had necessarily videotaped or photographed the victim, which was precisely the type of inference prohibited by this rule. State

v. Lambert, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 305 (Tenn. Crim. App. Apr. 28, 2020).

Court erred by admitting evidence about whether a witness had sold methamphetamine at the location where the shooting occurred because even if the witness was a drug dealer in the past, it was not relevant to any material issue because whether the witness allegedly sold drugs from his residence in the past did not make it more or less likely that defendant committed the charged crimes. State v. Moon, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 55 (Tenn. Crim. App. Feb. 14, 2021).

Trial court abused its discretion by admitting prior bad act evidence under that defendant abused another child four years before the victim's death because the fact that defendant fed both children, placed them in swings and cribs, and both suffered head trauma were inadequate to create a logical connection between the two events. The admission of the evidence to show intent or a common scheme or plan was also improper, and the error was not harmless because the expert testimony was conflicting as to the estimated time of death and the State significantly relied on the prior bad act evidence. State v. Huse, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 102 (Tenn. Crim. App. Mar. 23, 2021).

17. Background Evidence.

In terms of Tenn. R. Evid. 404(b), when the state seeks to offer evidence of other crimes, wrongs, or acts that is relevant only to provide a contextual background for the case, the state must establish, and the trial court must find, that: (1) The absence of the evidence would create a chronological or conceptual void in the state's presentation of its case; (2) The void created by the absence of the evidence would likely result in significant jury confusion as to the material issues or evidence in the case; and (3) The probative value of the evidence is not outweighed by the danger of unfair prejudice. State v. Gilliland, 22 S.W.3d 266, 2000 Tenn. LEXIS 341 (Tenn. 2000).

Trial court abused its discretion in admitting evidence of defendant's involvement in a prior shooting where the evidence possessed only a modicum of probative value as contextual background evidence and this slight value was clearly outweighed by the danger of unfair prejudice. State v. Gilliland, 22 S.W.3d 266, 2000 Tenn. LEXIS 341 (Tenn. 2000).

Testimony that the victim had previously been told to leave the residence due to defendant and his girlfriend's arguing and that defendant was angry when the victim was let back into the residence was properly admitted to explain why the victim started a physical altercation with defendant. State v. Davenport, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 513 (Tenn. Crim. App. Aug. 23, 2019).

18. Foundation for Testimony.

The proper foundation for the admission of opinion testimony pertaining to another witness's character for truthfulness requires a demonstration that the opinion is rationally based on the perception of the witness and would be helpful to the jury in determining the fact of credibility. State v. Dutton, 896 S.W.2d 114, 1995 Tenn. LEXIS 96 (Tenn. 1995).

To warrant admission of testimony about another person's reputation for truthfulness, it is necessary to qualify the reputation witness through a showing of such acquaintance with the person, the community in which he has lived and the circles in which he has moved, as to speak with authority of the terms in which the person is generally regarded. State v. Dutton, 896 S.W.2d 114, 1995 Tenn. LEXIS 96 (Tenn. 1995).

19. Procedure for Joinder.

Before two or more offenses may properly be joined in the same indictment, Tenn. R. Civ. P. Rule 14(b)(1) requires that the trial court find that the offenses are a part of a common scheme or plan, and comply with the procedural requirements of Tenn. R. Evid. 404(b). State v. Hoyt, 928 S.W.2d 935, 1995 Tenn. Crim. App. LEXIS 965 (Tenn. Crim. App. 1995), overruled in part, Spicer v. State, 12 S.W.3d 438, 2000 Tenn. LEXIS 57 (Tenn. 2000).

Two minor victims were direct witnesses to the sexual offenses committed by defendant against the other, and the offenses committed against each victim were substantially similar to the offenses committed against the other victim; each of the victims' testimony as to the crimes against the other was relevant under Tenn. R. Evid. 404(b) to rebut the theory that someone other than defendant had committed the alleged offenses, and the probative value of the evidence was not outweighed by the danger of unfair prejudice. State v. Osborne, 251 S.W.3d 1, 2007 Tenn. Crim. App. LEXIS 689 (Tenn. Crim. App. Aug. 28, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 59 (Tenn. Jan. 28, 2008).

20. Prejudice.

In determining whether exclusion is required by Tenn. R. Evid. 404(b), the issue is not whether the evidence is prejudicial, but whether it is unfairly prejudicial. State v. Vann, 976 S.W.2d 93, 1998 Tenn. LEXIS 513 (Tenn. 1998), rehearing denied, — S.W.2d —, 1998 Tenn. LEXIS 580 (Tenn. Oct. 19, 1998), cert. denied, Vann v. Tennessee, 526 U.S. 1071, 119 S. Ct. 1467, 143 L. Ed. 2d 551, 1999 U.S. LEXIS 2664 (1999).

"Unfair prejudice" is an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one. State v. Vann, 976 S.W.2d 93, 1998 Tenn. LEXIS 513 (Tenn. 1998), rehearing denied, — S.W.2d —, 1998 Tenn. LEXIS 580 (Tenn. Oct.

19, 1998), cert. denied, Vann v. Tennessee, 526 U.S. 1071, 119 S. Ct. 1467, 143 L. Ed. 2d 551, 1999 U.S. LEXIS 2664 (1999).

Photographs were properly admitted despite the fact that the trial judge recognized their prejudicial effect, as most evidence introduced during the trial of any lawsuit, criminal or civil, has a prejudicial impact on the position of one party to the lawsuit. State v. Vann, 976 S.W.2d 93, 1998 Tenn. LEXIS 513 (Tenn. 1998), rehearing denied, — S.W.2d —, 1998 Tenn. LEXIS 580 (Tenn. Oct. 19, 1998), cert. denied, Vann v. Tennessee, 526 U.S. 1071, 119 S. Ct. 1467, 143 L. Ed. 2d 551, 1999 U.S. LEXIS 2664 (1999).

Trial court was correct in utilizing Tenn. R. Evid. 404(b) to determine the admissibility of defendant's "other crimes" evidence, as it reflected upon the character of defendant; however, although relevant, the trial court erred in admitting evidence of the specific offenses for which defendant had been previously convicted instead of accepting a stipulation concerning the defendant's status as a felon, as the probative value of the evidence was outweighed by the risk of unfair prejudice. State v. James, 81 S.W.3d 751, 2002 Tenn. LEXIS 328 (Tenn. 2002).

In a rape of a child case, the court committed reversible error by admitting evidence of other, non-charged, sexual encounters between defendant and the victim because it was not needed to provide the jury the "complete story"; the victim testified in graphic detail about each of the charged offenses, and the state presented evidence that defendant sought a romantic relationship with the victim. State v. Montgomery, 350 S.W.3d 573, 2011 Tenn. Crim. App. LEXIS 233 (Tenn. Crim. App. Mar. 31, 2011).

Petitioner failed to show with clear and convincing evidence that his trial counsels' failure to file pretrial motions preventing the State from introducing evidence of prior bad acts was prejudicial; he failed to conduct a Tenn. R. Evid. 404(b) hearing within his evidentiary hearing to prove deficient performance or prejudice, and thus he was not entitled to post-conviction relief. Grimes v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 23 (Tenn. Crim. App. Jan. 16, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 439 (Tenn. Aug. 5, 2020).

Court erred in allowing testimony regarding defendant's witness's involvement in chop shops and misdemeanor convictions because defendant's witness played a critical role in the defense theory—he was the only witness who corroborated defendant's account that he had authority to borrow the tractor, and the multiple errors sent a message to the jury that the witness was a shady character who had attracted the continuing attention of the police for at least thirty years, and the trial court itself connected the witness to a notorious criminal and convicted murderer. State v. Seaton, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 63 (Tenn. Crim. App. Feb. 28, 2021).

21. Prior Misconduct.

In an aggravated child abuse case, where defendant struck his stepson on two separate dates with a braided heavy-duty extension cord, the trial court abused its discretion in consolidating the indictments, as the two offenses did not constitute parts of a common scheme or plan, because the evidence relating to the method employed to commit the offenses was markedly different, and the evidence of each offense was not relevant to any material issue in the trial of the other offense. That error, in conjunction with the erroneous admission of evidence of other uncharged crimes, wrongs, or acts of abuse, appeared to have affected the jury's verdict, because the evidence supporting the convictions was legally sufficient but not overwhelming. State v. Toliver, 117 S.W.3d 216, 2003 Tenn. LEXIS 857 (Tenn. 2003).

In a product liability case where patient's aorta was cut during surgery, a trial court erred by excluding evidence of other incidents involving medical devices of the same model under Tenn. R. Evid. 404(b) because Rule 404(b) applied to a "person"; eighteen other incidents were admissible to show the dangerous nature of the product or the manufacturer's knowledge of the dangerous nature. Sparks v. Mena, 294 S.W.3d 156, 2008 Tenn. App. LEXIS 65 (Tenn. Ct. App. Feb. 6, 2008).

Defendant's conviction for premeditated first-degree murder was appropriate because trial court did not abuse discretion in admitting testimony under Tenn. R. Evid. 404(b) from other witnesses that defendant had on prior occasions been violent toward the victim; evidence of his prior assaults on the victim showed the violent nature of their relationship and defendant's hostility toward the victim. State v. Gilley, 297 S.W.3d 739, 2008 Tenn. Crim. App. LEXIS 660 (Tenn. Crim. App. Aug. 13, 2008).

Testimony of defendant's sons about defendant breaking the victim's cell phone and slapping the victim was admissible as probative of defendant's motive to kill the victim, as defendant thought the victim was going to tell police he had been sexually abusing their daughter. State v. Hawkins, 519 S.W.3d 1, 2017 Tenn. LEXIS 272 (Tenn. May 1, 2017).

22. Interlocutory Appeals.

In a murder trial, T.R.A.P. 9 did not permit an interlocutory appeal of the court's ruling on the admissibility of evidence of the prior acts of physical abuse committed by the defendant against the victim under Tenn. R. Evid. 404(b), and because the trial had yet to begin, the appeal was largely advisory in nature; on remand, the trial court was directed to consider the admissibility of the state's proposed evidence by applying the specific safeguards set

forth in Rule 404(b). State v. Gilley, 173 S.W.3d 1, 2005 Tenn. LEXIS 789 (Tenn. 2005).

23. Establish the Identity.

Just as federal courts have concluded Fed. R. Evid. 404(b) permits evidence of other acts to prove that a defendant was in fact the perpetrator of the conduct at issue, such evidence is likewise admissible under the Tennessee rule, Tenn. R. Evid. 404(b), to establish the identity of the perpetrator. Sutton v. Bell, 683 F. Supp. 2d 640, 2010 U.S. Dist. LEXIS 5292 (E.D. Tenn. Jan. 22, 2010).

24. Waiver.

Defendant received a favorable ruling on other acts issue and any other challenge on these grounds was waived; he requested the trial court to only consider the acts pertinent to the charged crimes, he acquiesced in the trial court's determination that it would only consider allegations in Obion County, and the defense submitted transcripts of the interviews that included the inadmissible material. State v. Haven, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 431 (Tenn. Crim. App. June 19, 2020).

25. Instructions.

Defendant's petition for post-conviction relief was properly denied as counsel was not ineffective because any error resulting from counsel's failing to request a jury instruction limiting the use of defendant's statement of a prior bad act was harmless in light of the substantial evidence of defendant's guilt as the jury heard testimony that a confidential informant (CI) contacted defendant and arranged to purchase some pills, and that defendant sold two morphine pills to the CI; and the jury heard an audio recording of the transaction. Sizemore v. State, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 318 (Tenn. Crim. App. May 20, 2019).

Defendant's petition for post-conviction relief was properly denied as the appellate court did not need to determine whether counsel performed deficiently by failing to include the issue of the lack of a limiting instruction regarding the use of defendant's statement of a prior bad act in a motion for new trial because defendant had failed to show that he was prejudiced by the lack of a limiting instruction, and, therefore, had failed to establish prejudice on the current claim. Sizemore v. State, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 318 (Tenn. Crim. App. May 20, 2019).

26. Procedural Requirements.

Trial court's mid-trial hearing on the admissibility of other acts evidence did not entitle defendant to relief because (1) defendant waived the issue by not including the issue in defendant's new trial motion, and (2) defendant waived a claim of being prejudiced when the jury returned to the courtroom to find an empty witness box, as defendant did not object. State v. Lane, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 600 (Tenn. Crim. App. Sept. 20, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 111 (Tenn. Feb. 19, 2020).

27. Probative Value.

Defendant's petition for post-conviction relief was properly denied as counsel was not ineffective because the trial court considered the admitted statement of a prior bad act to be probative of defendant's acting knowingly in selling the two morphine pills to the confidential informant; and the trial court weighed the probative value and the prejudicial effect of the statement. Sizemore v. State, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 318 (Tenn. Crim. App. May 20, 2019).

Trial court did not err in denying defendant's request for a mistrial after the victim inadvertently referenced in narrative form in response to an open-ended question by the State of Tennessee during the victim's testimony that defendant said defendant would kill the victim before defendant returned to jail because the statement was probative of defendant's motive and intent to kidnap the victim to keep the victim from telling anyone about defendant's assault of the victim and the statement was not unduly prejudicial to defendant. State v. Mansir, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 635 (Tenn. Crim. App. Sept. 25, 2020).

28. Hearing

Trial counsel was not ineffective for waiving petitioner's presence at the hearing because it was a strategic decision so that the witness could not identify petitioner, just two weeks before his trial for running over the victim, as the man who picked up the witness and made incriminating statements about running over the victim. Hudson v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 195 (Tenn. Crim. App. Mar. 23, 2020).

Rule 405. Methods of proving character. —

(a) Reputation or Opinion. — In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. After application to the court, inquiry on cross-examination is allowable into relevant specific instances of conduct. The conditions which must be satisfied before allowing inquiry on cross-examination about specific instances of conduct are:

(1) The court upon request must hold a hearing outside the jury's presence,

(2) The court must determine that a reasonable factual basis exists for the inquiry, and

(3) The court must determine that the probative value of a specific instance of conduct on the character witness's credibility outweighs its prejudicial effect on substantive issues.

(b) Specific Instances of Conduct. — In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

Advisory Commission Comments. This rule changes Tennessee law, which does not permit character to be proved by personal opinion.

Cross-examination of character witnesses for the accused raises a delicate problem. The examining lawyer can ask the witness about rumored arrests and charges concerning the defendant, because the witness's knowledge of the rumors might impeach the witness in the eyes of the jurors. If the witness admits having heard unfavorable rumors, the jury may decide that the witness's reputation or opinion testimony is entitled to little weight. If the witness has not heard the rumors, the witness's testimony may likewise be taken with a grain of salt because the witness is unfamiliar with the accused or the accused's community.

The indirect effect of such a cross-examination may be the more damaging to the accused. While the jury will be instructed to consider the rumors only as affecting the character witness's credibility, the practical danger is that such rumors — even if untrue — place the defendant's character in a bad light with the jurors. In an effort to alleviate the problem, the proposed rule sets out detailed procedural safeguards. The cross-examiner must apply to the court for permission to inquire into specific instances of conduct, the jury must be excused, and the court must determine both that a factual basis exists and that probative value for impeachment outweighs prejudicial effect on the accused's character.

Part (b) allows substantive proof of specific acts where the character is an element of a cause of action or a defense. For instance, the defendant who called a defamed plaintiff a "crook" can prove the plaintiff embezzled funds.

Law Reviews. Comparing the Tennessee and Federal Rules of Evidence (Donald F. Paine), 26 Tenn. B.J. 37 (1990).

Evidence of Character Under the New Rules (Donald F. Paine), 26 Tenn. B.J. 31 (1990).

Relevance: The Tennessee Balancing Act (Robert Banks, Jr., Melissa Maravich), 57 Tenn. L. Rev. 33 (1989).

The Ten Commandments of Direct Examination (Donald F. Paine), 36 Tenn. B.J. 20 (2000).

NOTES TO DECISIONS

Analysis

1. Prejudice.
2. Specific Instances of Conduct.
3. Reasonable Factual Basis.
4. Form of Testimony.

1. Prejudice.

In a wrongful death action against a truck driver and the driver's employer, where plaintiff's allegations included a claim of negligent entrustment, plaintiff should have been allowed to introduce evidence of the driver's prior accidents. Woodson v. Porter Brown Limestone Co., 916 S.W.2d 896, 1996 Tenn. LEXIS 96 (Tenn. 1996).

Before allowing cross-examination about specific instances of defendant's violent conduct, the trial court failed to determine that a reasonable factual basis existed and that the probative value outweighed the prejudicial effect, plus after defendant denied threatening to kill a detective, the trial court improperly permitted extrinsic evidence to prove this took place; while the trial court erred, the error was harmless as the proof supported defendant's conviction and he opened the door for the State to offer the evidence. State v. Land, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 99 (Tenn. Crim. App. Feb. 19, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 364 (Tenn. July 20, 2020).

2. Specific Instances of Conduct.

In a prosecution for aggravated assault, the victim's convictions for assault and prior bad acts involving violence were admissible to corroborate the defendant's theory that the victim was the initial aggressor in the affray and the fact that the defendant was unaware of the victim's prior convictions and bad acts prior to their encounter did not affect the admissibility of this evidence to establish that the victim was the initial aggressor. State v. Hill, 885 S.W.2d 357, 1994 Tenn. Crim. App. LEXIS 73 (Tenn. Crim. App. 1994).

In a prosecution for aggravated assault, the trial court's ruling that the defendant could not ask the victim about his prior convictions for assault or recent prior bad acts involving violent conduct unless the victim admitted he was the initial aggressor was erroneous. State v. Hill, 885 S.W.2d 357, 1994 Tenn. Crim. App. LEXIS 73 (Tenn. Crim. App. 1994).

In a murder prosecution, evidence that the victim had committed an assault on a third person five and one-half years before the shooting, considered with the fact that the victim had brutally beaten defendant two years before the shooting, should have been admitted as probative on the issue of first aggressor, and, while prejudicial to the state's theory, would not have been unduly prejudicial. State v. Ruane, 912 S.W.2d 766, 1995 Tenn. Crim. App. LEXIS 584 (Tenn. Crim. App. 1995).

Trial court erred by allowing defendant's wife to be cross-examined about another alleged rape during defendant's trial for rape of a child because it failed to comply with the requirements of this rule as the State failed to present proof that the other accuser had reported her allegation prior to the instant victim's allegations, and the trial court failed to give a limiting instruction regarding the cross-examination. The error was not harmless because the only evidence of defendant's guilt was the victim's testimony. State v. Mendez, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 14 (Tenn. Crim. App. Jan. 7, 2019).

3. Reasonable Factual Basis.

Reports of a defendant's bad character which do not arise until after the crime for which the defendant is being tried are inherently suspect and may not form the basis for inquiry under Tenn. R. Evid. 405. State v. Nesbit, 978 S.W.2d 872, 1998 Tenn. LEXIS 533 (Tenn. 1998), rehearing denied, — S.W.2d —, 1998 Tenn. LEXIS 700 (Tenn. Nov. 23, 1998), cert. denied, Nesbit v. Tennessee, 526 U.S. 1052, 119 S. Ct. 1359, 143 L. Ed. 2d 520, 1999 U.S. LEXIS 2382 (1999).

4. Form of Testimony.

Just because defendant, in the absence of an objection from the State, did not limit his testimony to the victim's reputation or to the form of an opinion as required by the rule did not mean that his testimony did not amount to character evidence. State v. Land, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 99 (Tenn. Crim. App. Feb. 19, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 364 (Tenn. July 20, 2020).

Rule 406. Habit; routine practice. —

(a) Evidence of the habit of a person, an animal, or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eye-witnesses, is relevant to prove that the conduct of the person, animal, or organization on a particular occasion was in conformity with the habit or routine practice.

(b) A habit is a regular response to a repeated specific situation. A routine practice is a regular course of conduct of an organization.

Advisory Commission Comments. Tennessee has long admitted animal habit. *Copley v. State*, 153 Tenn. 189, 281 S.W. 460 (1925), is the leading case. Authorities supporting admissibility of human habit and business custom are collected in *Tennessee Law of Evidence* § 30.

The second paragraph defines habit and routine practice, emphasizing the need for a "regular response" when a person, animal, or organization is faced with a given situation.

Law Reviews. Relevance: The Tennessee Balancing Act (Robert Banks, Jr., Melissa Maravich), 57 Tenn. L. Rev. 33 (1989).

NOTES TO DECISIONS

Analysis

1. Proof of Habit Admissible.
2. Prejudice.
3. Evidence Properly Excluded.

1. Proof of Habit Admissible.

Proof of judge's habit to inform an accused of his constitutional rights under Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274, 1969 U.S. LEXIS 1434 (1969), superseded by statute as stated in, Aguirre-Mata v. State, 125 S.W.3d 473, 2003 Tex. Crim. App. LEXIS 87 (2003), superseded by statute as stated in, Wood v. Dretke, — U.S. —, — S. Ct. —, — L. Ed. 2d —, 2004 U.S. Dist. LEXIS 11087 (2004), and to comply with State v. Mackey, 553 S.W.2d 337, 1977 Tenn. LEXIS 579 (Tenn. 1977), superseded by statute as stated in, State v. Chastain, 871 S.W.2d 661, 1994 Tenn. LEXIS 26 (Tenn. 1994), superseded by statute as stated in, State v. Wilson, 31 S.W.3d 189, 2000 Tenn. LEXIS 519 (Tenn. 2000) and Tenn. R. Crim. P. 11 before accepting a plea of guilty, and the transcripts of

three unrelated guilty plea proceedings in which the judge advised an accused of his relevant constitutional rights, were admissible to show defendant was explained his rights and voluntarily waived them. Taylor v. State, 814 S.W.2d 374, 1991 Tenn. Crim. App. LEXIS 86 (Tenn. Crim. App. 1991).

2. Prejudice.

Testimony of defendant's two previous sexual partners about his propensity to bite his partner during sex was admissible; this evidence was relevant to establish the identity of the person who had raped and murdered victim, and its probative value was not substantially outweighed by its prejudicial effect. State v. Cazes, 875 S.W.2d 253, 1994 Tenn. LEXIS 28 (Tenn. 1994), rehearing denied, — S.W.2d —, 1994 Tenn. LEXIS 107 (Tenn. Apr. 4, 1994), cert. denied, Cazes v. Tennessee, 513 U.S. 1086, 115 S. Ct. 743, 130 L. Ed. 2d 644, 1995 U.S. LEXIS 228 (1995).

3. Evidence Properly Excluded.

In a wrongful death action against a truck driver and the driver's employer, where plaintiff's allegations included a claim of negligent entrustment, evidence that the driver was conscientious in the care and maintenance of his truck, and testimony that the driver had avoided a rear-end collision moments before the accident in the case were not admissible. Woodson v. Porter Brown Limestone Co., 916 S.W.2d 896, 1996 Tenn. LEXIS 96 (Tenn. 1996).

Rule 407. Subsequent remedial measures. —

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent remedial measures is not admissible to prove strict liability, negligence, or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving controverted ownership, control, or feasibility of precautionary measures, or impeachment.

Advisory Commission Comments. This rule and current Tennessee law exclude subsequent measures to remedy defects to prove negligence or culpable conduct. *Illinois C. R. Co. v. Wyatt*, 104 Tenn. 432, 58 S.W. 308 (1900). The rule adds, however, a specific exclusion in strict liability actions as well. Such is the majority federal view, including that of the Sixth Circuit. See *Hall v. American S.S. Co.*, 688 F.2d 1062 (6th Cir. 1982) (admiralty). Manufacturers should be encouraged to improve product designs without fear of encountering damaging evidence.

A defendant who controverts ownership, control, or feasibility opens the door for the plaintiff to introduce subsequent remedial measures. Similarly, an expert who opines that a design could not be improved upon invites attack by the impeachment exception to this otherwise exclusionary rule.

Law Reviews. Paine on Procedure: Punitive Damages: "Hodges" and "State Farm" (Donald F. Paine), 39 Tenn. B.J. 33 (2003).

Tennessee Attempts to Tighten the Purse Strings on Punitive Damages: Hodges v. S.C. Toof & Co. (P. Steven Hacker), 60 Tenn. L. Rev. 983 (1993).

NOTES TO DECISIONS

1. Application.

"Remedial" action for purposes of Tenn. R. Evid. 407 contemplates changing a situation, usually an unsafe property or product, to prevent the situation from causing further injury. Rothstein v. Orange Grove Ctr., 60 S.W.3d 807, 2001 Tenn. LEXIS 808 (Tenn. 2001).

Rule 408. Compromise and offers to compromise. —

Evidence of (1) furnishing or offering to furnish or (2) accepting or offering to accept a valuable consideration in compromising or attempting to compromise a claim, whether in the present litigation or related litigation, which claim was disputed or was reasonably expected to be disputed as to either validity or amount, is not admissible to prove liability for or invalidity of a civil claim or its amount or a criminal charge or its punishment. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence actually obtained during

discovery merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution; however, a party may not be impeached by a prior inconsistent statement made in compromise negotiations.

Advisory Commission Comments. The rule would work only slight changes in Tennessee evidence law. One difference is that statements of fact during settlement negotiations become inadmissible, but that is an improvement over the present practice admitting the fact statements.

Also salutary is the provision excluding compromises and settlement offers in "related litigation." The drafted language would change the suggestion to the contrary in *Tennessee Coach Co. v. Young*, 18 Tenn. App. 592, 80 S.W.2d 107 (1934). Consistent with the proposal is Tenn. Code Ann. § 29-11-105(b), excluding evidence of settlement by one tortfeasor where another goes to trial.

Tennessee courts exclude settlements and settlement offers only in civil trials, admitting them in criminal prosecutions. *Carter v. State*, 161 Tenn. 698, 34 S.W.2d 208 (1931). The proposed rule excludes such evidence in both civil and criminal trials.

Advisory Commission Comments [1993]. Where punitive damages are at issue, compromise offers become relevant and admissible despite Rule 408. See *Hodges v. S.C. Toof & Company*, 833 S.W.2d 896 (Tenn. 1992).

Law Reviews. Alternative Dispute Resolution in the Personal Injury Forum, 26 U. Mem. L. Rev. 1169 (1996).

NOTES TO DECISIONS

1. Application.

Where the conversation memorialized in a letter did not constitute a "compromise negotiation," the letter and testimony surrounding it should not have been excluded under Tenn. R. Evid. 408. Simmons v. O'Charley's, 914 S.W.2d 895, 1995 Tenn. App. LEXIS 518 (Tenn. Ct. App. 1995).

Based on the language in Tenn. Sup. Ct. R. 31, a mediator may not present evidence of an oral mediation agreement and Tenn. R. Evid. 408 provided that evidence of conduct or statements made in compromised negotiations was not admissible to prove liability for or in validity of a civil claim; therefore, the marital dissolution agreement, made during the mediation and not reduced to a signed writing, was not an enforceable contract. Ledbetter v. Ledbetter, 163 S.W.3d 681, 2005 Tenn. LEXIS 345 (Tenn. 2005).

Trial court properly excluded a proposed agreed order and parenting plan, because the order occurred at a time when numerous issues remained to be settled and the parties were engaged in settlement negotiations. Nelson v. Justice, — S.W.3d —, 2019 Tenn. App. LEXIS 35 (Tenn. Ct. App. Jan. 25, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 480 (Tenn. Sept. 18, 2019).

Rule 409. Payment of medical and similar expenses. —

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove liability for the injury.

Advisory Commission Comments. The rule and the Tennessee case law are the same. *Meegal v. Memphis Street Railway Co.*, 33 Tenn. App. 247, 238 S.W.2d 519 (1950). The rule applies to civil, not criminal, trials.

Rule 409.1. Expressions of sympathy or benevolence. —

(a) That portion of statements, writings, or benevolent gestures expressing sympathy or a general sense of benevolence relating to the pain, suffering or death of a person involved in an accident and made to such person or to the family of such person shall be inadmissible as evidence of an admission of liability in a civil action. A statement of fault that is part of, or in addition to, any of the above shall not be inadmissible because of this Rule.

(b) For purposes of this Rule:

(1) "Accident" means an occurrence resulting in injury or death to one or more persons which is not the result of willful action by a party.

(2) "Benevolent gestures" means actions which convey a sense of compassion or commiseration emanating from humane impulses.

(3) "Family" means an injured party's spouse, parent, grandparent, stepparent, child, grandchild, sibling, half sibling, adopted sibling, or parent-in-law. [Added by order entered January 31, 2003, and effective July 1, 2003.]

Advisory Commission Comments [2003]. Rule 409.1 renders inadmissible certain statements and actions reflecting sympathy for persons injured in accidents. This rule, like Evidence Rules 408, 409, and 410, is designed to encourage the settlement of lawsuits. It complements Evidence Rule 409, which makes inadmissible payment of medical and related expenses on the issue of liability. The underlying theory of Rule 409.1 is that a settlement of a lawsuit is more likely if the defendant is free to express sympathy for the plaintiff's injuries without making a statement that would be admissible as an admission of a party opponent. Without this rule, a defendant's statement such is "I am sorry that you have suffered so much from the accident" might well be admissible as an admission of a party opponent. Accordingly, defense counsel may advise against making such statements in order to avoid the creation of harmful evidence. Yet a simple apology may go a long way toward making an injured party feel more comfortable with a nonjudicial settlement of the matter. This process is consistent with the modern focus on mediation and other methods of dispute resolution that seek to avoid a trial by facilitating a resolution acceptable to all parties.

The rule is similar to that enacted in Massachusetts (Mass. Ann. Laws ch. 233, § 23D) and California (West's Ann. Cal. Evid. Code § 1160). A Texas provision is also consistent with Rule 409.1. See Vernon's Tex. Stat. & Code Ann., Civ. Prac. & Remedies Code § 18.061.

Rule 409.1 embraces only civil cases involving an "accident." It is inapplicable in criminal cases. It also extends only to "benevolent gestures"; it does not exclude statements of fault.

Compiler's Notes. The adoption of this rule, as promulgated and adopted by the Supreme Court in its order dated January 31, 2003, was ratified and approved by 2003 House Resolution 22 and Senate Resolution 10. The order promulgating the adoption of this rule provided that it take effect on July 1, 2003.

Rule 410. Inadmissibility of pleas, plea discussions, and related statements. —

Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the party who made the plea or was a participant in the plea discussions:

(1) A plea of guilty which was later withdrawn;

(2) A plea of *nolo contendere*;

(3) Any statement made in the course of any proceedings under Rule 11 of the Tennessee Rules of Criminal Procedure regarding either of the foregoing pleas; or

(4) Any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn. Such a statement is admissible, however, in a criminal proceeding for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

Advisory Commission Comments. This rule is cross-referenced in Tenn. R. Crim. P. 11(d).

Advisory Commission Comments [1994]. *Williams v. Brown*, 860 S.W.2d 854 (Tenn. 1993), held misdemeanor traffic fine payments without court appearance inadmissible by analogy to Rule 410.

Advisory Commission Comments [2013]. The original Advisory Commission Comment was revised to correct an obsolete cross-reference to a now nonexistent subparagraph of Tenn. R. Crim. P. 11.

Compiler's Notes. The amendment of the Advisory Commission Comments, which rewrote the original comments and added the 2013 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 18, 2012, was ratified and approved by House Resolution 32 and Senate Resolution 10. The order promulgating the amendment of the Advisory Commission Comments provided that it take effect July 1, 2013.

NOTES TO DECISIONS

1. Waiver.

Miranda warnings cannot make a defendant fully aware of the nature of the rights provided by Tenn. R. Evid. 410 and Tenn. R. Crim. P. 11(e)(6) such that a waiver of *Miranda* rights is also a knowing waiver of the rights provided by these rules. State v. Hinton, 42 S.W.3d 113, 2000 Tenn. Crim. App. LEXIS 544 (Tenn. Crim. App. 2000), review or rehearing denied, — S.W.3d —, 2001 Tenn. LEXIS 126 (Tenn. 2001).

Rule 411. Liability insurance. —

Evidence that a person was or was not insured against liability is not admissible upon issues of negligence or other wrongful conduct. This rule does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

Advisory Commission Comments. The rule restates Tennessee common law.

Attorney General Opinions. Applicability to workers' compensation insurance, OAG 98-084 (4/14/98).

Law Reviews. Alternative Dispute Resolution in the Personal Injury Forum, 26 U. Mem. L. Rev. 1169 (1996).

NOTES TO DECISIONS

Analysis

1. Mistrial.
2. Influencing Jury Verdict.
3. Impeachment.

1. Mistrial.

Any reference to liability insurance must have been wilfully made for the purpose of influencing the jury in order to be adequate ground for a mistrial. Terry v. Plateau Electric Coop., 825 S.W.2d 418, 1991 Tenn. App. LEXIS 98 (Tenn. Ct. App. 1991), rehearing denied, Terry v. Plateau Electric Co., — S.W.2d —, 1991 Tenn. App. LEXIS 520 (Tenn. Ct. App. July 9, 1991).

2. Influencing Jury Verdict.

Jury verdict in personal injury case was essentially predicated, not on the facts, but on liability insurance, an extraneous matter, and therefore could not stand. Terry v. Plateau Electric Coop., 825 S.W.2d 418, 1991 Tenn. App. LEXIS 98 (Tenn. Ct. App. 1991), rehearing denied, Terry v. Plateau Electric Co., — S.W.2d —, 1991 Tenn. App. LEXIS 520 (Tenn. Ct. App. July 9, 1991).

3. Impeachment.

Where patient's attorney sought to impeach doctors as expert witnesses because they had an ownership interest in an insurance company, the trial court properly excluded the impeachment testimony in the absence of any evidence to support the inference that the experts would be untruthful in order to prevent a possible increase in their premiums. Heath v. Memphis Radiological Prof'l Corp., 79 S.W.3d 550, 2001 Tenn. App. LEXIS 828 (Tenn. Ct. App. 2001).

Rule 412. Sex offense cases; relevance of victim's sexual behavior.

Notwithstanding any other provision of law, in a criminal trial, preliminary hearing, deposition, or other proceeding in which a person is accused of an offense under Tenn. Code Ann. § 39-13-309 [trafficking a person for a commercial sex act], 39-13-502 [aggravated rape], 39-13-503 [rape], 39-13-504 [aggravated sexual battery], 39-13-505 [sexual battery], 39-13-506 [statutory rape],

39-13-507 [spousal sexual offenses], 39-13-509 [sexual contact by minor with an authority figure], 39-13-522 [rape of a child], 39-13-527 [sexual battery by an authority figure], 39-13-528 [solicitation of minors for sexual acts], 39-13-531 [aggravated rape of a child], 35-13-532 [statutory rape by an authority figure], 35-13-533 [promoting travel for prostitution], 39-15-302 [incest], or the attempt to commit any such offense, the following rules apply:

(a) Definition of sexual behavior. — In this rule "sexual behavior" means sexual activity of the alleged victim other than the sexual act at issue in the case.

(b) Reputation or opinion. — Reputation or opinion evidence of the sexual behavior of an alleged victim of such offense is inadmissible unless admitted in accordance with the procedures in subdivision (d) of this Rule and required by the Tennessee or United States Constitution.

(c) Specific instances of conduct. — Evidence of specific instances of a victim's sexual behavior is inadmissible unless admitted in accordance with the procedures in subdivision (d) of this rule, and the evidence is:

(1) Required by the Tennessee or United States Constitution, or

(2) Offered by the defendant on the issue of credibility of the victim, provided the prosecutor or victim has presented evidence as to the victim's sexual behavior, and only to the extent needed to rebut the specific evidence presented by the prosecutor or victim, or

(3) If the sexual behavior was with the accused, on the issue of consent, or

(4) If the sexual behavior was with persons other than the accused,

(i) to rebut or explain scientific or medical evidence, or

(ii) to prove or explain the source of semen, injury, disease, or knowledge of sexual matters, or

(iii) to prove consent if the evidence is of a pattern of sexual behavior so distinctive and so closely resembling the accused's version of the alleged encounter with the victim that it tends to prove that the victim consented to the act charged or behaved in such a manner as to lead the defendant reasonably to believe that the victim consented.

(d) Procedures. — If a person accused of an offense covered by this Rule intends to offer under subdivision (b) reputation or opinion evidence or under subdivision (c) specific instances of conduct of the victim, the following procedures apply:

(1) The person must file a written motion to offer such evidence.

(i) The motion shall be filed no later than ten days before the date on which the trial is scheduled to begin, except the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case.

(ii) The motion shall be served on all parties, the prosecuting attorney, and the victim; service on the victim shall be made through the prosecuting attorney's office.

(iii) The motion shall be accompanied by a written offer of proof, describing the specific evidence and the purpose for introducing it.

(2) When a motion required by subdivision (d)(1) is filed and found by the court to comply with the requirements of this rule, the court shall hold a

hearing in chambers or otherwise out of the hearing of the public and the jury to determine whether evidence described in the motion is admissible. The hearing shall be on the record, but the record shall be sealed except for the limited purposes of facilitating appellate review, assisting the court or parties in their preparation of the case, and to impeach under subdivision (d)(3)(iii).

(3) At this hearing

(i) The victim may attend in person,

(ii) The parties may call witnesses, including the alleged victim, and offer relevant evidence, and

(iii) The accused may testify but the testimony during this hearing may not be used against the accused in the preliminary hearing, trial, or other proceeding, except that such testimony may be admissible to impeach the credibility of the defendant if the defendant elects to testify at the preliminary hearing, trial, or other proceeding.

(4) If the court determines that the evidence which the accused seeks to offer satisfies subdivisions (b) or (c) and that the probative value of the evidence outweighs its unfair prejudice to the victim, the evidence shall be admissible in the proceeding to the extent an order made by the court specifies the evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined. [As added by order entered January 25, 1991, effective July 1, 1991; and amended by order entered January 26, 1999, effective July 1, 1999; adopted by order dated January 8, 2019, effective October 1, 2019.]

Advisory Commission Comments [1991]. This rule governs the admissibility of evidence of a sex crime victim's sexual history in cases involving the sex crimes specified in the first sentence of the rule. It replaces the current rape-shield statute, Tenn. Code Ann. § 40-17-119 [repealed], and is to be applied in lieu of Tennessee Rule of Evidence 404(a)(2) (character of crime victim) for the specified sex crimes. Like Tenn. Code Ann. § 40-17-119 [repealed] and Federal Rule of Evidence 412, this rule strikes a balance between the paramount interests of the accused in a fair trial and the important interests of the sexual assault victim in avoiding an unnecessary, degrading, and embarrassing invasion of sexual privacy. Rule 412 recognizes the important interests of all involved — the victim, the public, and the criminal accused — and provides standards and procedures to assist courts in determining when such evidence is admissible. It specifically recognizes that, despite the embarrassing nature of the proof, sometimes the accused can only have a fair trial if permitted to introduce evidence of the alleged victim's sexual history. On the other hand, the rule also takes into account that the public's interest in prosecuting and convicting people guilty of various sexual offenses is frustrated when sexual assault victims refuse to report the offenses or to testify about them at trial because of the possible admission of evidence of their sexual history. Moreover, the rule seeks to minimize the likelihood that evidence of the alleged victim's sexual history may cause the jury to be unfairly prejudiced against the victim.

This rule is much more comprehensive than Tenn. Code Ann. § 40-17-119 [repealed], which deals only with proof of specific instances of a sexual assault victim's sexual behavior with third persons and only when that evidence is to be used on the issue of consent. Tenn. Code Ann. § 40-17-119 [repealed] does not address difficult questions of the admissibility of reputation and opinion evidence, of evidence of prior sexual activity with the accused, or of proof in sexual assault cases on issues other than consent. The narrow focus of this statute has resulted in Tennessee case law questioning its constitutionality in certain applications. *See Shockley v. State*, 585 S.W.2d 645 (Tenn. Crim. App. 1978).

Rule 412 deals with three types of proof: reputation, opinion, and specific acts. Subdivision (b) limits the use of reputation and opinion evidence about the victim's sexual behavior. Because such evidence is embarrassing and seldom probative, it is admissible only in those unusual cases where the United States or Tennessee Constitution mandates admissibility. *Cf. Doe v. United States*, 666 F.2d 43 (4th Cir. 1981) (recognizes possibility that constitution

could require admission of reputation and opinion evidence in extraordinary circumstances). When such evidence is admissible, the procedures outlined in subdivision (d) must be followed.

Subdivision (c) tells when specific acts of the victim's sexual history may be admissible if the procedures in subdivision (d) are satisfied. Because of the infinite variety of factual situations that can arise in sex crime cases, no evidence rule can detail all the possible situations where evidence of sexual history is required by the accused's Due Process rights. Subdivision (c)(1) recognizes this and provides that specific acts are admissible when required by the United States or Tennessee Constitution. *Cf. State v. Jalo*, 27 Or. App. 845, 557 P.2d 1359 (1976) (criminal accused's confrontation rights entitle him to prove that rape victim charged him with crime to retaliate for his discovery of her sexual relations with his son); *Commonwealth v. Black*, 337 Pa. Super. 548, 487 A.2d 396 (1985) (confrontation clause permits criminal accused to prove sex crime victim's bias; she allegedly reported crime so she could remove him from house in order to continue sexual relations with another house member and to punish him for interfering with this sexual relationship).

Subdivision (c)(2) provides that specific instances of the victim's sexual behavior may also be admissible to rebut evidence presented by the prosecution about the victim's sexual behavior. This exception is narrow, however. It only permits the defendant to prove specific acts when needed to rebut the specific evidence presented by the prosecution's proof. It does not open the door to the victim's entire sexual history.

Subdivision (c)(3) indicates that the victim's sexual behavior *with the accused* may be admissible on the issue of consent. If consent is not an issue, this subdivision does not apply.

Subdivision (c)(4) lists three situations where the victim's sexual behavior *with persons other than the accused* may be admissible. First, the proof may be used to rebut or explain scientific or medical evidence. Second, it may be used to prove or explain the source of semen, injury, or disease. For example, the defendant may prove that the victim, who testified that he or she contracted the AIDS virus from the defendant, actually contracted it from a named third party. Similarly, if it is alleged that the defendant's illegal sexual activity caused the victim to become pregnant, the defendant may prove that the victim had sexual relations with a third party who fathered the child. *See Shockley v. State*, 585 S.W.2d 645 (Tenn. Crim. App. 1978) (rape defendant entitled to prove someone else caused victim's pregnancy). This provision also permits proof of the source of knowledge of sexual matters. It will most frequently be used in cases where the victim is a young child who testifies in detail about sexual activity. To disprove any suggestion that the child acquired the detailed information about sexual matters from the encounter with the accused, the defense may want to prove that the child learned the terminology as the result of sexual activity with third parties. Third, the defendant may prove acts with third parties in the so-called "signature" cases to prove consent. These acts are so similar to the defendant's version of the offense that they corroborate the defendant's story.

In order to ensure that the victim's privacy is not inappropriately compromised when the court assesses whether a given item of evidence is admissible under the rule, subdivision (d), like Tenn. Code Ann. § 40-17-119 [repealed], provides specific procedures that must be followed before evidence is admitted under this rule. First, subdivision (d)(1) requires the defendant to file a written motion of an intent to offer evidence covered by the rule. The motion shall be filed 10 days before the trial unless the exceptions mentioned in the rule apply. The ten day rule is designed to provide the prosecution and the victim an opportunity to investigate the proposed proof and to contest the issue. The motion is to be served on all parties, the prosecuting attorney, and the victim. To facilitate preparation, the motion must describe both the evidence to be offered and the purpose for offering it.

If a motion is filed and the court determines that the evidence is the kind of evidence possibly covered by the rule, it should hold a hearing, pursuant to subdivision (d)(2). The victim's privacy is somewhat protected since the proceeding must be held outside the hearing of the public. The rule specifically provides that the hearing may be held in chambers. The hearing must be on the record to permit appellate review, but the record of the hearing is sealed.

Subdivision (d)(3) indicates that the victim has a right to attend the hearing and that all parties may call witnesses and offer evidence on the issue whether the proof of the victim's sexual behavior should be introduced.

In order to protect the defendant's right to remain silent, the defendant may testify at his hearing without producing evidence admissible as substantive evidence at the trial. The defendant's testimony at the hearing may, however, be used to impeach the defendant at the later trial.

After the hearing the court must balance the evidence's probative value against the harm that disclosure will cause to the victim. This balance includes consideration of the harmful effect the proof may have on the victim. If the probative value outweighs the listed factors and the evidence is admitted, the court should issue an order specifying exactly which proof will be received and which issues may be explored during questioning.

Advisory Commission Comments [1996]. While Rule 412 applies only to criminal prosecutions, a statute shields the civil plaintiff's sexual behavior in actions for sexual misconduct of therapists against patients. Tenn. Code Ann. § 29-26-207 states that the victim's sexual history is not admissible as evidence except to prove that the sexual behavior occurred with the therapist prior to the provision of therapy to the patient by the therapist.

Advisory Commission Comments [1999]. The amendment adds other sex offenses.

Advisory Commission Comments [2019]. The 2019 amendment adds five offenses to which this rule applies and reorders the listing to the order of appearance in the code.

Compiler's Notes. The amendment of Rule 412 and the addition of [2019] Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated January 8, 2019, was ratified and approved by 2019 Special Session House Resolution 1 and 2019 Regular Session Senate Resolution 15. The order promulgating the amendment of Rule 412 and adding [2019] Advisory Commission Comments, provided that it take effect October 1, 2019.

NOTES TO DECISIONS

Analysis

1. Exclusion Proper.
2. Exclusion Improper.
3. Plain Error Not Found.
4. Ineffective Assistance of Counsel.

1. Exclusion Proper.

Evidence proffered by defendant that did not establish a pattern of distinctive sexual behavior on the part of the victim was properly excluded. State v. Sheline, 955 S.W.2d 42, 1997 Tenn. LEXIS 496 (Tenn. 1997), cert. denied, Sheline v. Tennessee, 523 U.S. 1010, 118 S. Ct. 1199, 140 L. Ed. 2d 327, 1998 U.S. LEXIS 1735 (1998).

Exclusion of the type of evidence required to be excluded by Tenn. R. Evid. 412 did not deny defendant's constitutional right to present evidence and confront witnesses. State v. Sheline, 955 S.W.2d 42, 1997 Tenn. LEXIS 496 (Tenn. 1997), cert. denied, Sheline v. Tennessee, 523 U.S. 1010, 118 S. Ct. 1199, 140 L. Ed. 2d 327, 1998 U.S. LEXIS 1735 (1998).

Exclusion of sexual entries from the victim's social networking page was not an abuse of discretion as even though the entries fell under the purview of Tenn. R. Evid. 412 as they concerned the victim's history of sexual discourse, any error in failing to analyze the evidence under Rule 412 was harmless as the trial court considered the potential for confusion, the minimal probative value of the evidence, and the prejudicial impact on the victim under Tenn. R. Evid. 401 and 403, which analysis was incorporated in Rule 412(d)(4). State v. Nance, 393 S.W.3d 212, 2012 Tenn. Crim. App. LEXIS 316 (Tenn. Crim. App. May 16, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 898 (Tenn. Nov. 27, 2012).

2. Exclusion Improper.

Evidence that the complainant admitted to two friends that she had sexual intercourse with an adolescent male during the same time period the defendant allegedly committed aggravated rape was proper evidence under Tenn. R. Evid. P. 412(c)(4)(1), and should have been admitted to satisfy the defendant's constitutional right to present a defense. State v. Brown, 29 S.W.3d 427, 2000 Tenn. LEXIS 24 (Tenn. 2000), cert. denied, Tennessee v. Brown, 531 U.S. 916, 121 S. Ct. 275, 148 L. Ed. 2d 200, 2000 U.S. LEXIS 6506 (2000).

3. Plain Error Not Found.

Trial court did not commit plain error under T.R.A.P. 36(b) in allowing evidence of a victim's past sexual history for impeachment purposes only as the trial court did not violate Tenn. R. Evid. 412 as it allowed defendant to establish the prior abuse by the victim's father and allowed defendant to ask about details of the father's abuse when those details were similar to allegations the victim levied against defendant; the limitation did not violate the Confrontation Clause, U.S. Const. amend. VI, as defendant was permitted to ask the victim questions about details of the prior abuse when those details were similar to any of the allegations she made against defendant. State v. Nance, 393 S.W.3d 212, 2012 Tenn. Crim. App. LEXIS 316 (Tenn. Crim. App. May 16, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 898 (Tenn. Nov. 27, 2012).

4. Ineffective Assistance of Counsel.

Defendant's petition for post-conviction relief was properly denied as trial counsel was not ineffective for failing to timely file a motion to cross-examine the victim about an alleged consensual sexual encounter because counsel testified that defendant came up with the idea that he had been in a consensual sexual relationship with the victim when he saw the victim at trial, that defendant never told him about a consensual sexual encounter before trial and that, if defendant had mentioned that before trial, it would have made perfect sense to go ahead and file such a motion; the post-conviction court determined that counsel was credible and defendant was not; and the proof at trial regarding the rape was overwhelming. Jefferson v. State, — S.W.3d —, 2019 Tenn.

Crim. App. LEXIS 8 (Tenn. Crim. App. Jan. 4, 2019).

Defense attorneys were ineffective in failing to renew their motion under Tenn. R. Evid. 412 after it became clear that the prosecution was going to present evidence and argue that all of the victim's sexual knowledge was gained as a result of the inmate's abuse while there was evidence of the victim having a sexual relationship with another person. Arnold v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 72 (Tenn. Crim. App. Feb. 5, 2020).

Petitioner failed to show that his trial counsel was ineffective for failing to make an offer of proof about additional allegations of rape made by the victim and thereby failed to preserve the issue for appeal because counsel testified that he did not know any of the specifics of the additional 50 to 60 allegations and therefore would have been unsuccessful in pursuing an offer of proof, and the defense theory was that none of the sexual abuse took place. Whitehair v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 138 (Tenn. Crim. App. Feb. 26, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 463 (Tenn. July 17, 2020).

Trial counsel was not deficient for failing to file a Tenn. R. Evid. 412 motion and the inmate failed to demonstrate he was prejudiced by trial counsel's failure to file the motion because one victim was 15 at the time of the abuse and trial counsel even acknowledged that it would not be unusual for a fifteen-year-old to have knowledge about sexual matters. Colwell v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 470 (Tenn. Crim. App. July 10, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 574 (Tenn. Oct. 7, 2020).

ARTICLE V. PRIVILEGES

Rule 501. Privileges recognized only as provided. —

Except as otherwise provided by constitution, statute, common law, or by these or other rules promulgated by the Tennessee Supreme Court, no person has a privilege to:

(1) Refuse to be a witness;

(2) Refuse to disclose any matter;

(3) Refuse to produce any object or writing; or

(4) Prevent another from being a witness or disclosing any matter or producing any object or writing. [As amended by order entered December 14, 2009, effective July 1, 2010.]

Advisory Commission Comments [1999]. The following statutes and rules deal with some Tennessee privileges. They are provided for the convenience of the bench and bar. The relevant statutes and rules should be consulted to ensure accuracy and completeness. Many other statutes make certain documents confidential, but the Commission did not view such confidentiality concepts as synonymous with privilege theories.

Tenn. Code Ann. § 55-10-114(b). ACCIDENT REPORT PRIVILEGE

No report or information mentioned in this section [accident report made by "any person or by garages"] shall be used as evidence in any trial, civil or criminal, arising out of an accident, except that the department [of safety] shall furnish upon demand of any party to such trial, or upon demand of any court, a certificate showing that a specified accident report has or has not been made to the department in compliance with law.

Tenn. Code Ann. § 55-12-128. SAME, CIVIL SUITS

Neither the reports required by this chapter [operator's report of financial responsibility], the action taken by the commissioner pursuant to this chapter, the findings of the commissioner upon which such action is based, nor the security filed as provided in this chapter shall be referred to in any way, nor constitute any evidence of the negligence or due care of either party at the trial of any action at law to recover damages.

Tenn. Code Ann. § 62-1-116. ACCOUNTANT-CLIENT PRIVILEGE

(a) Licensees shall not divulge, nor shall they in any manner be required to divulge, any information which is communicated to them or obtained by them by the reason of the confidential nature of their employment. Such information shall be deemed confidential; provided, that nothing herein shall be construed as prohibiting the disclosure of information required to be disclosed by the standards of the public accounting profession in reporting on the examination of financial statements or as prohibiting disclosures in investigations or proceedings under this chapter, in ethical investigations conducted by private professional organizations, or in the course of peer reviews, or to other persons active in the orga-

nization performing services for that client on a need to know basis or to persons in the entity who need this information for the sole purpose of assuring quality control. Disclosure of confidential information pursuant to this section shall not constitute a waiver of the confidential nature of such information for any other purpose.

(b) Information derived as a result of such professional employment is deemed to be confidential, except that nothing in any section of this chapter shall be construed as modifying, changing or affecting the criminal or bankruptcy laws of this state or of the United States.

Tenn. Code Ann. § 23-3-105. ATTORNEY-CLIENT PRIVILEGE

No attorney, solicitor or counselor shall be permitted, in giving testimony against a client, or person who consulted the attorney, solicitor or counselor professionally, to disclose any communication made to the attorney, solicitor or counselor as such by such person, during the pendency of the suit, before or afterwards, to the person's injury.

Tenn. Code Ann. § 23-3-107. SAME

Any attorney offering to give testimony in any of the cases provided for in Tenn. Code Ann. § 23-3-105...shall be rejected by the court, and such attorney commits a Class C misdemeanor, for which, on conviction, the attorney shall also be stricken from the rolls, if a practicing attorney.

Tenn. Code Ann. § 24-1-209. ATTORNEY-PRIVATE DETECTIVE OR INVESTIGATOR PRIVILEGE

Communication between an attorney and a private detective or investigator hired by such attorney, while acting in their respective professional capacities shall be privileged communications.

Tenn. Code Ann. § 37-1-614. CHILD SEXUAL ABUSE EXCEPTION TO PRIVILEGES

The privileged quality of communication between husband and wife and between any professional person and the professional person's patient or client, and any other privileged communication except that between attorney and client, as such communication relates both to the competency of the witness and to the exclusion of confidential communications, shall not apply to any situation involving known or suspected child sexual abuse and shall not constitute grounds for failure to report as required by this part [Tenn. Code Ann. § 37-1-605], failure to cooperate with the department in its activities pursuant to this part [Tenn. Code Ann. § 37-1-611(b)], or failure to give evidence in any judicial proceeding relating to child sexual abuse.

Tenn. Code Ann. § 24-1-206. CLERGY-PENITENT PRIVILEGE

(a)(1) No minister of the gospel, no priest of the Catholic Church, no rector of the Episcopal Church, no ordained rabbi, and no regular minister of religion of any religious organization or denomination usually referred to as a church, over eighteen (18) years of age, shall be allowed or required in giving testimony as a witness in any litigation, to disclose any information communicated to that person in a confidential manner, properly entrusted to that person in that person's professional capacity, and necessary to enable that person to discharge the functions of such office according to the usual course of that person's practice or discipline, wherein such person so communicating such information about such person or another is seeking spiritual counsel and advice relative to and growing out of the information so imparted.

(2) It shall be the duty of the judge of the court wherein such litigation is pending, when such testimony as prohibited in this section is offered, to determine whether or not that person possesses the qualifications which prohibit that person from testifying to the communications sought to be proven by that person.

(b) The prohibition of this section shall not apply to cases where the communicating party, or parties, waives the right so conferred by personal appearance in open court so declaring, or by an affidavit properly sworn to by such a one or ones, before some person authorized to administer oaths, and filed with the court wherein litigation is pending.

(c) Nothing in this section shall modify or in any way change the law relative to "hearsay testimony."

(d) Any minister of the gospel, priest of the Catholic Church, rector of the Episcopal Church, ordained rabbi, and any regular minister of religion of any religious organization or denomination usually referred to as a church, who violates the provisions of this section, commits a Class C misdemeanor.

Tenn. Code Ann. § 24-1-211(f). DEAF PERSON-INTERPRETER PRIVILEGE

Before a qualified interpreter will participate in any proceedings subsequent to an appointment under the provisions of this section, such interpreter shall make an oath or affirmation that such interpreter will make a true interpretation in an understandable manner to the deaf person for whom the interpreter is appointed and that such interpreter will interpret the statements of the deaf person desiring that statements be made, in the English language to the best of such interpreter's skill and judgment. The appointing authority shall provide recess periods as necessary for the interpreter when the interpreter so indicates. Any and all information that the interpreter gathers from the deaf person pertaining to any proceeding then pending shall at all times remain confi-

dential and privileged, or on an equal basis with the attorney-client privilege, unless such deaf person desires that such information be communicated to other persons.

Tenn. S. Ct. Rule 9, § 27.1. DISCIPLINARY BOARD—COMPLAINANT PRIVILEGE

Communications to the board, hearing committee members or disciplinary counsel relating to lawyer misconduct or disability and testimony given in the proceedings shall be absolutely privileged, and no civil lawsuit predicated thereon may be instituted against any complainant or witnesses. Members of the board, hearing committee members, disciplinary counsel and staff shall be immune from civil suit for any conduct in the course of their official duties.

Tenn. Code Ann. § 24-7-114. LEGISLATIVE COMMITTEE-WITNESS PRIVILEGE

From and after February 20, 1959, without the consent of such witness there shall not be admitted into evidence in any civil proceeding in the courts of this state the testimony of a witness given before any committee of the general assembly of the State of Tennessee, provided such testimony when given was pertinent to the inquiry of such committee or responsive to a question from such committee.

Tenn. Code Ann. § 24-1-208. NEWS REPORTER'S PRIVILEGE

(a) A person engaged in gathering information for publication or broadcast connected with or employed by the news media or press, or who is independently engaged in gathering information for publication or broadcast, shall not be required by a court, a grand jury, the general assembly, or any administrative body, to disclose before the general assembly or any Tennessee court, grand jury, agency, department, or commission any information or the source of any information procured for publication or broadcast.

(b) Subsection (a) shall not apply with respect to the source of any allegedly defamatory information in any case where the defendant in a civil action for defamation asserts a defense based on the source of such information.

(c)(1) Any person seeking information or the source thereof protected under this section may apply for an order divesting such protection. Such application shall be made to the judge of the court having jurisdiction over the hearing, action, or other proceeding in which the information sought is pending.

(2) The application shall be granted only if the court after hearing the parties determines that the person seeking the information has shown by clear and convincing evidence that:

(A) There is probable cause to believe that the person from whom the information is sought has information which is clearly relevant to a specific probable violation of law;

(B) The person has demonstrated that the information sought cannot reasonably be obtained by alternative means; and

(C) The person has demonstrated a compelling and overriding public interest of the people of the State of Tennessee in the information.

(3)(A) Any order of the trial court may be appealed to the court of appeals in the same manner as other civil cases. The court of appeals shall make an independent determination of the applicability of the standards in this subsection to the facts in the record and shall not accord a presumption of correctness to the trial court's findings.

(B) The execution of or any proceeding to enforce a judgment divesting the protection of this section shall be stayed pending appeal upon the timely filing of a notice of appeal in accordance with Rule 3 of the Tennessee Rules of Civil Procedure, and the appeal shall be expedited upon the docket of the court of appeals upon the application of either party.

(C) Any order of the court of appeals may be appealed to the supreme court of Tennessee as provided by law.

Tenn. Code Ann. § 63-22-114. PROFESSIONAL COUNSELOR/MARITAL AND FAMILY THERAPIST/CLINICAL PASTORAL THERAPIST–CLIENT PRIVILEGE

The confidential relations and communications between licensed marital and family therapists, licensed professional counselors or certified clinical pastoral therapists and clients are placed upon the same basis as those provided by law between attorney and client, and nothing in this part shall be construed to require any such privileged communication to be disclosed. However, nothing contained within this section shall be construed to prevent disclosures of confidential communications in proceedings arising under title 37, chapter 1, part 4 concerning mandatory child abuse reports.

Tenn. Code Ann. § 24-1-207. PSYCHIATRIST-PATIENT PRIVILEGE

(a) Communications between a patient and a licensed physician when practicing as a psychiatrist in the course of and in connection with a therapeutic counseling relationship regardless of whether the therapy is individual, joint, or group, are privileged in proceedings before judicial and quasi-judicial tribunals. Neither the psychiatrist nor any member of the staff may testify or be compelled to testify as to such communications or otherwise reveal them in such proceedings without consent of the patient except:

(1) In proceedings in which the patient raises the issue of the patient's mental or emotional condition;

(2) In proceedings for which the psychiatrist was ordered by the tribunal to examine the patient if the patient was advised that communications to the psychiatrist would not be privi-

leged, but testimony as to the communications is admissible only on issues involving the patient's mental or emotional condition; and

(3) In proceedings to involuntarily hospitalize the patient under § 33-6-103 or § 33-6-104, if the psychiatrist decides that the patient is in need of care and treatment in a residential facility. Unless otherwise ordered by the court, the exception is limited to disclosures necessary to establish that the patient poses a substantial likelihood of serious harm requiring involuntary hospitalization under § 33-6-103 or § 33-6-104.

(b) When personally identifiable patient information is to be disclosed in a judicial or quasi-judicial proceeding or any other public proceeding, the authority conducting the proceeding shall take reasonable steps to prevent unnecessary exposure of such information to the public and to further this section's policy of protecting the right of privacy. Such steps may include screening of questions in pre-hearing conferences and in camera inspection of papers.

(c)(1) Privileged communications between a patient and a licensed physician when practicing as a psychiatrist in the course of and in connection with a therapeutic counseling relationship, regardless of whether the therapy is individual, joint, or group, may be disclosed without consent of the patient if:

(A) Such patient has made an actual threat to physically harm an identifiable victim or victims; and

(B) The treating psychiatrist makes a clinical judgment that the patient has the apparent capability to commit such an act and that it is more likely than not that in the near future the patient will carry out the threat.

(2) The psychiatrist may disclose patient communications to the extent necessary to warn or protect any potential victim. No civil or criminal action shall be instituted, nor shall liability be imposed due to the disclosure of otherwise confidential communications by a psychiatrist pursuant to this subsection.

Tenn. Code Ann. § 63-11-213. PSYCHOLOGIST/PSYCHOLOGICAL EXAMINER-CLIENT PRIVILEGE

For the purposes of this chapter, the confidential relations and communications between licensed psychologist or psychological examiner and client are placed upon the same basis as those provided by law between attorney and client, and nothing in this chapter shall be construed to require any such privileged communication to be disclosed.

Tenn. Code Ann. § 63-23-107. SOCIAL WORKER-CLIENT PRIVILEGE

(a) The confidential relations and communications between a client and a certified master social worker, or an independent practitioner of social work holding a valid certificate of registration, as defined in this chapter, are placed upon the same basis as those provided by law between licensed psychologists and psychological examiners and client, and nothing in this chapter shall be construed to require any such privileged communication to be disclosed.

(b) Nothing contained within this section shall be construed to prevent disclosure of confidential communications in proceedings arising under title 37, chapter 1, part 4 concerning mandatory child abuse reports.

Tenn. Code Ann. § 24-1-201. SPOUSAL PRIVILEGE

(a) In either a civil or criminal proceeding, no married person has privilege to refuse to take the witness stand solely because that person's spouse is a party to the proceeding.

(b) In a civil proceeding, confidential communications between married persons are privileged and inadmissible if either spouse objects. This communications privilege shall not apply to proceedings between spouses or to proceedings concerning abuse of one (1) of the spouses or abuse of a minor in the custody of or under the dominion and control of either spouse, including, but not limited to, proceedings arising under title 36, chapter 1, part 1 [adoption]; title 37, chapter 1, parts 1 [juvenile courts], 4 [mandatory child abuse reports] and 6 [child sexual abuse], title 37, chapter 2, part 4 [foster care] and; and title 71, chapter 6, part 1 [protective services for adults]. This confidential communications privilege shall not apply to any insured's obligations under a contract of insurance in civil proceedings.

(c)(1) In a criminal proceeding a marital confidential communication shall be privileged if:

(A) The communications originated in a confidence that they will not be disclosed;

(B) The element of confidentiality is essential to the full and satisfactory maintenance of the relation between the parties;

(C) The relation must be one which, in the opinion of the community, ought to be sedulously fostered; and

(D) The injury to the relation by disclosure of the communications outweighs the benefit gained for the correct disposal of litigation.

(2) Upon a finding that a marital communication is privileged, it shall be inadmissible if either spouse objects. Such communication privileges shall not apply to proceedings concerning abuse of one (1) of the spouses or abuse of a minor in the custody of or under the dominion and control of either spouse, including, but not limited to proceedings arising under title 37, chapter 1, parts 1 and 4; title 37, chapter 2, part 4; and title 71, chapter 6, part 1.

Advisory Commission Comments [2003].

Tenn. Code Ann. § 33-3-114. EXCEPTIONS TO EVIDENTIARY PRIVILEGE OF MENTAL HEALTH PROFESSIONALS

Notwithstanding any evidentiary privilege a qualified mental health professional may have,

including §§ 24-1-207, 63-11-213, 63-22-114, and former § 63-23-107 (now § 63-23-109), the qualified mental health professional may be compelled to testify in:

(1) Judicial proceedings under this title to commit a person with mental illness, serious emotional disturbance, or developmental disability to treatment if the qualified mental health professional decides that the service recipient is in need of compulsory care and treatment; and

(2) In proceedings for which the qualified mental health professional was ordered by the court to examine the service recipient if the service recipient was advised that communications to the qualified health professional would not be privileged.

Advisory Commission Comments [2010]. Delete from the 1999 comment the reference to Tenn. R. Crim. P. 6(k), which is not really a privilege.

Advisory Commission Comments [2012]. The Advisory Commission Comment [1999] was amended by deleting a reference to Tenn. Code Ann. § 63-6-219(e), which was repealed by Chapter 67, Tennessee Public Acts of 2011. In addition to repealing Tenn. Code Ann. § 63-6-219, Chapter 67 enacted the following privilege (using identical language in two separate statutes):

Tenn. Code Ann. §§ 63-1-150(d)(1) and 68-11-272(c)(1). QUALITY IMPROVEMENT COMMITTEE PRIVILEGE

Records of a QIC [Quality Improvement Committee] and testimony or statements by a healthcare organization's officers or directors, trustees, healthcare providers, administrative staff, employees or other committee members or attendees relating to activities of the QIC shall be confidential and privileged and shall be protected from direct or indirect means of discovery, subpoena or admission into evidence in any judicial or administrative proceeding. Any person who supplies information, testifies or makes statements as part of a QIC may not be required to provide information as to the information, testimony or statements provided to or made before such a committee or opinions formed by such person as a result of committee participation.

But see Tenn. Code Ann. § 63-1-150(a) (listing statutes to which Section 63-1-150 does not apply).

Compiler's Notes. The amendment of the Advisory Commission Comments (1999), which inserted the comments to T.C.A. § 63-22-114, as promulgated and adopted by the Supreme Court in its order dated January 2, 2007, was ratified and approved by House Resolution 17 and Senate Resolution 13. The order promulgating the amendment of the Advisory Commission Comments provided that it take effect July 1, 2007.

The amendments of the 1999 Advisory Commission Comments to Rule 501, which substituted "Tenn. Code Ann. § 24-1-211(f). DEAF PERSON–INTERPRETER PRIVILEGE" for "Tenn. Code Ann. § 24-1-103(f) DEAF PERSON–INTERPRETER PRIVILEGE" and substituted "Tenn. Code Ann. § 24-7-114. LEGISLATIVE COMMITTEE–WITNESS PRIVILEGE" for "Tenn. Code Ann. § 24-7-113 LEGISLATIVE COMMITTEE–WITNESS PRIVILEGE", as promulgated and adopted by the Supreme Court in its order dated January 8, 2008, were ratified and approved by House Resolution 239 and Senate Resolution 221. The order promulgating the amendment of the Advisory Commission Comments provided that it take effect July 1, 2008.

The amendment of the Advisory Commission Comments (2009), which deleted the comments to Tenn. R. Crim. P. 6(k), as promulgated and adopted by the Supreme Court in its order dated December 14, 2009, was ratified and approved by 2010 Senate Resolution 181 and 2010 House Resolution 236. The order promulgating the amendment of this rule provided that it take effect July 1, 2010.

The amendment of the Advisory Commission Comments (1999), which deleted the comments to T.C.A. § 63-6-219(e). MEDICAL REVIEW COMMITTEE—INFORMANT PRIVILEGE, as promulgated and adopted by the Supreme Court in its order dated January 13, 2012, was ratified and approved by House Resolution 190 and Senate Resolution 81. The order promulgating the amendment of the Advisory Commission Comments provided that it take effect July 1, 2012.

Textbooks. Tennessee Law of Evidence (2nd ed., Cohen, Paine and Sheppeard), Rule 501; §§ 501.1, 501.2.

Law Reviews. A Meta-Analysis of the Tennessee Rules of Evidence (Neil P. Cohen), 57 Tenn. L. Rev. 1 (1989).

ESI Tennessee: At the Intersection of Privilege and E-Discovery (M. James Thomas), 44 Tenn. B.J. 14 (2008).

Evidence — State v. Hurley: Erosion of the Marital Privilege for Confidential Communications in Tennessee, 25 U. Mem. L. Rev. 835 (1995).

NOTES TO DECISIONS

1. Self-Incrimination.

The trial court did not err in refusing to allow the defendant to cross-examine the codefendant by ruling that the codefendant could invoke his fifth amendment privilege where the codefendant was accused of the same crime as the defendant, had not been tried, and chose to invoke the privilege upon the advice of his

attorney. State v. Zirkle, 910 S.W.2d 874, 1995 Tenn. Crim. App. LEXIS 103 (Tenn. Crim. App. 1995), rehearing denied, — S.W.2d —, 1995 Tenn. Crim. App. LEXIS 230 (Tenn. Crim. App. Mar. 21, 1995), appeal denied, — S.W.2d —, 1995 Tenn. LEXIS 481 (Tenn. Aug. 28, 1995), dismissed, Zirkle v. Carlton, — F. Supp. 2d —, 2013 U.S. Dist. LEXIS 123960 (E.D. Tenn. June 12, 2013).

Rule 502. Limitations on waiver of privileged information or work product. —

Inadvertent disclosure of privileged information or work product does not operate as a waiver if:

(1) the disclosure is inadvertent,

(2) the holder of the privilege or work-product protection took reasonable steps to prevent disclosure, and

(3) the holder promptly took reasonable steps to rectify the error. [As added by order entered December 14, 2009, effective July 1, 2010; and by order filed January 8, 2018, effective July 1, 2018.]

Advisory Commission Comments [2010]. This language is taken from Federal Rule of Evidence 502(b). Compare Tennessee Rule of Civil Procedure 26.02(5) on discovery of electronically stored information.

Advisory Commission Comments [2018]. The 2018 amendment corrects a typographical error in the original text of the rule by adding the word "if" at the end of the introductory clause.

Compiler's Notes. The enactment of this rule, as promulgated and adopted by the Supreme Court in its order dated December 14, 2009, was ratified and approved by 2010 Senate Resolution 181 and 2010 House Resolution 236. The order promulgating the enactment of this rule provided that it take effect July 1, 2010.

The amendment of Rule 502 which amended the introductory language and added the [2018] Advisory Comments, as promulgated and adopted by the Supreme Court in its order dated January 8, 2018, was ratified and approved by 2018 House Resolution 201 and Senate Resolution 164. The order promulgating the amendment of Rule 502 by amending the introductory language and adding [2018] Advisory Commission Comments, provided that it take effect July 1, 2018.

ARTICLE VI. WITNESSES

Rule 601. General rule of competency. —

Every person is presumed competent to be a witness except as otherwise provided in these rules or by statute. [As amended by order entered January 24, 1992, effective July 1, 1992.]

Advisory Commission Comments. This language is similar to Tenn. Code Ann. § 24-1-101 [repealed], first sentence.

Virtually all witnesses may be permitted to testify: children, mentally incompetent persons, convicted felons. Rules 602 and 603 should be read in connection with this rule, however, because any witness must swear or affirm to tell the truth and must have personal knowledge of that truth. The common law rebuttably presumed children under fourteen incompetent, *Ball v. State*, 188 Tenn. 255, 219 S.W.2d 166 (1949), but the proposed rule is contra. See also Tenn. Code Ann. § 24-1-101 [repealed], second sentence, making children under age thirteen competent in sexual offense prosecutions.

The most important statute referenced by the rule is the Dead Man Statute, Tenn. Code Ann. § 24-1-203. It applies generally to prevent parties from testifying to transactions with a deceased person in actions by or against estates. While the statute occasionally causes proof problems, the rule leaves it intact. See also Tenn. Code Ann. § 24-1-202 [repealed] on incompetents' estates.

Advisory Commission Comments [1992]. The amendment removes the earlier language requiring "of sufficient capacity to understand the obligation of an oath or affirmation" and establishes a rebuttable presumption of competency. Note, however, that Rule 602 requires lay witnesses to have personal knowledge of matters, and Rule 603 requires all witnesses to swear or affirm they will tell the truth.

Law Reviews. A Meta-Analysis of the Tennessee Rules of Evidence (Neil P. Cohen), 57 Tenn. L. Rev. 1 (1989).

Competency and Impeachment of Witnesses (Leo Bearman, Jr.), 57 Tenn. L. Rev. 89 (1989).

Competency of Witnesses and the Trial of Frank James (Donald F. Paine), 37 Tenn. B.J. 14 (2001).

Expert Witness Conflicts and Compensation, 67 Tenn. L. Rev. 909 (2000).

NOTES TO DECISIONS

ANALYSIS

1. In General.
2. Expert.
3. Child Witness.
4. Review.

1. In General.

Appellate court could not consider, on the instant summary judgment analysis, a patient's affidavit with respect to her assertions regarding the effects of the medications she was taking or her belief that the taking of the medications caused confusion during her deposition regarding the dates and substance of conversations because the patient, as a lay person, was not competent to opine as to the effects of the medications. Sampson v. Wellmont Health Sys., 228 S.W.3d 124, 2007 Tenn. App. LEXIS 62 (Tenn. Ct. App. Jan. 31, 2007), appeal denied, Sampson v. Wellmont Health Ctr., — S.W.3d —, 2007 Tenn. LEXIS 547 (Tenn. June 18, 2007).

2. Expert.

The expertise of a physicist who has spent years studying the effects of noise on the human ear should not be disregarded as incompetent because it was not acquired in conjunction with a medical license. Tucker v. American Tel. & Tel. Corp., 794 F. Supp. 240, 1992 U.S. Dist. LEXIS 7685 (W.D. Tenn. 1992).

Six-year-old complainant who testified that she knew lying was wrong, and demonstrated that she knew the difference between telling the truth and a "story", understood the nature of her oath, and the trial court did not abuse its discretion by allowing her testimony. State v. Howard, 926 S.W.2d 579, 1996 Tenn. Crim. App. LEXIS 195 (Tenn. Crim. App. 1996), overruled, State v. Williams, 977 S.W.2d 101, 1998 Tenn. LEXIS 512 (Tenn. 1998).

3. Child Witness.

Failure of the trial court to ask 14-year-old witness whether she understood the difference between telling the truth and a lie and whether she comprehended the importance of telling the truth did not render the competency evaluation conducted before she testified inadequate. State v. Caughron, 855 S.W.2d 526, 1993 Tenn. LEXIS 189 (Tenn. 1993), cert. denied, Caughron v. Tennessee, 510 U.S. 979, 114 S. Ct. 475, 126 L. Ed. 2d 426, 1993 U.S. LEXIS 7207 (1993).

There is a rebuttable presumption that a child under 14 years of age is presumed to be competent to testify; where defendant failed to successfully rebut the presumption and where the trial court questioned the child at length prior to trial, admission of the child's testimony was proper. State v. Campbell, 904 S.W.2d 608, 1995 Tenn. Crim. App. LEXIS 189 (Tenn. Crim. App. 1995).

In a prosecution for murder, the trial court did not err in finding defendant's four-year old daughter qualified to testify. State v. Kendricks, 947 S.W.2d 875, 1996 Tenn. Crim. App. LEXIS 582 (Tenn. Crim. App. 1996), appeal denied, — S.W.2d —, 1997 Tenn. LEXIS 248 (Tenn. May 5, 1997).

Child-victim in rape and attempted murder case was competent to testify where the child told the trial court that she was required to tell the truth in court and promised to do so, took an oath, gave cogent and responsive testimony illustrating her personal knowledge of what had occurred, and the trial court was satisfied that the child understood the difference between a true and false statement; the child's admission that she had told untruths in the past did not bar her testimony. State v. Griffis, 964 S.W.2d 577, 1997 Tenn. Crim. App. LEXIS 427 (Tenn. Crim. App. 1997).

In modification of child custody case, although trial court erred when it quashed notices of deposition and subpoenas of the children, error was harmless as trial court allowed the children to testify at trial and explain where they wanted to live and where they wanted to go to school, and their trial testimony was favorable to the father; thus, the father failed to demonstrate how his case was prejudiced by trial court's refusal to allow him to depose the children. Pippin v. Pippin, 277 S.W.3d 398, 2008 Tenn. App. LEXIS 339 (Tenn. Ct. App. June 4, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 954 (Tenn. Dec. 15, 2008).

Postconviction court did not err by denying petitioner relief on his claim that counsel was ineffective for failing to challenge the victim's competency to testify because petitioner did not show that the victim was, at the time of trial, unable to understand and relate facts from his personal knowledge. Rathbone v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 311 (Tenn. Crim. App. Apr. 30, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 508 (Tenn. Sept. 16, 2020).

4. Review.

In the final analysis, the competency of a witness is a matter entrusted to the sound

discretion of the trial judge. State v. Carroll, 36 S.W.3d 854, 1999 Tenn. Crim. App. LEXIS 1346 (Tenn. Crim. App. 1999).

Trial court did not abuse its discretion in allowing the judicial commissioner to testify in defendant's case because although there were concerns that judicial testimony could have potentially undermined judicial independence and created an appearance of impropriety, and the court did not expressly approve of the State's use of the judicial commissioner as a fact witness in defendant's case, neither Tenn. R. Evid. 601 and 605 nor Tenn. Sup. Ct. R. 10, Canon 3 required the judge's disqualification under the circumstances. State v. Nash, 294 S.W.3d 541, 2009 Tenn. LEXIS 652 (Tenn. Oct. 7, 2009).

Trial court did not err by refusing to declare defendant's wife an incompetent witness because evidence that the wife experienced memory lapses, confusion, and agitation went to the weight of her testimony, not her competency. Holt v. Kirk, — S.W.3d —, 2019 Tenn. App. LEXIS 205 (Tenn. Ct. App. Apr. 30, 2019).

Rule 602. Lack of personal knowledge. —

A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony. This rule is subject to the provisions of Rule 703 relating to opinion testimony by expert witnesses.

Advisory Commission Comments. Basic to relevancy concepts is that a witness must know about the subject matter of testimony. This is the familiar requirement of first-hand knowledge.

Under Rule 703, experts may base an opinion on the factual findings of others. Also, party admissions need not be based on first-hand knowledge.

Law Reviews. Competency and Impeachment of Witnesses (Leo Bearman, Jr.), 57 Tenn. L. Rev. 89 (1989).

The Nature and Purpose of Evidence Theory, 66 Vand. L. Rev. 547 (2013).

NOTES TO DECISIONS

Analysis

1. Exceptions.
2. Competence to Testify.
3. Child Witness.
4. Inferences.
5. Knowledge.
6. Illustrative Cases.

1. Exceptions.

Exceptions to the first-hand knowledge rule are expert testimony and admissions of a party opponent. State v. Boling, 840 S.W.2d 944, 1992 Tenn. Crim. App. LEXIS 384 (Tenn. Crim. App. 1992), appeal denied, — S.W.2d —, 1992 Tenn. LEXIS 530 (Tenn. Aug. 31, 1992).

Questions concerning a witness's identification of a defendant go to the weight and credibility of his testimony and not to the admissibility of the testimony. State v. Robinson, 971 S.W.2d 30, 1997 Tenn. Crim. App. LEXIS 580 (Tenn. Crim. App. 1997).

2. Competence to Testify.

In an aggravated assault and aggravated kidnapping proceeding trial, the trial court erred by finding that victim was incompetent to testify where the victim claimed to have no recollection of the assault or the kidnapping, was placed under oath without objection, and the victim's doctor conceded that the victim's health was adequate for giving testimony. State v. Boling, 840 S.W.2d 944, 1992 Tenn. Crim. App. LEXIS 384 (Tenn. Crim. App. 1992), appeal denied, — S.W.2d —, 1992 Tenn. LEXIS 530 (Tenn. Aug. 31, 1992).

In determining whether a witness is competent for purposes of Tenn. R. Evid. 602, the trial court must determine whether a witness had a sufficient opportunity to perceive the subject matter about which he or she is testifying; thus, the party offering the testimony must introduce sufficient evidence to support a jury finding that the witness had personal knowledge of the matter. State v. Land, 34 S.W.3d 516, 2000 Tenn. Crim. App. LEXIS 369 (Tenn. Crim. App. 2000).

3. Child Witness.

Court did not abuse its discretion in allowing child to testify in aggravated sexual battery trial, notwithstanding her statements on cross-examination that she knew about certain aspects of the case through discussions with her sister or overhearing her mother discuss the case with friends; this testimony related to occurrences after the alleged touching, and were not central to the state's case, whereas her testimony as to the actual touching was based on personal observation. State v. Howard, 926 S.W.2d 579, 1996 Tenn. Crim. App. LEXIS 195 (Tenn. Crim. App. 1996), overruled, State v.

Williams, 977 S.W.2d 101, 1998 Tenn. LEXIS 512 (Tenn. 1998).

Postconviction court did not err by denying petitioner relief on his claim that counsel was ineffective for failing to challenge the victim's competency to testify because petitioner did not show that the victim was, at the time of trial, unable to understand and relate facts from his personal knowledge. Rathbone v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 311 (Tenn. Crim. App. Apr. 30, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 508 (Tenn. Sept. 16, 2020).

4. Inferences.

While foundationally the declarant must have personal knowledge, that knowledge may be inferred from the statements themselves and the surrounding facts and circumstances. State v. Land, 34 S.W.3d 516, 2000 Tenn. Crim. App. LEXIS 369 (Tenn. Crim. App. 2000).

5. Knowledge.

While Tenn. R. Evid. 602 fails to define what constitutes "knowledge," the rule does not require absolute certainty; nevertheless, the witness/declarant's statements may not be based on mere speculation. State v. Land, 34 S.W.3d 516, 2000 Tenn. Crim. App. LEXIS 369 (Tenn. Crim. App. 2000).

Admission of statement "he stole my car, he stole my car" was error where there was no evidence that witness either saw or otherwise perceived the defendant's taking of the vehicle; however, such error was harmless as other evidence existed regarding the defendant's guilt. State v. Land, 34 S.W.3d 516, 2000 Tenn. Crim. App. LEXIS 369 (Tenn. Crim. App. 2000).

Lay witnesses were competent to testify because they had personal knowledge of the presence of asbestos in their workplaces, and regardless of whether their testimony was sufficient to independently satisfy the requirements of a Federal Employer's Liability Act claim, the evidence was relevant in that it made the existence of an injury resulting from asbestos exposure more probable; the rule authorized the admission of this testimony, as the witnesses merely testified to the presence of asbestos without offering a scientific opinion as to whether the condition of the asbestos rendered it capable of causing injury. Payne v. CSX Transp., Inc., 467 S.W.3d 413, 2015 Tenn. LEXIS 547 (Tenn. July 1, 2015).

Trial court did not err by denying defendant an opportunity to cross-examine the social worker regarding the medical history contained in the medical reports or to make an offer of proof regarding the same because defense counsel had asked the social worker medical questions related to the portion of the victim's medical report that was prepared by a nurse. State v. Johnson, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 312 (Tenn. Crim. App. Apr. 30, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 548 (Tenn. Sept. 16, 2020).

6. Illustrative Cases.

Trial court did not err in limiting a witness's testimony to matters upon which she had personal knowledge because she could not recall which units she had visited prior to her purchase of the property and could not identify photographs taken of specific units. Riad v. Erie Ins. Exch., 436 S.W.3d 256, 2013 Tenn. App. LEXIS 712 (Tenn. Ct. App. Oct. 31, 2013), appeal denied, Riad v. Erie Ins. Exch., — S.W.3d —, 2014 Tenn. LEXIS 196 (Tenn. Mar. 4, 2014), superseded by statute as stated in, Lindenberg v. Jackson Nat'l Life Ins. Co., — F. Supp. 2d —, 2014 U.S. Dist. LEXIS 184081 (W.D. Tenn. Dec. 9, 2014).

Rule 603. Oath or affirmation. —

Before testifying, every witness shall be required to declare that the witness will testify truthfully by oath or affirmation, administered in a form calculated to awaken the witness's conscience and impress the witness's mind with the duty to do so.

Advisory Commission Comments. Witnesses have already been required to take an oath or affirmation. Tenn. Code Ann. § 24-1-101 [repealed], third sentence, is similar to the rule.

Law Reviews. Competency and Impeachment of Witnesses (Leo Bearman, Jr.), 57 Tenn. L. Rev. 89 (1989).

NOTES TO DECISIONS

ANALYSIS

1. In General.
2. Child Witness.

1. In General.

Understanding the obligation of an oath does not mean that the witness is required to have sufficient academic learning to define an oath or articulate its obligations; rather, the crux of Tenn. R. Evid 603 is that the witness must be aware of and sensitive to the obligation to tell the truth under oath. State v. Jackson, 52 S.W.3d 661, 2001 Tenn. Crim. App. LEXIS 142 (Tenn. Crim. App. 2001).

Prosecutor did not improperly vouch for a

witness's credibility by asking the witness if the witness was going to tell the truth because this did not state an opinion as to whether the witness was truthful. State v. Toles, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 315 (Tenn. Crim. App. May 17, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 462 (Tenn. Sept. 20, 2019).

2. Child Witness.

Six-year-old complainant who testified that she knew lying was wrong, and demonstrated that she knew the difference between telling the truth and a "story", understood the nature of her oath, and the trial court did not abuse its discretion by allowing her testimony. State v. Howard, 926 S.W.2d 579, 1996 Tenn. Crim. App. LEXIS 195 (Tenn. Crim. App. 1996), overruled, State v. Williams, 977 S.W.2d 101, 1998 Tenn. LEXIS 512 (Tenn. 1998).

Postconviction court did not err by denying petitioner relief on his claim that counsel was ineffective for failing to challenge the victim's competency to testify because petitioner did not show that the victim was, at the time of trial, unable to understand and relate facts from his personal knowledge. Rathbone v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 311 (Tenn. Crim. App. Apr. 30, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 508 (Tenn. Sept. 16, 2020).

Rule 604. Interpreters. —

An interpreter is subject to the provisions of these rules and applicable statutes relating to qualifications as an expert and the administration of an oath or affirmation to make a true interpretation. [As amended by order filed December 29, 2005, effective July 1, 2006.]

Advisory Commission Comments. Interpreters must fulfill two requirements: expertise in translating and willingness to swear or affirm. Tenn. Code Ann. § 24-1-211 details the qualifications of sign language interpreters.

Advisory Commission Comments [2006]. The last word is changed from "translation" to "interpretation."

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated December 29, 2005, was ratified and approved by 2006 House Resolution 198 and Senate Resolution 98. The order promulgating the amendment of this rule provided that it take effect July 1, 2006.

The amendment of the Advisory Commission Comments to Rule 604, which substituted "Tenn. Code Ann. § 24-1-211" for "Tenn. Code Ann. § 24-1-103(a)(2)" in the original Comments, as promulgated and adopted by the Supreme Court in its order dated January 8, 2008, was ratified and approved by House Resolution 239 and Senate Resolution 221. The order promulgating the amendment of the Advisory Commission Comments provided that it take effect July 1, 2008.

Law Reviews. Confrontation and the Law of Evidence: Can the Language Conduit Theory Survive in the Wake of Crawford? 67 Vand. L. Rev. 1497 (2014).

NOTES TO DECISIONS

Analysis

1. Ineffective Counsel.
2. Trial Court's Discretion.
3. Burden of Proof.
4. Impeachment.

1. Ineffective Counsel.

Defendant's counsel was not ineffective for failure to object to the use of only one interpreter for the victim (a deaf mute), and for failure to hire a second interpreter from funds available through the public defender's office. Denton v. State, 945 S.W.2d 793, 1996 Tenn. Crim. App. LEXIS 752 (Tenn. Crim. App. 1996).

2. Trial Court's Discretion.

Appointment of an interpreter of a witness' testimony in a criminal case is a matter for the trial court's discretion subject to reversal only for abuse of that discretion. State v. Millsaps, 30 S.W.3d 364, 2000 Tenn. Crim. App. LEXIS

258 (Tenn. Crim. App. 2000), review or rehearing denied, — S.W.3d —, 2000 Tenn. LEXIS 553 (Tenn. Oct. 2, 2000).

3. Burden of Proof.

A party contending that a translation was inaccurate must prove prejudice, and the court of criminal appeals should not speculate as to the accuracy of the translation. Because defendant did not demonstrate nor even allege that the translation was inaccurate, he failed to demonstrate prejudice and the issue was without merit. State v. Millsaps, 30 S.W.3d 364, 2000 Tenn. Crim. App. LEXIS 258 (Tenn. Crim. App. 2000), review or rehearing denied, — S.W.3d —, 2000 Tenn. LEXIS 553 (Tenn. Oct. 2, 2000).

4. Impeachment.

The accuracy of the testimony of the witness as heard and determined by the trial court or jury depends upon the accuracy of the translation or interpretation; therefore, if an interpreter's credibility is subject to question, certainly this may be established by an examination of the interpreter. State v. Millsaps, 30 S.W.3d 364, 2000 Tenn. Crim. App. LEXIS 258 (Tenn. Crim. App. 2000), review or rehearing denied, — S.W.3d —, 2000 Tenn. LEXIS 553 (Tenn. Oct. 2, 2000).

Rule 605. Competency of judge as witness. —

The judge or chancellor presiding at the trial may not testify in that trial. No objection need be made in order to preserve the point.

Advisory Commission Comments. The rule would change Tennessee law. Tenn. Code Ann. § 24-1-205 [repealed] permits trial testimony by a presiding judge. The commission thought it wiser to avoid this awkward practice. See also Canon 3 of the Code of Judicial Conduct.

Of course a judge could testify in a later collateral attack proceeding. The subsequent proceeding would not be "that trial."

The rule does not change a judge's power to notice facts or law under Rules 201 and 202.

NOTES TO DECISIONS

Analysis

1. In General.
2. Disqualification.

1. In General.

By observing a party outside of the judicial proceedings, and then basing a decision on those observations, the judge becomes a source of evidence, in effect, a witness. Vaughn v. Shelby Williams of Tennessee, Inc., 813 S.W.2d 132, 1991 Tenn. LEXIS 265 (Tenn. 1991).

2. Disqualification.

Trial court did not abuse its discretion in allowing the judicial commissioner to testify in defendant's case because although there were concerns that judicial testimony could have potentially undermined judicial independence and created an appearance of impropriety, and the court did not expressly approve of the State's use of the judicial commissioner as a fact witness in defendant's case, neither Tenn. R. Evid. 601 and 605 nor Tenn. Sup. Ct. R. 10, Canon 3 required the judge's disqualification under the circumstances. State v. Nash, 294 S.W.3d 541, 2009 Tenn. LEXIS 652 (Tenn. Oct. 7, 2009).

Rule 606. Competency of juror as witness. —

(a) At the Trial. — A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. No objection need be made in order to preserve the point.

(b) Inquiry into Validity of Verdict or Indictment. — Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon any juror's mind or emotions as influencing that juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes, except that a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention, whether any outside influence was improperly brought to bear upon

any juror, or whether the jurors agreed in advance to be bound by a quotient or gambling verdict without further discussion; nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes. [As amended by order entered January 23, 2001, effective July 1, 2001.]

Advisory Commission Comments. While there is no Tennessee precedent, jurors could and did testify at early common law. This proposed rule would prevent a juror from switching from jury box to witness stand during the course of a trial.

After verdict, part (b) would come into play. A juror may testify or submit an affidavit in connection with a motion for new trial, but only in the limited circumstances of:

(1) "Extraneous prejudicial information" finding its way into the jury room,

(2) Improper outside pressure on a juror, or

(3) A quotient or gambling verdict.

This rule is the same as that adopted in *State v. Blackwell*, 664 S.W.2d 686 (Tenn. 1984).

Law Reviews. Criminal Procedure—Juror Misconduct and Bias—Assessing the Prejudicial Effect of Extra-Judicial Communications by Jurors in a Technologically Advanced Society, 82 Tenn. L. Rev. 253 (2014).

Satisfying the Appearance of Justice When a Juror's Intentional Nondisclosure of Material Information Comes to Light (Jennifer H. Case), 35 U. Mem. L. Rev. 315 (2005).

The Sixth Amendment, Rule 606(b), and the Intrusion into Jury Deliberations of Religious Principles of Decision (Dean Sanderford), 74 Tenn L. Rev. 167 (2007).

Theology in the Jury Room: Religious Discussion as "Extra Material" in the Course of Capital Punishment Deliberations, 55 Vand. L. Rev. 127 (2002).

What Jurors Want to Know: Motivating Juror Cognition to Increase Legal Knowledge & Improve Decisionmaking, 81 Tenn. L. Rev. 752 (2014).

NOTES TO DECISIONS

Analysis

1. Applicability.
2. Purpose.
3. Extraneous Prejudicial Information.
4. Voir Dire.
5. Verdict Forms.
6. Matters Occurring During Deliberations.
7. Matters Concerning the Validity of the Verdict.
8. Admissibility.
9. Bias.

1. Applicability.

In contrast to jury deliberations, which are private, when the matter involves a board's deliberations, which are open to public observation, the court find that the Tenn. R. Evid. 606(b) restrictions do not extend to this situation. Tenn. Dep't of Health v. Collins, — S.W.3d —, 2020 Tenn. App. LEXIS 532 (Tenn. Ct. App. Nov. 25, 2020).

2. Purpose.

Pursuant to Tenn. R. Evid. 606(b) a juror may testify on the question of whether extraneous prejudicial information was improperly brought to the jury's attention without doing violence to the importance of the inviolate nature of their deliberations, because litigants are absolutely entitled to verdicts free of extraneous prejudicial information. Terry v. Plateau Electric Coop., 825 S.W.2d 418, 1991 Tenn. App. LEXIS 98 (Tenn. Ct. App. 1991), rehearing denied, Terry v. Plateau Electric Co., — S.W.2d —, 1991 Tenn. App. LEXIS 520 (Tenn. Ct. App. July 9, 1991).

3. Extraneous Prejudicial Information.

Tenn. R. Evid. 606(b) did not preclude consideration of jurors' affidavits where jury verdict in personal injury case was essentially predicated, not on the facts, but on liability insurance, an extraneous matter. Terry v. Plateau Electric Coop., 825 S.W.2d 418, 1991 Tenn. App. LEXIS 98 (Tenn. Ct. App. 1991), rehearing denied, Terry v. Plateau Electric Co., — S.W.2d —, 1991 Tenn. App. LEXIS 520 (Tenn. Ct. App. July 9, 1991).

Where the plaintiff requests a new trial due to jury misconduct for the alleged reading of a newspaper article, the extraneous prejudicial information must have influenced the jury's verdict. Patton v. Rose, 892 S.W.2d 410, 1994 Tenn. App. LEXIS 339 (Tenn. Ct. App. 1994), appeal denied, — S.W.2d —, 1994 Tenn. LEXIS 350 (Tenn. 1994).

Affidavit of juror which related to effect on jury verdict of failure of witness to testify violated express terms of Tenn. R. Evid. 606 and should not have been considered by intermediate appellate court. Henley v. State, 960 S.W.2d 572, 1997 Tenn. LEXIS 615 (Tenn. 1997), rehearing denied, — S.W.2d —, 1998 Tenn. LEXIS 31 (1998), cert. denied, Henley v. Tennessee, 525 U.S. 830, 119 S. Ct. 82, 142 L. Ed. 2d 64, 1998 U.S. LEXIS 5030 (1998).

A new trial was required where the impression given to the jurors by a bailiff's response to

one juror's question was that the bailiff had said that the jury was required to reach a verdict. State v. Parchman, 973 S.W.2d 607, 1997 Tenn. Crim. App. LEXIS 136 (Tenn. Crim. App. 1997).

Once a criminal defendant established an improper communication with the jury, she was not required to prove an improper influence occurred; the burden shifted to the state to affirmatively show that any contact was harmless. State v. Parchman, 973 S.W.2d 607, 1997 Tenn. Crim. App. LEXIS 136 (Tenn. Crim. App. 1997).

Where a juror had first-hand knowledge of the facts and issues in dispute, the injection of this knowledge into jury deliberations constituted extraneous information for the purposes of Tenn. R. Evid. 606(b). Cavalier Metal Corp. v. Johnson Metal Controls, 124 S.W.3d 122, 2003 Tenn. App. LEXIS 397 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 1186 (Tenn. Dec. 8, 2003).

Because a juror possessed first-hand knowledge of facts and issues in dispute in the trial, which information was passed on to other jurors, the affidavits of those jurors were admissible under Tenn. R. Evid. 606(b); because the information was prejudicial, a company's new trial motion should have been granted, and the court ordered a new trial. Cavalier Metal Corp. v. Johnson Metal Controls, 124 S.W.3d 122, 2003 Tenn. App. LEXIS 397 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 1186 (Tenn. Dec. 8, 2003).

Trial court erred in allowing defendant access to sealed jury information, where the juror's communications to the court that they were offended by defendant's behavior were not external influences within the ambit of Tenn. R. Evid. 606(b) and defendant had not established a compelling need for unsealing the records of the anonymously empaneled jury. Carruthers v. State, 145 S.W.3d 85, 2003 Tenn. Crim. App. LEXIS 839 (Tenn. Crim. App. Oct. 1, 2003), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 109 (Tenn. Jan. 26, 2004).

Defendant established a compelling need for unsealing the records of an anonymously empaneled jury in order to interview a juror to determine if that juror willfully concealed information during voir dire, and whether he was biased against defendant. Tenn. R. Evid. 606(b) permitted the other jurors to testify as to whether the juror related information to them about his prior history involving defendant and/or his family, which was relevant to whether the juror was truthful during voir dire and to whether he imparted extraneous information to other jurors. Carruthers v. State, 145 S.W.3d 85, 2003 Tenn. Crim. App. LEXIS 839 (Tenn. Crim. App. Oct. 1, 2003), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 109 (Tenn. Jan. 26, 2004).

In post-conviction hearing, court erred in admitting juror testimony concerning the influence of extraneous information from a court officer during jury deliberations in petitioner's criminal trial; Tenn. R. Evid. 606(b) did not permit testimony concerning the effect of such information on the deliberative process. Walsh v. State, 166 S.W.3d 641, 2005 Tenn. LEXIS 581 (Tenn. 2005).

While the juror acted in contravention of instructions, his statement was not extraneous prejudicial information in light of appellant's own testimony, and there was no reasonable possibility that the statement altered the verdict, and thus the trial court did not err in denying appellant's motion for a new trial. Allen v. Albea, 476 S.W.3d 366, 2015 Tenn. App. LEXIS 241 (Tenn. Ct. App. Apr. 23, 2015).

4. Voir Dire.

Tenn. R. Evid. 606(b) does not apply to testimony about voir dire and does not foreclose a challenge on the grounds of propter affectum. State v. Akins, 867 S.W.2d 350, 1993 Tenn. Crim. App. LEXIS 430 (Tenn. Crim. App. 1993).

5. Verdict Forms.

Tenn. R. Evid. 606 was violated where, upon being notified by the defendant after the trial was over that the wrong verdict form had been used, the court held a hearing 14 days after the verdict had been rendered and the jury had been discharged, during which the court recalled and, with counsel, examined each juror who had heard the case to ascertain whether the verdict form had affected the jurors' verdict and whether the jury had applied the correct standard. State v. Stephenson, 878 S.W.2d 530, 1994 Tenn. LEXIS 143 (Tenn. 1994), rehearing denied, — S.W.2d —, 1994 Tenn. LEXIS 203 (Tenn. June 20, 1994), overruled, State v. Mitchell, 137 S.W.3d 630, 2003 Tenn. Crim. App. LEXIS 670 (Tenn. Crim. App. 2003).

6. Matters Occurring During Deliberations.

A juror's affidavit offered to show the effect of another juror's negative statements regarding one of the parties was inadmissible. State ex rel. Commissioner, Dep't of Transp. v. Hurley, 911 S.W.2d 724, 1995 Tenn. App. LEXIS 414 (Tenn. Ct. App. 1995), appeal denied, — S.W.2d —, 1995 Tenn. LEXIS 637 (Tenn. 1995).

In a coram nobis proceeding, the trial court correctly ruled that Tenn. R. Evid. 606(b) prohibited a juror, who would have testified that recanted testimony and newly discovered x-ray evidence would have affected the juror's verdict in the original trial testimony, from testifying, as the testimony was speculative at best. State v. Workman, 111 S.W.3d 10, 2002 Tenn. Crim. App. LEXIS 1124 (Tenn. Crim. App. 2002), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 469 (Tenn. May 19, 2003).

Plaintiff had not shown that the alleged extraneous information provided by a juror to his fellow jurors during deliberations of a medical malpractice case was prejudicial as plaintiff did not produce the article she claimed constituted the extraneous prejudicial information, she did not produce an affidavit of the juror who allegedly read the article and then tried to discuss it with the other jurors, and the only affidavits of jurors submitted averred that they refused to read the article. Mayo v. Shine, 392 S.W.3d 61, 2012 Tenn. App. LEXIS 425 (Tenn. Ct. App. June 25, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 807 (Tenn. Oct. 18, 2012).

In a rape case in which defendant attempted to admit three affidavits from jurors as grounds to overturn his conviction, stating the jurors all related that another juror's inappropriate racial remarks pressured them to vote guilty, this rule explicitly forbade that type of testimony as the affidavits contained information about jury deliberations and jurors' thought processes, but they did not contain proof of extraneous prejudicial information that could have warranted a new trial; and internal jury influences were not grounds to overturn a verdict. State v. Valentine, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 1 (Tenn. Crim. App. Jan. 3, 2020).

Exposure to the extraneous information was harmless because, while it was highly improper for the jury to research the meaning of a life sentence in Tennessee and a medical word in violation of the instruction of the trial court, the victim's cause of death was not in dispute and the meaning of a life sentence in Tennessee did not bear on the guilt or innocence of defendant. State v. Booker, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 226 (Tenn. Crim. App. Apr. 8, 2020).

Post-conviction court did not deprive defendant of due process by sustaining the State's objection to the testimony of a juror at defendant's trial because the juror's testimony regarding the effect defendant's trial testimony had on her deliberation did not fall within one of the exceptions of this rule. Fisher v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 456 (Tenn. Crim. App. July 1, 2020).

7. Matters Concerning the Validity of the Verdict.

In a criminal case, post-conviction court did not err by excluding the affidavit of a juror who claimed that he would have voted against conviction had he heard exculpatory evidence withheld by the state in violation of the defendants' Brady rights; the evidence was prohibited by Tenn. R. Evid. 606. Hutchison v. State, 118 S.W.3d 720, 2003 Tenn. Crim. App. LEXIS 253 (Tenn. Crim. App. 2003).

8. Admissibility.

That portion of one juror's affidavit regarding another juror's statement to the jury was admissible with respect to the fact of alleged extraneous information, but that portion of his affidavit with respect to the effect, or intended effect, of that information was not admissible. Allen v. Albea, 476 S.W.3d 366, 2015 Tenn. App. LEXIS 241 (Tenn. Ct. App. Apr. 23, 2015).

Defendants claimed that the court's refusal to consider a juror's affidavit was error when the affidavit established that there was doubt about the conclusions that could be drawn from the evidence; however, given the rule, exclusion of the affidavit was proper. Ledford v. Sneed, — S.W.3d —, 2020 Tenn. App. LEXIS 208 (Tenn. Ct. App. May 8, 2020).

9. Bias.

Juror's post-trial post on social medial that the juror prayed plaintiffs would win was insufficient to show bias necessitating a new trial. Hatfield v. Allenbrooke Nursing & Rehab. Ctr., LLC, — S.W.3d —, 2018 Tenn. App. LEXIS 450 (Tenn. Ct. App. Aug. 6, 2018), appeal denied, Hatfield v. Allenbrooke Nursing & Rehab. Ctr., LLC, — S.W.3d —, 2019 Tenn. LEXIS 74 (Tenn. Jan. 17, 2019).

Rule 607. Who may impeach. —

The credibility of a witness may be attacked by any party, including the party calling the witness.

Advisory Commission Comments. The rule would abolish Tennessee's common law prohibition against impeaching one's own witness — the voucher rule. The present rule finds expression in *King v. State*, 187 Tenn. 431, 215 S.W.2d 813 (1948); *Record v. Chickasaw Cooperage Co.*, 108 Tenn. 657, 69 S.W. 334 (1902).

The Commission believed that requiring a lawyer calling a witness to vouch for the witness's credibility too often unfairly restricts proof. Obviously there is no choice over who witnesses facts. In some instances, rigid enforcement of the voucher rule has caused Constitutional error. See *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).

See Rule 611 for the mode and order of interrogation.

Advisory Commission Comments [2000]. Decisional law prohibits a lawyer from calling a witness — knowing the testimony will be adverse to the lawyer's position — solely to impeach that witness by an inconsistent statement. See the June 1999 issue of the *Tennessee Bar Journal* at page 23 and Cohen et alia, *Tennessee Law of Evidence* (3d ed.) at § 613.1.

Law Reviews. Calling Andy Williams to Impeach Him: The Claudine Longet Trial (Donald F. Paine), 35 Tenn. B.J. 23 (1999).

NOTES TO DECISIONS

ANALYSIS

1. In General.
2. Admissibility.

1. In General.

Tenn. R. Evid. 606 permits impeachment by either party so long as the questioning is not a pretext for putting inadmissible hearsay before the jury. State v. Jones, 15 S.W.3d 880, 1999 Tenn. Crim. App. LEXIS 850 (Tenn. Crim. App. 1999).

2. Admissibility.

Because a doctor's misdiagnosis of thyroid cancer was relevant to his credibility as an expert and the validity of his opinion as to the issues, the admission of his testimony about the misdiagnosis was not erroneous and did not amount to a substantial error in the admission of evidence warranting a new trial. Payne v. CSX Transp., Inc., 467 S.W.3d 413, 2015 Tenn. LEXIS 547 (Tenn. July 1, 2015).

Based upon the prosecutor's statement to the court about the State's preparing the witness for his trial testimony and the witness's deception relative to the content of his trial testimony, defendant did not show that the State was aware, when it called the witness, that the witness had disavowed his written statement; in the absence of such evidence, the appellate court could not conclude that the witness was called as a witness as a pretext to introducing his written statement and that the testimony of a chief and a captain should not have been allowed to impeach the witness's testimony. State v. Rayfield, 507 S.W.3d 682, 2015 Tenn. Crim. App. LEXIS 780 (Tenn. Crim. App. Sept. 28, 2015), appeal denied, — S.W.3d —, 2016 Tenn. LEXIS 146 (Tenn. Feb. 18, 2016).

Trial court did not err by permitting the State to impeach the co-defendant with her prior inconsistent statement to an investigator that defendant was wearing a red coat because there was no evidence in the record that the State was aware at trial that the co-defendant would repudiate her prior statement, the co-defendant's prior inconsistent statement spoke directly to the credibility of her recollection of defendant's clothing on the night of the crimes, and her credibility on this issue was of significant value, and trial court's instruction specifically instructed the jury that the red coat statement was only admissible as impeachment evidence, and it sought to limit any prejudicial impact. State v. Kea, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 72 (Tenn. Crim. App. Mar. 4, 2021).

Rule 608. Evidence of character and conduct of witness. —

(a) Opinion and Reputation Evidence of Character. — The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) the evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked.

(b) Specific Instances of Conduct. — Specific instances of conduct of a witness for the purpose of attacking or supporting the witness's character for truthfulness, other than convictions of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, if probative of truthfulness or untruthfulness and under the following conditions, be inquired into on cross-examination of the witness concerning the witness's character for truthfulness or untruthfulness or concerning the character for truthfulness or untruthfulness of another witness as to which the character witness being cross-examined has testified. The conditions which must be satisfied before allowing inquiry on cross-examination about such conduct probative solely of truthfulness or untruthfulness are:

(1) The court upon request must hold a hearing outside the jury's presence and must determine that the alleged conduct has probative value and that a reasonable factual basis exists for the inquiry;

(2) The conduct must have occurred no more than ten years before commencement of the action or prosecution, but evidence of a specific instance of conduct not qualifying under this paragraph (2) is admissible if the proponent gives to the adverse party sufficient advance notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence and the court determines in the interests of justice that the probative value of that evidence, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(3) If the witness to be impeached is the accused in a criminal prosecution, the State must give the accused reasonable written notice of the impeaching conduct before trial, and the court upon request must determine that the conduct's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues. The court may rule on the admissibility of such proof prior to the trial but in any event shall rule prior to the testimony of the accused. If the court makes a final determination that such proof is admissible for impeachment purposes, the accused need not actually testify at the trial to later challenge the propriety of the determination.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the witness's privilege against self-incrimination when examined with respect to matters which relate only to character for truthfulness.

(c) Juvenile Conduct. — Evidence of specific instances of conduct of a witness committed while the witness was a juvenile is generally not admissible under this rule. The court may, however, allow evidence of such conduct of a witness other than the accused in a criminal case if the conduct would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination in a civil action or criminal proceeding. [As amended by order entered January 25, 1991, effective July 1, 1991; and by order entered January 6, 2005, effective July 1, 2005.]

Advisory Commission Comments. Part (a) admits opinion as well as community reputation to prove character. Presently Tennessee restricts proof to reputation evidence. *Ford v. Ford*, 26 Tenn. 92 (1846). The proposed change is minimal, however, because Tennessee has allowed a character witness on the credibility issue to opine that the fact witness should or should not be believed. *Ford v. Ford*, 26 Tenn. 92, 102 (1846).

Part (b) reflects the Supreme Court's view of impeachment by prior bad acts. *State v. Morgan*, 541 S.W.2d 385 (Tenn. 1976), incorporated F.R.Evid. 608(b) into Tennessee case law. The proposed rule is even more specific than the federal version. It requires a jury-out hearing on probative value and basis for cross-examination, relatively recent misconduct, and notice plus analytical weighing of probative value versus unfair prejudice.

To the extent that *State v. Caruthers*, 676 S.W.2d 935 (Tenn. 1984), can be construed as allowing cross-examination about a prior act of rape to impeach, the proposal would change that result.

If the witness makes a sweeping claim of good conduct on direct examination, that claim may open the door to cross-examination without pretrial notice and with a lower standard of probativeness, as rebuttal of the broad claim would itself tend to show untruthfulness. Also, there may be instances where the prosecution would not discover the accused's bad acts until after the trial begins, making pretrial notice impossible; in such cases immediate notice and a hearing on the issue before the accused testifies should satisfy the spirit of the rule.

Note that the accused's failure to take the stand in face of an adverse ruling on admissibility of a prior bad act does not waive the right to assign error on appeal.

Part (c) conforms juvenile bad acts admissibility to the principles used with juvenile adjudications. See Rule 609(d).

Advisory Commission Comments [1991]. This is a technical amendment.

Advisory Commission Comments [2005]. Substituting "character for truthfulness" in place of "credibility" at the beginning and end of

Rule 608(b) clarifies that contradiction impeachment by extrinsic evidence is permissible.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 6, 2005, was ratified and approved by House Resolution 13 and Senate Resolution 11. The order promulgating the amendment of this rule provided that it take effect July 1, 2005.

Cross-References. Admissibility of evidence of other crimes, wrongs, or acts of any individual, § 24-7-125.

Law Reviews. Comparing the Tennessee and Federal Rules of Evidence (Donald F. Paine), 26 Tenn. B.J. 37 (1990).

Evidence of Character Under the New Rules (Donald F. Paine), 26 Tenn. B.J. 25 (1990).

Impeachment by Contradiction (Donald F. Paine), 33 Tenn. B.J. 32 (1997).

"I've Lost a Wife and Gained a Boat": The Murder Trial of Ron Sotka (Donald F. Paine), 36 Tenn. B.J. 31 (2000).

Relevance: The Tennessee Balancing Act (Robert Banks, Jr., Melissa Maravich), 57 Tenn. L. Rev. 33 (1989).

The Ten Commandments of Direct Examination (Donald F. Paine), 36 Tenn. B.J. 20 (2000).

Warping the Rules: How Some Courts Misapply Generic Evidentiary Rules to Exclude Polygraph Evidence, 59 Vand. L. Rev. 539 (2006).

NOTES TO DECISIONS

ANALYSIS

1. Right to Present Evidence.
2. Jury-out Hearing.
3. Specific Instances of Conduct.
4. —Factual Basis.
5. —Probative Value.
6. Admissibility.
7. —Foundation for Testimony.
8. Sexual Conduct.
9. Harmless Error.
10. Prejudice.
11. Self-Impeachment.

1. Right to Present Evidence.

Under Tenn. R. Evid. 608, a defendant has the right to present evidence of his truthful character after it has been attacked by any competent means and that right is not dependent upon relinquishment of his fifth amendment privilege. State v. Phipps, 883 S.W.2d 138, 1994 Tenn. Crim. App. LEXIS 298 (Tenn. Crim. App. 1994).

Given the witness's explanation of the problems that led to her reprimand, none of which were targeted at her technical ability with performing autopsies, drawing conclusions therefrom, or making professional misrepresentations, its omission from her curriculum vita did not establish that she had been "untruthful." State v. Larkin, 443 S.W.3d 751, 2013 Tenn. Crim. App. LEXIS 297 (Tenn. Crim. App. Mar. 28, 2013).

2. Jury-out Hearing.

Trial court erred by denying plaintiff in civil case's request for a jury-out hearing on the admissibility of the evidence concerning other fires on his property and that of his family. Wright v. United Services Auto. Ass'n, 789 S.W.2d 911, 1990 Tenn. App. LEXIS 132 (Tenn. Ct. App. 1990).

Jury-out hearing to determine the admissibility of specific instances of conduct was required to be held before the appellant had testified and rested his defense. State v. Ford, 861 S.W.2d 846, 1992 Tenn. Crim. App. LEXIS 583 (Tenn. Crim. App. 1992).

3. Specific Instances of Conduct.

Asking whether plaintiff had pled guilty to charges of theft and burglary on cross-examination, was a legitimate way to question his credibility. Kanipes v. North American Phillips Electronics Corp., 825 S.W.2d 426, 1991 Tenn. App. LEXIS 858 (Tenn. Ct. App. 1991), rehearing denied, — S.W.2d —, 1991 Tenn. App. LEXIS 898 (Tenn. Ct. App. Nov. 19, 1991).

The trial court committed error of prejudicial dimensions in permitting the state to introduce testimony by defendant's niece that defendant had sexually abused her in the past, where both the trial court and the state failed to satisfy the prerequisites for the introduction of specific instances of conduct. State v. Ford, 861 S.W.2d 846, 1992 Tenn. Crim. App. LEXIS 583 (Tenn. Crim. App. 1992).

State was bound by the appellant's answer to the state's question as to whether he had on past occasions sexually abused his niece, and could not introduce extrinsic evidence to prove such abuse. State v. Ford, 861 S.W.2d 846, 1992 Tenn. Crim. App. LEXIS 583 (Tenn. Crim. App. 1992).

In a prosecution for armed robbery, it was improper for the state to attempt to impeach an alibi witness by asking about a purported conviction for receiving and concealing stolen property, where the state had not requested a hearing to determine the admissibility of the alleged conviction and the basis for the question was an erroneous National Crime Information Center (N.C.I.C.) printout. State v. Philpott, 882 S.W.2d 394, 1994 Tenn. Crim. App. LEXIS 170 (Tenn. Crim. App. 1994), appeal denied, — S.W.2d —, 1994 Tenn. LEXIS 224 (Tenn. 1994).

In a criminal prosecution, because the credibility of the victim was a central issue, the trial court committed reversible error in not allowing defendant to question the victim about her prior involvement in a burglary, even though the victim had been granted pretrial diversion

and the records of the burglary proceedings were expunged. State v. Dishman, 915 S.W.2d 458, 1995 Tenn. Crim. App. LEXIS 814 (Tenn. Crim. App. 1995).

Where physician testifying as expert witness was bound by the ethical rules of the profession, and yet for a number of years engaged in a practice of deception which the doctor knew could constitute grounds for license revocation, the doctor's veracity as a witness should surely have been questioned by virtue of this conduct. Sneed v. Stovall, 22 S.W.3d 277, 1999 Tenn. App. LEXIS 857 (Tenn. Ct. App. 1999), aff'd, 156 S.W.3d 1, 2004 Tenn. App. LEXIS 201 (Tenn. Ct. App. 2004).

In a car accident negligence suit, testimony regarding whether or not defendant rendered assistance to plaintiffs following the accident was not inadmissible because it was not a prior bad act. In addition, defendant's testimony was impeached only after he claimed, in response to an open-ended question, that he had assisted plaintiffs; therefore, the trial court's admission of that testimony was not error. Davidson v. Lindsey, 104 S.W.3d 483, 2003 Tenn. LEXIS 410 (Tenn. 2003).

Disclosure to the jury that the State's expert witness's license had been previously suspended and was in probationary status when he evaluated the victim was prejudicial to the State in this rape case, as the information bore on the expert's credibility, and the State failed to establish exclusion of the suspension; the trial court was required to weigh the probative value of the license suspension, not the precipitating acts of misconduct, against the countervailing factors identified in the rule, and erred in failing to do so. State v. Zeigler, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 83 (Tenn. Crim. App. Feb. 7, 2019).

Limited inquiry into the status of an expert witness's professional license is admissible to impeach the credibility of the witness. State v. Zeigler, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 83 (Tenn. Crim. App. Feb. 7, 2019).

Trial court did not abuse its discretion by refusing to allow defense counsel to question an investigator about allegations that the investigator improperly influenced the victim's testimony at the preliminary hearing because counsel's use of extrinsic evidence to impeach the victim would have been improper. State v. Gary, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 584 (Tenn. Crim. App. Sept. 18, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 31 (Tenn. Jan. 15, 2020).

Trial court did not unreasonably restrict defendant's right to cross-examine a former police officer, who was fired from his employment for having sent and or received inappropriate text messages with a confidential informant, because the evidence surrounding his termination was not relevant in that it made any fact in evidence that was of consequence more probable or less probable; and there was no evidence that the text messages were concealed or that the officer made false statements or lied about the messages. State v. Robinson, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 96 (Tenn. Crim. App. Mar. 17, 2021).

4. —Factual Basis.

Trial court did not err in not allowing defendant to impeach witness by cross-examination about, and proving his commission of, perjury in another hearing, where the document in the record did not constitute proof that the witness was convicted of perjury. State v. Shepherd, 862 S.W.2d 557, 1992 Tenn. Crim. App. LEXIS 833 (Tenn. Crim. App. 1992), rehearing denied, 862 S.W.2d 557, 1992 Tenn. Crim. App. LEXIS 894 (Tenn. Crim. App. 1992), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 120 (Tenn. Mar. 22, 1993).

5. —Probative Value.

The trial court erred in failing to determine whether the specific instances of sexual misconduct related by defendant's niece were probative of truthfulness or untruthfulness. State v. Ford, 861 S.W.2d 846, 1992 Tenn. Crim. App. LEXIS 583 (Tenn. Crim. App. 1992).

Finding that the subcontractor was 50 percent at fault in his negligence action against the general contractor and the subcontractor was proper because the trial court did not err in excluding a worker's misdemeanor convictions and probation violations. None of his misdemeanor convictions involved dishonesty or false statements, and therefore they were inadmissible under Tenn. R. Evid. 609; moreover, his probation violations for failing a drug test were not probative of his character for truthfulness, Tenn. R. Evid. 608(a). Indoccio v. M&A Builders, LLC, 372 S.W.3d 112, 2011 Tenn. App. LEXIS 619 (Tenn. Ct. App. Nov. 14, 2011), appeal denied, Indoccio v. M & A Builders, LLC, — S.W.3d —, 2012 Tenn. LEXIS 259 (Tenn. Apr. 11, 2012).

6. Admissibility.

In contrast to the use of character evidence to show conformity with a trait such as violence or peacefulness, reputation and opinion evidence is always admissible to attack a witness's credibility. State v. West, 844 S.W.2d 144, 1992 Tenn. LEXIS 657 (Tenn. 1992).

After defendant directly questioned a witness about specific "bad acts," the court did not err in permitting the state to cross-examine the witness about the acts for impeachment purposes without holding a jury-out hearing about the probative value of such evidence. State v. Hutchison, 898 S.W.2d 161, 1994 Tenn. LEXIS 157 (Tenn. 1994), rehearing denied, 898 S.W.2d 161, 1995 Tenn. LEXIS 198 (1995), cert. denied, Hutchinson v. Tennessee, 516 U.S. 846, 116 S. Ct. 137, 133 L. Ed. 2d 84, 1995 U.S. LEXIS 5846 (1995), dismissed, Hutchison v. Bell, — F.

Supp. 2d —, 2010 U.S. Dist. LEXIS 31736 (E.D. Tenn. Mar. 30, 2010).

Testimony of an expert witness as to a criminal defendant's post-traumatic stress, offered to show that the victim had raped defendant, was properly excluded since it did not relate to "character for truthfulness" but rather to defendant's truthfulness on a particular occasion; such evidence is not allowed by Tenn. R. Evid. 608. State v. Ashburn, 914 S.W.2d 108, 1995 Tenn. Crim. App. LEXIS 558 (Tenn. Crim. App. 1995), appeal denied, — S.W.2d —, 1995 Tenn. LEXIS 776 (Tenn. 1995).

The defendant's testimony that he had killed in self-defense put his credibility at issue and the state was, therefore, properly permitted to ask the defendant on cross-examination about his passing of bad checks and forgery. State v. Bivens, 967 S.W.2d 821, 1996 Tenn. Crim. App. LEXIS 784 (Tenn. Crim. App. 1996).

There was no error under Tenn. R. Evid. 608(b) in allowing wife of victim, in murder trial, to be impeached with charges of writing bad checks because, although the charges had been dismissed, this did not equate to a finding of innocence and Tenn. R. Evid. 608 is not dependent on criminal convictions for admissibility but concerns conduct bearing on the witness's honesty. State v. Watson, 227 S.W.3d 622, 2006 Tenn. Crim. App. LEXIS 259 (Tenn. Crim. App. 2006), appeal denied, State v. Brooks, — S.W.3d —, 2006 Tenn. LEXIS 620 (Tenn. July 3, 2006).

In defendant's murder trial for the killing of his wife, the trial court did not err in permitting the State to introduce propensity evidence in rebuttal after defendant testified that he had never hit his wife; because defendant put his treatment of the victim at issue, the prosecutor was properly permitted to introduce the testimony of a co-worker of the victim, who testified that defendant had appeared at the workplace on several occasions in a rage, that the victim appeared at work on several occasions and had difficulty walking, that the victim often seemed stiff and was covered with bruises, and that the victim wore long sleeves even in warm weather. State v. Brock, 327 S.W.3d 645, 2009 Tenn. Crim. App. LEXIS 496 (Tenn. Crim. App. June 29, 2009), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 56 (Tenn. Jan. 25, 2010), cert. denied, Brock v. Tennessee, , 562 U.S. 850, 131 S. Ct. 101, 178 L. Ed. 2d 64, 2010 U.S. LEXIS 5883 (U.S. 2010).

Because defendant's motion to exclude evidence of the acquittals of two men defendant implicated as the individuals responsible for a murder was made before the men testified, it be premature to admit evidence of the acquittals to demonstrate their truthful character. State v. Turner, 352 S.W.3d 425, 2011 Tenn. LEXIS 960 (Tenn. Oct. 12, 2011).

Trial court applied an incorrect legal standard and erred in admitting the evidence of the prior acquittals of two men defendant implicated as the individuals responsible for a murder for the purpose of demonstrating their credibility because evidence of the prior acquittals was not relevant to the men's truthfulness; the men testified in their previous trial that they did not kill the victim, and if they did, in fact, kill the victim, they would have ample motivation to lie. State v. Turner, 352 S.W.3d 425, 2011 Tenn. LEXIS 960 (Tenn. Oct. 12, 2011).

Trial court properly allowed the State to cross-examine a witness about his alleged criminal conduct, which occurred less than 10 years prior to the prosecution against defendant. State v. Gill, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 91 (Tenn. Crim. App. Feb. 11, 2019).

Evidence of first victim's alleged domestic assault on her mother was not admissible as impeachment evidence because it was not probative of the victim's character for truthfulness or untruthfulness and had little relevance to the issues being tried. State v. Robinson, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 277 (Tenn. Crim. App. Apr. 21, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 427 (Tenn. Aug. 7, 2020).

Trial court did not err by prohibiting the defendant from inquiring of a witness about specific instances of the victim's conduct regarding her character for truthfulness because this rule allows counsel to ask the witness about the witness's prior acts, not the prior acts of another witness. State v. Johnson, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 312 (Tenn. Crim. App. Apr. 30, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 548 (Tenn. Sept. 16, 2020).

7. —Foundation for Testimony.

The proper foundation for the admission of opinion testimony pertaining to another witness's character for truthfulness requires a demonstration that the opinion is rationally based on the perception of the witness and would be helpful to the jury in determining the fact of credibility. State v. Dutton, 896 S.W.2d 114, 1995 Tenn. LEXIS 96 (Tenn. 1995).

To warrant admission of testimony about another person's reputation for truthfulness, it is necessary to qualify the reputation witness through a showing of such acquaintance with the person, the community in which he has lived and the circles in which he has moved, as to speak with authority of the terms in which the person is generally regarded. State v. Dutton, 896 S.W.2d 114, 1995 Tenn. LEXIS 96 (Tenn. 1995).

School counselor's testimony that the alleged sexual assault victim was reserved and never one to be attention seeking was a description of the victim's demeanor rather than testimony regarding the victim's character and was based

on the counselor's perception of the victim and the counselor's previous experience of the victim. The testimony, thus, was properly admitted as the school counselor testified about the counselor's personal perception of the victim based on the counselor's interactions with the victim. Petr Pompa v. State, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 767 (Tenn. Crim. App. Dec. 2, 2019).

8. Sexual Conduct.

Specific instances of sexual conduct are not probative of truthfulness or untruthfulness. State v. Ford, 861 S.W.2d 846, 1992 Tenn. Crim. App. LEXIS 583 (Tenn. Crim. App. 1992).

Affair by the murder victim's spouse with the spouse's paramour was not probative of the truthfulness of the spouse in defendant's murder trial. Accordingly, the trial court did not err when it refused to allow the impeachment of the spouse on the basis of the spouse's affair. State v. Bell, 480 S.W.3d 486, 2015 Tenn. LEXIS 720 (Tenn. Sept. 10, 2015), cert. denied, Bell v. Tennessee, 195 L. Ed. 2d 221, 136 S. Ct. 2006, — U.S. —, 2016 U.S. LEXIS 3192 (U.S. 2016).

9. Harmless Error.

Objection to prosecution's question to defendant regarding drug purchases unconnected to murder case should have been sustained and curative instructions given, but, considering the record as a whole, the state's error was harmless. State v. Gaylor, 862 S.W.2d 546, 1992 Tenn. Crim. App. LEXIS 748 (Tenn. Crim. App. 1992), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 234 (Tenn. June 7, 1993).

10. Prejudice.

In an action arising from an automobile-truck collision, the trial court properly prevented reference to traffic violations or criminal convictions of defendant truck driver that occurred after the accident because prejudice to the defendant overcame any probative value they might have. Herbert by Herbert v. Brazeale, 902 S.W.2d 933, 1995 Tenn. App. LEXIS 86 (Tenn. Ct. App. 1995).

Court erred in allowing testimony regarding defendant's witness's involvement in chop shops and misdemeanor convictions because defendant's witness played a critical role in the defense theory—he was the only witness who corroborated defendant's account that he had authority to borrow the tractor, and the multiple errors sent a message to the jury that the witness was a shady character who had attracted the continuing attention of the police for at least thirty years, and the trial court itself connected the witness to a notorious criminal and convicted murderer. State v. Seaton, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 63 (Tenn. Crim. App. Feb. 28, 2021).

11. Self-Impeachment.

In an action arising from an automobile accident, plaintiff's admission of untruthfulness on a job application she made before the accident was admissible as self-impeachment. Buchanan v. Harris, 902 S.W.2d 941, 1995 Tenn. App. LEXIS 141 (Tenn. Ct. App. 1995).

Rule 609. Impeachment by evidence of conviction of crime. —

(a) General Rule. — For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a crime may be admitted if the following procedures and conditions are satisfied:

(1) The witness must be asked about the conviction on cross-examination. If the witness denies having been convicted, the conviction may be established by public record. If the witness denies being the person named in the public record, identity may be established by other evidence.

(2) The crime must be punishable by death or imprisonment in excess of one year under the law under which the witness was convicted or, if not so punishable, the crime must have involved dishonesty or false statement.

(3) If the witness to be impeached is the accused in a criminal prosecution, the state must give the accused reasonable written notice of the impeaching conviction before trial, and the court upon request must determine that the conviction's probative value on credibility outweighs its unfair prejudicial effect on the substantive issues. The court may rule on the admissibility of such proof prior to the trial but in any event shall rule prior to the testimony of the accused. If the court makes a final determination that such proof is admissible for impeachment purposes, the accused need not actually testify at the trial to later challenge the propriety of the determination.

(b) Time Limit. — Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed between the date of release from

confinement and commencement of the action or prosecution; if the witness was not confined, the ten-year period is measured from the date of conviction rather than release. Evidence of a conviction not qualifying under the preceding sentence is admissible if the proponent gives to the adverse party sufficient advance notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence and the court determines in the interests of justice that the probative value of the conviction, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.

(c) Effect of Pardon. — Evidence of a conviction is not admissible under this rule if (1) the conviction has been the subject of a pardon based on a finding of the rehabilitation of the person convicted and that person has not been convicted of a subsequent crime which was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon based on a finding of innocence.

(d) Juvenile Adjudications. — Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, allow evidence of a juvenile adjudication of a witness other than the accused in a criminal case if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination in a civil action or criminal proceeding.

(e) Pendency of Appeal. — The pendency of an appeal of a conviction does not render evidence of that conviction inadmissible. Evidence of the pendency of an appeal is admissible.

Advisory Commission Comments. The Supreme Court adopted F.R.Evid. 609(a) & (b) in *State v. Morgan*, 541 S.W.2d 385 (Tenn. 1976), and thereby rejected the old "moral turpitude" criterion for admissibility of convictions to impeach. Proposed Tennessee Rule 609(a) takes *Morgan* at face value and lists its essential elements:

(1) The time of proof ordinarily is during cross-examination, but the witness's denial triggers extrinsic evidence. This rule does not preclude questions about prior convictions during direct examination.

(2) Only felony convictions or those misdemeanor convictions involving dishonesty are competent for impeachment. See *State v. Butler*, 626 S.W.2d 6 (Tenn. 1981), for the Supreme Court's view that theft crimes involve dishonesty. The rule is consistent with *Butler.*

(3) When the witness in a criminal trial is the accused, the prosecution "must" give pretrial notice and the trial judge "must" make a determination before the accused elects to testify or not that the probative value of the conviction "on credibility" is greater than its "unfair prejudicial effect on the substantive issues." To the extent that *State v. Sheffield*, 676 S.W.2d 542 (Tenn. 1984), is inconsistent, the proposal would change the result.

Note that the accused who does not take the witness stand because of an unfavorable ruling on admissibility of a prior conviction can nonetheless raise error on appeal.

For witnesses not covered by 609(a)(3), the balancing test is different. Rule 403 applies, and a conviction would be admissible to impeach unless "its probative value is substantially outweighed by the danger of unfair prejudice" or other criteria listed in that rule.

Part (b) of proposed Rule 609 restates and hopefully clarifies *Morgan* language concerning inadmissibility of stale convictions. To avoid the mistaken exclusion of convictions "ten years old," the rule separates convictions with time served from those where the convict served no prison time. Normally, ten years would be measured from release from jail to commencement of prosecution.

Even old convictions can be used in certain instances, but the proposed rule requires a weighing ("substantially outweighs") of probative value versus undue prejudicial effect, with a specific factual determination by the trial judge.

Part (c) excludes only those convictions of witnesses pardoned because of rehabilitation or innocence.

Part (d) follows the current philosophy expressed in Tenn. Code Ann. § 37-1-133(b) and *State v. Butler*, 626 S.W.2d 6 (Tenn. 1981). Constitutional confrontation issues may require admitting the juvenile record of a witness

testifying against the criminal accused. See *Davis v. Alaska*, 415 U.S. 308 (1974).

Part (e) permits impeachment by a conviction undergoing appeal because, under Tennessee law, the convict is presumed guilty after judgment.

Advisory Commission Comments [2001]. The Tennessee Supreme Court suggested in *State v. Galmore*, 994 S.W.2d 120 (1999), and *State v. Taylor*, 993 S.W.2d 33 (1999), that the accused in a criminal trial may need to make a jury-out offer of proof in order to reverse the trial court for an erroneous ruling that a conviction is admissible to impeach. Such error might otherwise be harmless.

Law Reviews. Comparing the Tennessee and Federal Rules of Evidence (Donald F. Paine), 26 Tenn. B.J. 37 (1990).

Evidence of Character Under the New Rules (Donald F. Paine), 26 Tenn. B.J. 25 (1990).

"I've Lost a Wife and Gained a Boat": The Murder Trial of Ron Sotka (Donald F. Paine), 34 Tenn. B.J. 31 (2000).

Paine on Procedure: Catch 22 and the U.S. Supreme Court (Donald F. Paine), 37 Tenn. B.J. 29 (2001).

Relevance: The Tennessee Balancing Act (Robert Banks, Jr., Melissa Maravich), 57 Tenn. L. Rev. 33 (1989).

The Ten Commandments of Direct Examination (Donald F. Paine), 36 Tenn. B.J. 20 (2000).

NOTES TO DECISIONS

Analysis

1. Nature of Crime.
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1. Nature of Crime.

Criminal trespass is not a crime involving dishonesty and was not a basis for impeachment. State v. Philpott, 882 S.W.2d 394, 1994 Tenn. Crim. App. LEXIS 170 (Tenn. Crim. App. 1994), appeal denied, — S.W.2d —, 1994 Tenn. LEXIS 224 (Tenn. 1994).

In a prosecution for second-degree murder, it was error to admit evidence of a prior felony, also a murder, to impeach defendant's credibility, since a prior murder does not necessarily go to defendant's credibility; however, since the nature of the prior felony was not revealed to the jury, and since evidence of another attempted felony conviction was presented at trial, the error was harmless. State v. Summerall, 926 S.W.2d 272, 1995 Tenn. Crim. App. LEXIS 1009 (Tenn. Crim. App. 1995).

In a prosecution for second-degree murder, the trial court erred in ruling that defendant's prior incest conviction was probative of his credibility, however, the error was harmless since defendant failed to show he was prejudiced by the ruling. State v. Baxter, 938 S.W.2d 697, 1996 Tenn. Crim. App. LEXIS 454 (Tenn. Crim. App. 1996).

The mere fact of the sale of cocaine is not as probative of the defendant's credibility as would be an offense involving dishonesty or false statement. State v. Walker, 29 S.W.3d 885, 1999 Tenn. Crim. App. LEXIS 1059 (Tenn. Crim. App. 1999).

The unfairly prejudicial effect of an impeaching conviction on the substantive issues greatly increases if the impeaching conviction is substantially similar to the crime for which the defendant is being tried. State v. Walker, 29 S.W.3d 885, 1999 Tenn. Crim. App. LEXIS 1059 (Tenn. Crim. App. 1999).

Person who commits the offense of passing worthless checks with "fraudulent intent" satisfies the "dishonesty" requirement of Tenn. R. Evid. 609(a)(2), and a person who passes a check knowing that there are insufficient funds to pay the check has made a misrepresentation to the payee and therefore meets the requirement of "dishonesty or false statement under Tenn. R. Evid. 609(a)(2); a person who cancels a check with knowledge that the goods or services received were as represented at the time the check was issued has knowingly failed to pay for those goods or services. Knowingly canceling payment for goods or services received when those goods or services were as represented is dishonest. State v. Russell, 382 S.W.3d 312, 2012 Tenn. LEXIS 718 (Tenn. Oct. 1, 2012).

Statute setting forth the crime of passing worthless checks, T.C.A. § 39-14-121, does not criminalize an honest mistake; a prior conviction for passing worthless checks pursuant to § 39-14-121 therefore is probative of a witness's honesty. State v. Russell, 382 S.W.3d 312, 2012 Tenn. LEXIS 718 (Tenn. Oct. 1, 2012).

2. Guilty Plea.

Asking whether plaintiff had pled guilty to charges of theft and burglary on cross-examination, was a legitimate way to question his credibility. Kanipes v. North American Phillips Electronics Corp., 825 S.W.2d 426, 1991 Tenn. App. LEXIS 858 (Tenn. Ct. App. 1991), rehearing denied, — S.W.2d —, 1991 Tenn. App. LEXIS 898 (Tenn. Ct. App. Nov. 19, 1991).

3. Procedure.

Where the state gave written notice, defendant requested a hearing on the issue, and the court, after a hearing on the issue, determined that the probative value of three of defendant's prior convictions outweighed any unfair prejudicial effect that their admission may cause, the procedural safeguards provided in Tenn. R. Evid. 609 were undertaken. State v. Wright, 836 S.W.2d 130, 1992 Tenn. Crim. App. LEXIS 143 (Tenn. Crim. App. 1992), appeal denied, 1992 Tenn. LEXIS 378 (Tenn. May 26, 1992).

In determining whether the probative value of a conviction on the issue of credibility outweighs its unfair prejudicial effect on the substantive issues, a trial court should: (1) Assess the similarity between the crime on trial and the crime underlying the impeaching conviction; and (2) Analyze the relevance the impeaching conviction has to the issue of credibility. State v. Farmer, 841 S.W.2d 837, 1992 Tenn. Crim. App. LEXIS 374 (Tenn. Crim. App. 1992).

The offense must be identified to the finder of fact when a prior conviction is used for impeachment purposes pursuant to Tenn. R. Evid. 609. State v. Taylor, 993 S.W.2d 33, 1999 Tenn. LEXIS 287 (Tenn. 1999).

If a trial court fails to comply with procedural requirements of Tenn. R. Evid. 609, court's decision to admit or exclude a prior conviction is not entitled to deference by reviewing court; when trial court does not follow the procedural guidelines required by Tenn. R. Evid. 609, appellate courts must independently determine admissibility of the prior impeaching conviction based on evidence presented. State v. Lankford, 298 S.W.3d 176, 2008 Tenn. Crim. App. LEXIS 888 (Tenn. Crim. App. Nov. 3, 2008), appeal denied, — S.W.3d —, 2009 Tenn. LEXIS 123 (Tenn. Mar. 23, 2009).

Because defendant did not testify, the State could not impeach her testimony with evidence that she was on probation; instead, the evidence of her probation and the probation conditions was properly admitted as substantive evidence to explain her son's involvement in the offenses, not as impeachment evidence. State v. Jives-Nealy, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 156 (Tenn. Crim. App. Feb. 28, 2020), appeal denied, State v. Jives-Nealy, — S.W.3d —, 2020 Tenn. LEXIS 319 (Tenn. Aug. 11, 2020).

4. Harmless Error.

The trial court committed error in permitting the state to ask defendant if he had previously been convicted of assault with intent to commit voluntary manslaughter for the purpose of impeachment in trial for second degree murder; however, the error was harmless given the facts and circumstances of the case. State v. Farmer, 841 S.W.2d 837, 1992 Tenn. Crim. App. LEXIS 374 (Tenn. Crim. App. 1992).

Even though the prosecution sent a discovery response to defense counsel outlining defendant's criminal record, the actual notice requirement was not satisfied where the state failed to inform defendant of its intention to use the prior conviction for impeachment purposes; nevertheless, defendant was not unduly prejudiced by the noncompliance, and the error was harmless beyond a reasonable doubt. State v. Barnard, 899 S.W.2d 617, 1994 Tenn. Crim. App. LEXIS 567 (Tenn. Crim. App. 1994).

Trial court erred in ruling that defendant's prior controlled substance convictions could be used for impeachment purposes if he testified, since the prior convictions had only a limited relevance to the issue of credibility, and their limited probative value was outweighed by their prejudicial effect, due to their substantial similarity to the charged crime of the unlawful sale of a counterfeit controlled substance; however, the error was harmless, based on the overwhelming and uncontroverted evidence that existed to convict defendant. State v. Waller, 118 S.W.3d 368, 2003 Tenn. LEXIS 1020 (Tenn. 2003).

On appeal from his convictions for first-degree premeditated murder and abuse of a corpse, the fact that the state did not utilize the convictions to impeach the defendant's testimony lessened their impact on the defendant's credibility, Tenn. R. Evid. 609(a); further, the convictions were mentioned only briefly at the beginning of defendant's very lengthy testimony, and no certified copies of the convictions were entered into the record. Under those circumstances, it could not have been said that defendant was prejudiced by the trial court's decision, even if it was erroneous, T.R.A.P. 36(b). State v. Hill, 333 S.W.3d 106, 2010 Tenn. Crim. App. LEXIS 371 (Tenn. Crim. App. May 12, 2010), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 953 (Tenn. Oct. 12, 2010).

5. Proof of Conviction.

Trial court did not err in not allowing defendant to impeach witness by cross-examination about, and proving his commission of, perjury in another hearing, where the document in the record did not constitute proof that the witness was convicted of perjury. State v. Shepherd, 862 S.W.2d 557, 1992 Tenn. Crim. App. LEXIS 833 (Tenn. Crim. App. 1992), rehearing denied, 862 S.W.2d 557, 1992 Tenn. Crim. App. LEXIS 894 (Tenn. Crim. App. 1992), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 120 (Tenn. Mar. 22, 1993).

In a prosecution for forgery, questions regarding defendant's prior convictions for forgery were admissible since he raised the issue of truthfulness when he denied forging the check. State v. Williams, 929 S.W.2d 385, 1996 Tenn. Crim. App. LEXIS 120 (Tenn. Crim. App. 1996).

6. No Conviction.

Because defendants sought to question the witness about pending charges, not convictions, the trial court properly ruled that this rule did

not apply as it did not permit cross-examination regarding pending charges. State v. Carter, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 496 (Tenn. Crim. App. Aug. 16, 2019).

7. Admissibility of Prior Convictions.

In a prosecution for aggravated sexual battery, the trial court properly determined that evidence of defendant's prior conviction for theft of property and second degree murder were admissible for impeachment purposes. State v. Blanton, 926 S.W.2d 953, 1996 Tenn. Crim. App. LEXIS 67 (Tenn. Crim. App. 1996).

In a prosecution for burglary and attempted theft, it was not error to allow the state to use defendant's prior convictions for breaking and entering into a business with intent to commit larceny, grand larceny, and bringing stolen property into the state to impeach his testimony. State v. Roberts, 943 S.W.2d 403, 1996 Tenn. Crim. App. LEXIS 228 (Tenn. Crim. App. 1996), overruled, State v. Ralph, 6 S.W.3d 251, 1999 Tenn. LEXIS 586 (Tenn. 1999).

In a prosecution for rape and related offenses, evidence of defendant's Florida conviction for delivery of cocaine was admissible for impeachment purposes. State v. Binion, 947 S.W.2d 867, 1996 Tenn. Crim. App. LEXIS 476 (Tenn. Crim. App. 1996).

In a prosecution for aggravated rape and aggravated burglary, the trial court did not abuse its discretion in ruling that six prior convictions for burglary and theft could be used to impeach defendant if he opted to testify. State v. Baker, 956 S.W.2d 8, 1997 Tenn. Crim. App. LEXIS 51 (Tenn. Crim. App. 1997).

Although prior burglary convictions were similar to offense on trial, automobile burglary, the trial court did not abuse its discretion in concluding that the prior convictions' probative value as to credibility outweighed any danger of unfair prejudice to the defendant. State v. Blevins, 968 S.W.2d 888, 1997 Tenn. Crim. App. LEXIS 499 (Tenn. Crim. App. 1997).

In trial for first degree murder committed during the perpetration of an aggravated robbery, court properly allowed the use of defendant's prior convictions for receiving stolen property, larceny from a person and misdemeanor theft to attack his credibility. State v. Addison, 973 S.W.2d 260, 1997 Tenn. Crim. App. LEXIS 1164 (Tenn. Crim. App. 1997).

In prosecution for attempted rape, attempted incest and sexual battery, the trial court committed reversible error by allowing the state to impeach defendant's testimony by inquiring into a prior sexual battery conviction due to its prejudicial nature. State v. Mixon, 983 S.W.2d 661, 1999 Tenn. LEXIS 33 (Tenn. 1999).

Trial court erred in ruling that the defendant's credibility could be impeached by asking whether he had been convicted of an unnamed felony because application of the balancing rule under Tenn. R. Evid. 609(a)(3) requires identification of the prior conviction, State v. Galmore, 994 S.W.2d 120, 1999 Tenn. LEXIS 261 (Tenn. 1999).

The state may not impeach a defendant's credibility by referring to an unnamed felony. State v. Walker, 29 S.W.3d 885, 1999 Tenn. Crim. App. LEXIS 1059 (Tenn. Crim. App. 1999).

Use of a prior murder conviction, more than ten years old, to impeach the credibility of the appellant constitutes reversible error. State v. Dooley, 29 S.W.3d 542, 2000 Tenn. Crim. App. LEXIS 141 (Tenn. Crim. App. 2000).

Although Tenn. R. Evid. 609 does not make reference to "release from confinement imposed for" the impeaching conviction, the correct approach is to conduct a "release from confinement" analysis based upon sentence expiration dates, not when the defendant was actually released from confinement for all of his prior convictions. State v. Thompson, 36 S.W.3d 102, 2000 Tenn. Crim. App. LEXIS 256 (Tenn. Crim. App. 2000).

Trial court did not err by allowing the testimony from three jurors regarding the will proponent taking the original copy of the purported will at the first trial and evidence regarding the proponent's involvement with drugs and his criminal record because the proponent's credibility was relevant to a number of issues surrounding the formation and execution of the purported will; defendant was a legal proponent of the purported will, was the sole beneficiary, and by his own admission facilitated the drafting and execution of the will on the eve of the decedent's death. Blackburn v. Blackburn, 253 S.W.3d 603, 2007 Tenn. App. LEXIS 692 (Tenn. Ct. App. Nov. 14, 2007), appeal denied, In re Estate of Blackburn, — S.W.3d —, 2008 Tenn. LEXIS 240 (Tenn. Apr. 7, 2008).

In an aggravated robbery case, defendant's prior robbery conviction was properly used to impeach him because the court gave specific consideration to the similarity between the present aggravated robbery charge and defendant's previous conviction for robbery, and it determined that the robbery should be admitted for impeachment purposes because "credibility was everything in the case." State v. Welcome, 280 S.W.3d 215, 2007 Tenn. Crim. App. LEXIS 761 (Tenn. Crim. App. Sept. 26, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 134 (Tenn. Feb. 25, 2008).

Defendant's convictions for aggravated burglary and theft of property over $1,000 were proper because the probative value of his credibility was not substantially outweighed by the unfair prejudicial effect on the substantive issues; accordingly, trial court properly admitted defendant's prior conviction for the purposes of impeachment. State v. Lankford, 298 S.W.3d 176, 2008 Tenn. Crim. App. LEXIS 888 (Tenn. Crim. App. Nov. 3, 2008), appeal denied, —

S.W.3d —, 2009 Tenn. LEXIS 123 (Tenn. Mar. 23, 2009).

Failure to disclose *Brady* materials regarding a jailhouse informant did not violate the due process clause of the fourteenth amendment because the informant's credibility was effectively impeached at trial, evidence of his history of mental illness would have been cumulative to the evidence already in the record, and under Tennessee evidentiary law the informant's convictions for perjury and forgery were presumptively inadmissible due to age, pursuant to Tenn. R. Evid. 609(b). Brooks v. Tennessee, 626 F.3d 878, 2010 FED App. 360P, 2010 U.S. App. LEXIS 24025 (6th Cir. Nov. 23, 2010), cert. denied, 563 U.S. 976, 131 S. Ct. 2876, 179 L. Ed. 2d 1191, 2011 U.S. LEXIS 3448 (U.S. 2011).

Finding that the subcontractor was 50 percent at fault in his negligence action against the general contractor and the subcontractor was proper because the trial court did not err in excluding a worker's misdemeanor convictions and probation violations. None of his misdemeanor convictions involved dishonesty or false statements, and therefore they were inadmissible under Tenn. R. Evid. 609; moreover, his probation violations for failing a drug test were not probative of his character for truthfulness, Tenn. R. Evid. 608(a). Indoccio v. M&A Builders, LLC, 372 S.W.3d 112, 2011 Tenn. App. LEXIS 619 (Tenn. Ct. App. Nov. 14, 2011), appeal denied, Indoccio v. M & A Builders, LLC, — S.W.3d —, 2012 Tenn. LEXIS 259 (Tenn. Apr. 11, 2012).

Trial court did not abuse its discretion by finding that the probative value of defendant's convictions for passing worthless checks outweighed the unfair prejudicial effect on the substantive issues in her trial because the probative value of defendant's prior convictions was high, and her prior convictions were not substantially similar to the offense for which she was on trial; the prior offense to which defendant pleaded guilty involved passing a check knowing that the check would not be paid, but the offense for which defendant was indicted did not involve passing a check. State v. Russell, 382 S.W.3d 312, 2012 Tenn. LEXIS 718 (Tenn. Oct. 1, 2012).

Because the crime of passing worthless checks in violation of T.C.A. § 39-14-121 involved an element of dishonesty or false statement, the trial court did not abuse its discretion in determining that defendant's prior conviction could be used to impeach her credibility pursuant to Tenn. R. Evid. 609(a)(2). State v. Russell, 382 S.W.3d 312, 2012 Tenn. LEXIS 718 (Tenn. Oct. 1, 2012).

Trial court did not err by admitting defendant's prior felony convictions because he was released from confinement less than 10 years from the date of the superseding presentment and the prior convictions were not similar to the instant offenses. State v. Burkes, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 371 (Tenn. Crim. App. May 14, 2018), cert. denied, Burkes v. Tennessee, 206 L. Ed. 2d 220, 140 S. Ct. 1225, — U.S. —, 2020 U.S. LEXIS 903 (U.S. Feb. 24, 2020).

Defendant's petition for post-conviction relief was properly denied as counsel was not ineffective for failing to seek a hearing to determine which of defendant's prior convictions were admissible impeachment evidence if defendant chose to testify because defendant never intended to testify regardless of which priors could have been used against him at trial; his convictions also could have been admitted as substantive evidence to rebut a claim of self-defense had he testified; and he did not show that he would have testified had counsel conducted a hearing regarding the admissible impeachment convictions and that his testimony would have affected the outcome of his trial. Johnson v. State, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 37 (Tenn. Crim. App. Jan. 17, 2019).

Trial court did not err by limiting defendant's cross-examination of the witness regarding her probation because the defense was allowed to impeach her credibility by inquiring about her prior convictions for felony failure to appear and theft, crimes which the jury might conclude reflected adversely upon her truthfulness, and the defense was also allowed to ask her whether she had received any benefit from the state in exchange for her cooperation in defendant's case. State v. Ward, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 202 (Tenn. Crim. App. Apr. 1, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 331 (Tenn. July 18, 2019).

Because defendant's prior convictions were not used for impeachment purposes, Tenn. R. Evid. 609 was not applicable; the applicable rule was Tenn. R. Evid. 404(b) because the state sought to show intent and absence of mistake by showing defendant's familiarity with the court system. State v. Mathis, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 287 (Tenn. Crim. App. May 2, 2019).

Trial court did not abuse its discretion by ruling that the State could cross-examine defendant on a 22-year-old felony conviction for escape if he chose to testify because it determined that the probative value on credibility substantially outweighed the prejudicial effect and noted that escape bore no similarity to the drug offenses at issue. State v. Savely, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 443 (Tenn. Crim. App. June 25, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 491 (Tenn. Oct. 7, 2020).

Trial court did not abuse its discretion when it excluded evidence of the victim's prior conviction of reckless endangerment because it allowed defendant to cross-examine the victim about the car crash, including testimony that

the victim caused the accident by grabbing the steering wheel and that she ended up in jail as a result. State v. Stevens, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 626 (Tenn. Crim. App. Sept. 21, 2020).

8. Appeal.

Defendant does not need to show that he did not testify because of an adverse ruling on impeachment evidence or to make an offer of proof in order to challenge a trial court's ruling that prior convictions are admissible for impeachment purposes; State v. Galmore, 994 S.W.2d 120, 1999 Tenn. LEXIS 261 (Tenn. 1999).

On appellate review the trial court's rulings on the admissibility of prior convictions for impeachment purposes are subject to reversal only for abuse of discretion. State v. Thompson, 36 S.W.3d 102, 2000 Tenn. Crim. App. LEXIS 256 (Tenn. Crim. App. 2000).

9. Erroneous Impeachment.

In assessing the harmfulness of an error in a case in which the defendant did not testify based on the trial court's decision to admit prior convictions to impeach defendant, the court considers the "theory of the defense" in order to determine whether the erroneous impeachment would have had an impact on the result of the trial. State v. Thompson, 36 S.W.3d 102, 2000 Tenn. Crim. App. LEXIS 256 (Tenn. Crim. App. 2000).

10. Impeachment of Translators.

The accuracy of the testimony of the witness as heard and determined by the trial court or jury depends upon the accuracy of the translation or interpretation; therefore, if an interpreter's credibility is subject to question, certainly this may be established by an examination of the interpreter. State v. Millsaps, 30 S.W.3d 364, 2000 Tenn. Crim. App. LEXIS 258 (Tenn. Crim. App. 2000), review or rehearing denied, — S.W.3d —, 2000 Tenn. LEXIS 553 (Tenn. Oct. 2, 2000).

11. Evidence of Acquittal.

Trial court applied an incorrect legal standard and erred in admitting the evidence of the prior acquittals of two men defendant implicated as the individuals responsible for a murder for the purpose of demonstrating their credibility because defendant's trial occurred eleven years after the men were acquitted of the murder; to admit evidence of an acquittal for a crime to support the truthfulness of the witness is illogical when the evidence of the conviction for the same crime would be barred to demonstrate the untruthfulness of the witness. State v. Turner, 352 S.W.3d 425, 2011 Tenn. LEXIS 960 (Tenn. Oct. 12, 2011).

12. Finality.

Even though a defendant's state felony conviction was pending on direct appeal at the time of the defendant's alleged possessions of firearms, the defendant was nonetheless a prohibited person under 18 U.S.C.S. § 922(g)(1) because the defendant was "convicted" under both possible definitions of "conviction" in Tennessee law. United States v. Houston, 813 F.3d 282, 2016 U.S. App. LEXIS 2121, 2016 FED App. 31P (6th Cir.) (6th Cir. Tenn. 2016).

13. Abuse of discretion.

Court erred in allowing testimony regarding defendant's witness's involvement in chop shops and misdemeanor convictions because defendant's witness played a critical role in the defense theory—he was the only witness who corroborated defendant's account that he had authority to borrow the tractor, and the multiple errors sent a message to the jury that the witness was a shady character who had attracted the continuing attention of the police for at least thirty years, and the trial court itself connected the witness to a notorious criminal and convicted murderer. State v. Seaton, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 63 (Tenn. Crim. App. Feb. 28, 2021).

14. Ineffective Assistance.

Petitioner failed to demonstrate that a motion to suppress would have been successful if filed and therefore failed to prove that counsel was deficient; petitioner testified she was confined as a result of her convictions, which were about 10 years old, but she did not state her date of release from confinement or introduce evidence to show that more than 10 years had elapsed between the date of her release and the date of her trial. She was not entitled to post-conviction relief. Smith v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 291 (Tenn. Crim. App. Apr. 24, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 515 (Tenn. Sept. 21, 2020).

Petitioner was questioned about a theft conviction and the State gave counsel notice, making the State's impeachment evidence admissible; petitioner failed to show that an objection by counsel would have resulted in the exclusion of the evidence, plus the record reflected an abundance of evidence on which a jury could have convicted him even with counsel's failure to object. Ineffective assistance was not shown and petitioner was not entitled to relief. Delosh v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 631 (Tenn. Crim. App. Sept. 23, 2020).

Rule 610. Religious beliefs or opinions. —

Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness's credibility is impaired or enhanced.

Advisory Commission Comments. The rule prohibits any use of religious beliefs either to impeach or enhance a witness's credibility. Adoption of the rule would bring a salutary change to Tennessee law in the Commission's view. Cf. Tenn. Code Ann. § 24-1-102 [repealed].

Rule 611. Mode and order of interrogation and presentation. —

(a) Control by Court. — The court shall exercise appropriate control over the presentation of evidence and conduct of the trial when necessary to avoid abuse by counsel.

(b) Scope of Cross-Examination. — A witness may be cross-examined on any matter relevant to any issue in the case, including credibility, except as provided in paragraph (c)(2) of this rule.

(c) Leading Questions. —

(1) Leading questions should not be used on direct examination of a witness except as may be necessary to develop the witness's testimony. Leading questions should be permitted on cross-examination.

(2) When a party calls a hostile witness, an adverse party (or an officer, director, or managing agent of a public or private corporation or of a partnership, association, or individual proprietorship which is an adverse party), or a witness identified with an adverse party, interrogation may be by leading questions. The scope of cross-examination under this paragraph shall be limited to the subject matter of direct examination, and cross-examination may be by leading questions. [As amended by order filed December 21, 2010, effective July 1, 2011.]

Advisory Commission Comments. Part (a) recognizes the inherent power of a court to control trial conduct to prevent lawyers from abusing the process.

Part (b) retains the English rule permitting wide-open scope of cross-examination historically favored in Tennessee. *Sands v. Southern Railway Co.*, 108 Tenn. 1, 64 S.W. 478 (1901), is the leading case.

Part (c) attempts to resolve leading question problems. Generally a lawyer may lead on cross but not on direct.

Advisory Commission Comments [2011]. Amended Rule 611 allows a lawyer to ask leading questions when calling a "witness identified with an adverse party" in all civil and criminal proceedings.

Advisory Commission Comments [2017]. Nothing in these rules prohibits the court in its inherent authority from permitting a suitable animal, toy, or support person to accompany a witness who is shown to be at risk for being unable to communicate effectively without the aid of such comfort. *See State v. Juan Jose Reyes*, No. M2015-00504-CCA-R3-CD, 2016 WL 3090904 (Tenn. Crim. App. May 24,2016), *perm. app. denied* (Tenn. Sept. 23, 2016).

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated December 21, 2010, was ratified and approved by 2011 House Resolution 33 and Senate Resolution 11. The order promulgating the amendment of this rule provided that it take effect July 1, 2011.

The amendment of Rule 611 by the addition of [2017] Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 21, 2016, was ratified and approved by 2017 House Resolution 21 and Senate Resolution 14. The order promulgating the amendment of Rule 611 by adding [2017] Advisory Commission Comments, provided that it take effect July 1, 2017.

Law Reviews. Comparing the Tennessee and Federal Rules of Evidence (Donald F. Paine), 26 Tenn. B.J. 37 (1990).

Deposition Questioning Made Easy — or — CLE at the Office (Robert L. Arrington), 29 Tenn. B.J. 22 (1993).

For an article, "Communication with Juries: Episodic Representational Structure In Cross-Examination," see 67 Tenn. L. Rev. 599 (2000).

Homage to the Queen: Foundational Requirements for Impeachment for Prior Inconsistent Statements (Randall E. Sermons), 35 Tenn. B.J. 14 (1999).

The Ten Commandments of Direct Examination (Donald F. Paine), 36 Tenn. B.J. 20 (2000).

NOTES TO DECISIONS

Analysis

1. Applicability.
2. Discretion of Trial Judge.
3. Leading Questions.
4. Harmless Error.
5. Limitation of Cross-Examination.

1. Applicability.

Tenn. R. Evid. 611 does not control the question of whether exhibits should be permitted in the jury room. State v. Braden, 867 S.W.2d 750, 1993 Tenn. Crim. App. LEXIS 355 (Tenn. Crim. App. 1993), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 387 (Tenn. Nov. 1, 1993).

With respect to the testimony of a post-conviction petitioner, the specific limitation provided in Tenn. Sup. Ct. R. 28, § 8(C)(1)(d) controls the scope of cross-examination and modifies the general rule provided in Tenn. R. Evid. 611(b). Keough v. State, 356 S.W.3d 366, 2011 Tenn. LEXIS 1140 (Tenn. Dec. 9, 2011).

2. Discretion of Trial Judge.

It is within the sound discretion of the trial court whether to allow a party to examine a witness by leading questions. Wilkerson v. Altizer, 845 S.W.2d 744, 1992 Tenn. App. LEXIS 325 (Tenn. Ct. App. 1992), rehearing denied, — S.W.2d —, 1992 Tenn. App. LEXIS 613 (Tenn. Ct. App. July 20, 1992), appeal denied, 845 S.W.2d 744, 1992 Tenn. LEXIS 580 (Tenn. 1992).

While the right of cross-examination is fundamental, its exercise is controlled by the discretionary authority of the trial judge. Only a plain abuse of that authority constitutes grounds for reversal. State v. Gaylor, 862 S.W.2d 546, 1992 Tenn. Crim. App. LEXIS 748 (Tenn. Crim. App. 1992), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 234 (Tenn. June 7, 1993).

The trial court did not err in refusing to allow the defendant to cross-examine the codefendant by ruling that the codefendant could invoke his fifth amendment privilege, where the codefendant was accused of the same crime as the defendant, had not been tried, and chose to invoke the privilege upon the advice of his attorney. State v. Zirkle, 910 S.W.2d 874, 1995 Tenn. Crim. App. LEXIS 103 (Tenn. Crim. App. 1995), rehearing denied, — S.W.2d —, 1995 Tenn. Crim. App. LEXIS 230 (Tenn. Crim. App. Mar. 21, 1995), appeal denied, — S.W.2d —, 1995 Tenn. LEXIS 481 (Tenn. Aug. 28, 1995), dismissed, Zirkle v. Carlton, — F. Supp. 2d —, 2013 U.S. Dist. LEXIS 123960 (E.D. Tenn. June 12, 2013).

Trial court acted within its discretion in limiting the testimony of defendant pursuant to Tenn. R. Evid. 611(a) and Tenn. R. Evid. 401 because the proffered testimony did not have any bearing on any fact that pertained to defendant's guilt or innocence. State v. Mosley, 200 S.W.3d 624, 2005 Tenn. Crim. App. LEXIS 1196 (Tenn. Crim. App. 2005), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 266 (Tenn. 2006).

Defendant's conviction for premeditated first-degree murder was appropriate because trial court did not err in allowing questioning of defendant's brother; defendant's brother's letters to defendant constituted evidence of bias, were relevant to witness' credibility, and were therefore admissible. State v. Gilley, 297 S.W.3d 739, 2008 Tenn. Crim. App. LEXIS 660 (Tenn. Crim. App. Aug. 13, 2008).

3. Leading Questions.

Where there was no showing that witness was a hostile witness, there was no error in refusing to allow plaintiffs in premises liability case to interrogate witness by leading questions. Phillips v. F.W. Woolworth Co., 867 S.W.2d 316, 1992 Tenn. App. LEXIS 918 (Tenn. Ct. App. 1992), appeal denied, Phillips v. F. W. Woolworth Co., — S.W.2d —, 1993 Tenn. LEXIS 53 (Tenn. Feb. 22, 1993).

The trial court properly refused to allow defendant to cross-examine his codefendant with leading questions where the codefendant had not testified against the defendant but, rather, solely for himself. State v. Hutchison, 898 S.W.2d 161, 1994 Tenn. LEXIS 157 (Tenn. 1994), rehearing denied, 898 S.W.2d 161, 1995 Tenn. LEXIS 198 (1995), cert. denied, Hutchinson v. Tennessee, 516 U.S. 846, 116 S. Ct. 137, 133 L. Ed. 2d 84, 1995 U.S. LEXIS 5846 (1995), dismissed, Hutchison v. Bell, — F. Supp. 2d —, 2010 U.S. Dist. LEXIS 31736 (E.D. Tenn. Mar. 30, 2010).

In an action for sexual crimes, the trial court did not abuse its discretion in allowing the State to ask some leading questions of first victim because some of the questions asked by the State were not leading questions and, in other instances, it was within the trial court's

discretion to allow the State some leeway to lead the witness who was nineteen years at trial but a victim of childhood sexual abuse that occurred frequently over the course of several years. State v. Robinson, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 277 (Tenn. Crim. App. Apr. 21, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 427 (Tenn. Aug. 7, 2020).

4. Harmless Error.

Any error in allowing leading questions was harmless where the testimony introduced through leading questions had already been established. Wilkerson v. Altizer, 845 S.W.2d 744, 1992 Tenn. App. LEXIS 325 (Tenn. Ct. App. 1992), rehearing denied, — S.W.2d —, 1992 Tenn. App. LEXIS 613 (Tenn. Ct. App. July 20, 1992), appeal denied, 845 S.W.2d 744, 1992 Tenn. LEXIS 580 (Tenn. 1992).

Although the trial court abused its discretion in allowing cross-examination by the state regarding voice stress analysis because the cross-examination was misleading, factually incorrect, and irrelevant, the allowance of the improper cross examination did not constitute reversible error because it did not affirmatively appear to have affected the result of the trial on the merits, pursuant to Tenn. R. Crim. P. 52(a), nor involves a substantial right of defendant, pursuant to T.R.A.P. 36(b). State v. Schiefelbein, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 138 (Tenn. Crim. App. Feb. 8, 2007), modified, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 213 (Tenn. Crim. App. Mar. 7, 2007).

5. Limitation of Cross-Examination.

In a capital sentencing proceeding, by finding that defendant's statements of remorse opened the door to full cross-examination on the circumstances of the crimes, the court violated defendant's right to avoid self-incrimination because defendant had already admitted his culpability for the crimes charged by pleading guilty, and although the evidence already before the jury gave them a fairly clear picture of what happened during the attack, hearing such details from third parties did not have nearly the same impact as hearing detailed, graphic descriptions from defendant. State v. Riels, 216 S.W.3d 737, 2007 Tenn. LEXIS 142 (Tenn. 2007).

Rule 612. Writing used to refresh memory. —

If a witness uses a writing while testifying to refresh memory for the purpose of testifying, an adverse party is entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If it is claimed that the writing contains matters not related to the subject matter of the testimony, the court shall examine the writing in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of appeal. If a writing is not produced or delivered pursuant to order under this rule, the court shall make any order justice requires; in criminal cases when the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.

Advisory Commission Comments. Tennessee trial lawyers have long used this procedure for refreshing a witness's recollection, and this rule simply reflects traditional law. Only writings used "while testifying" are subject to opposing counsel's inspection. See also T. R. Crim. P. 26.2.

Only if a witness's memory requires refreshing should a writing be used by the witness. The direct examiner should lay a foundation for necessity, show the witness the writing, take back the writing, and ask the witness to testify from refreshed memory.

Law Reviews. Comparing the Tennessee and Federal Rules of Evidence (Donald F. Paine), 26 Tenn. B.J. 37 (1990).

Contrasting "Present Recollection Refreshed" with "Past Recollection Recorded" (Donald F. Paine), 35 Tenn. B.J. 27(1999).

The Ten Commandments of Direct Examination (Donald F. Paine), 36 Tenn. B.J. 20 (2000).

NOTES TO DECISIONS

1. In General.

Tenn. R. Evid. 612 only permits the use of a writing to refresh a witness's memory if the witness's memory requires refreshing; where it has not been established that the witness's memory needs refreshing at the time the writing is used, but such fact is established subsequently, the use of the writing is supported by sufficient factual foundation. State v. Mathis, 969 S.W.2d 418, 1997 Tenn. Crim. App. LEXIS 511 (Tenn. Crim. App. 1997).

The court should have required the state to establish a proper foundation by showing that the witness was having difficulty recalling the events about which the witness was being questioned before allowing the witness to refresh recollection with written documents. State v. Price, 46 S.W.3d 785, 2000 Tenn. Crim. App. LEXIS 597 (Tenn. Crim. App. 2000), review or rehearing denied, — S.W.3d —, 2001 Tenn. LEXIS 146 (Tenn. Feb. 26, 2001).

In defendant's murder case, although a court erred in allowing a witness' statement to be read aloud and then becoming an exhibit, the error was harmless, because much of the statement was duplicative of other testimony and it was apparent that, had the state followed the required procedures, at least portions of the statement could have been utilized in one fashion or another. State v. Robertson, 130 S.W.3d 842, 2003 Tenn. Crim. App. LEXIS 358 (Tenn. Crim. App. 2003), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 1068 (Tenn. Oct. 27, 2003).

Procedure for refreshing a witness's recollection was not followed because the record did not reflect that the State established that the witness's memory needed to be refreshed with the transcript of her recorded statement to the detective, and the witness testified as to the contents of the statement itself, rather than from her memory after reviewing the document. State v. Ward, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 202 (Tenn. Crim. App. Apr. 1, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 331 (Tenn. July 18, 2019).

Trial court did not err by allowing the refreshment of a witness's memory with her prior statement to the police because she showed hesitation initially by qualifying her identification of the height of the two men and she expressly stated that she could not remember exactly which man was taller. State v. Harris, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 647 (Tenn. Crim. App. Oct. 1, 2020).

Rule 613. Prior statements of witnesses. —

(a) Examining Witness Concerning Prior Statement. — In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

(b) Extrinsic Evidence of Prior Inconsistent Statement of Witness. — Extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless and until the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in Rule 803(1.2).

(c) Opinions. — A prior statement in opinion form is admissible to impeach testimony. [As amended by order entered January 31, 2003, and effective July 1, 2003.]

Advisory Commission Comments. The rule eliminates any necessity of showing an inconsistent writing to a fact witness under impeachment attack. The only requirement is that, where the impeaching lawyer introduces extrinsic evidence of the inconsistent statement, the fact witness must be "afforded an opportunity to explain or deny." The rule will not change drastically Tennessee procedure. Compare *Moore v. Bettis*, 30 Tenn. 67 (1850), with *Titus v. State*, 66 Tenn. 132 (1874).

Part (c) would change such hypertechnical results as that reached in *Saunders v. City & Suburban Railroad*, 99 Tenn. 130, 41 S.W. 1031 (1897), excluding a prior inconsistent statement characterized as an "opinion." Obviously an opinion inconsistent with a fact should be admissible.

Advisory Commission Comments [2003]. Paragraph (b) is amended to add the words "and until." The effect is to incorporate the holding in *State v. Martin*, 964 S.W.2d 564

(Tenn. 1998): "extrinsic evidence remains inadmissible until the witness either denies or equivocates as to having made the prior inconsistent statement."

Note that Rule 806 does not require a foundation before impeaching a hearsay declarant by inconsistent statement.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 31, 2003, was ratified and approved by 2003 House Resolution 22 and Senate Resolution 10. The order promulgating the 2003 amendment of this rule provided that it take effect on July 1, 2003.

Law Reviews. Communication With Juries: Episodic Representational Structure In Cross-Examination, see 67 Tenn. L. Rev. 599 (2000).

Homage to the Queen: Foundational Requirements for Impeachment for Prior Inconsistent Statements (Randall E. Sermons), 35 Tenn. B.J. 14 (1999).

Recent Changes in Tennessee Evidence Law (Donald F. Paine), 34 Tenn. B.J. 14 (1998).

The Rule in Queen Caroline's Case (Donald F. Paine), 38 Tenn. B.J. 23 (2002).

NOTES TO DECISIONS

Analysis

1. Applicability.
2. Inconsistency.
3. —Defined.
4. —Cases.
5. Impeachment.
6. Harmless Error.
7. Illustrative Cases.
8. Trustworthiness.

1. Applicability.

In a wrongful death case, a court properly denied plaintiff's request to use a prior statement of the doctors' expert witness for impeachment purposes because, although plaintiff made a credible argument that the prior statement was inconsistent with the expert's testimony that his role as an expert witness did not include creating a theory of defense or acting as an advocate, the trial court was concerned with the reliability and probative value of the alleged prior statement. Hunter v. Ura, 163 S.W.3d 686, 2005 Tenn. LEXIS 306 (Tenn. 2005), rehearing denied, — S.W.3d —, 2005 Tenn. LEXIS 373 (Tenn. Apr. 27, 2005).

Generally, a jury's consideration of extrinsic proof of a prior inconsistent statement is limited to its impact on the witness's credibility pursuant to Tenn. R. Evid. 613(b). However, if no objection is made to a prior inconsistent statement as substantive evidence, the evidence may be used by the jury for that purpose. State v. Garrett, 331 S.W.3d 392, 2011 Tenn. LEXIS 7 (Tenn. Jan. 24, 2011).

2. Inconsistency.

3. —Defined.

Although Tenn. R. Evid. 613 does not define an inconsistent statement, as one inconsistent with a statement offered at trial, that is all it can mean. Doochin v. United States Fidelity & Guar. Co., 854 S.W.2d 109, 1993 Tenn. App. LEXIS 25 (Tenn. Ct. App. 1993).

4. —Cases.

Where witness A did not testify on direct examination about a conversation with witness B, although he had denied in his deposition that the conversation occurred, statement of witness B was not a statement inconsistent with one made by witness A at the trial; even if it was witness A's own statement, it was not a prior inconsistent statement, since he had not mentioned the conversation in his trial testimony. Doochin v. United States Fidelity & Guar. Co., 854 S.W.2d 109, 1993 Tenn. App. LEXIS 25 (Tenn. Ct. App. 1993).

Extrinsic evidence of a witness's prior inconsistent statement is inadmissible until the witness is asked whether the witness made the prior inconsistent statement and the witness denies or equivocates as to having made the prior statement. State v. Martin, 964 S.W.2d 564, 1998 Tenn. LEXIS 118 (Tenn. 1998).

In a felony murder case, admitting a witness's prior consistent statement was not error, where defendant's focus on the inconsistencies unfairly painted a picture of the statement as an inconsistent one, and admission of the entire statement allowed the jury to view the inconsistencies in their overall context. State v. Winters, 137 S.W.3d 641, 2003 Tenn. Crim. App. LEXIS 944 (Tenn. Crim. App. 2003), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 298 (Tenn. Mar. 22, 2004).

Defendants did not show admitting testimony that defendants previously broke into a witness's house violated Tenn. R. Evid. 404(b) because (1) Rule 404(b) did not apply, as Tenn. R. Evid. 613 governed and allowed the witness to explain a prior inconsistent statement, and (2) any error was harmless, as defendants were not prejudiced, since the witness admitted not knowing if defendants broke into the witness's house. State v. Williams, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 518 (Tenn. Crim. App. Aug. 23, 2019), appeal denied, State v. Johnson, — S.W.3d —, 2019 Tenn. LEXIS 573 (Tenn. Dec. 9, 2019).

5. Impeachment.

Impeachment cannot be a mere ruse to present to the jury prejudicial or improper testimony. State v. Jones, 15 S.W.3d 880, 1999 Tenn. Crim. App. LEXIS 850 (Tenn. Crim. App. 1999).

In defendant's murder case, a court properly excluded the testimony of a witness to discredit another witness, where the inconsistent statements involved collateral facts. Proof that the witness lied to mental health evaluators about his criminal record and personal information was not relevant to a material issue at trial, the witness was thoroughly cross-examined about his criminal record and motive for testifying, and proof that the witness was evasive and manipulative during his mental health evaluation had little probative value in showing that he was biased in favor of the state. State v. Leach, 148 S.W.3d 42, 2004 Tenn. LEXIS 741 (Tenn. 2004), rehearing denied, — S.W.3d —, 2004 Tenn. LEXIS 955 (Tenn. Nov. 8, 2004), cert. denied, Leach v. Tennessee, 544 U.S. 966, 125 S. Ct. 1739, 161 L. Ed. 2d 610, 2005 U.S. LEXIS 3045 (2005).

During defendant's trial for vehicular assault and aggravated vehicular homicide where trial court admitted testimony of a deceased witness from the preliminary hearing, trial court's exclusion of a deputy's report detailing the decedent's prior inconsistent statement was improper; statement could have been used to impeach the witness under Tenn. R. Evid. 613. State v. Bowman, 327 S.W.3d 69, 2009 Tenn. Crim. App. LEXIS 35 (Tenn. Crim. App. Jan. 14, 2009), appeal denied, — S.W.3d —, 2009 Tenn. LEXIS 395 (Tenn. June 15, 2009), cert. denied, Bowman v. Tennessee, 175 L. Ed. 2d 388, 130 S. Ct. 559, 2009 U.S. LEXIS 8080 (U.S. 2009).

Based upon the prosecutor's statement to the court about the State's preparing the witness for his trial testimony and the witness's deception relative to the content of his trial testimony, defendant did not show that the State was aware, when it called the witness, that the witness had disavowed his written statement; in the absence of such evidence, the appellate court could not conclude that the witness was called as a witness as a pretext to introducing his written statement and that the testimony of a chief and a captain should not have been allowed to impeach the witness's testimony. State v. Rayfield, 507 S.W.3d 682, 2015 Tenn. Crim. App. LEXIS 780 (Tenn. Crim. App. Sept. 28, 2015), appeal denied, — S.W.3d —, 2016 Tenn. LEXIS 146 (Tenn. Feb. 18, 2016).

Trial court did not err by permitting the State to impeach the co-defendant with her prior inconsistent statement to an investigator that defendant was wearing a red coat because there was no evidence in the record that the State was aware at trial that the co-defendant would repudiate her prior statement, the co-defendant's prior inconsistent statement spoke directly to the credibility of her recollection of defendant's clothing on the night of the crimes, and her credibility on this issue was of significant value, and trial court's instruction specifically instructed the jury that the red coat statement was only admissible as impeachment evidence, and it sought to limit any prejudicial impact. State v. Kea, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 72 (Tenn. Crim. App. Mar. 4, 2021).

6. Harmless Error.

Where impeachment is used as a mere ruse to present to the jury prejudicial or improper testimony, striking the testimony and providing a curative instruction may be insufficient to render the error harmless because the jury is unlikely to consider the prior statement for credibility purposes only and may view it as substantive evidence. State v. Jones, 15 S.W.3d 880, 1999 Tenn. Crim. App. LEXIS 850 (Tenn. Crim. App. 1999).

In defendant's murder case, although a court erred in allowing a witness' statement to be read aloud and then to become an exhibit, the error was harmless, because much of the statement was duplicative of other testimony; and it was apparent that, had the state followed the required procedures, at least portions of the statement could have been utilized in one fashion or another. State v. Robertson, 130 S.W.3d 842, 2003 Tenn. Crim. App. LEXIS 358 (Tenn. Crim. App. 2003), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 1068 (Tenn. Oct. 27, 2003).

Even though the trial court erred by allowing the prosecutor to impeach him on cross-examination with a statement he made to the police that the trial court had excluded earlier during the trial, the error was harmless because the evidence presented to support defendant's convictions was strong and despite the error, the jury was able to consider and weigh the evidence and acquitted defendant of four of the charges. State v. Bond, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 198 (Tenn. Crim. App. Mar. 28, 2019).

Any alleged error regarding the exclusion of testimony as to prior inconsistent statements made by the victim and contained within an officer's police report was harmless because the victim admitted to making inconsistent statements and being unable to recall every detail of the crimes committed against the victim. State v. Brown, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 690 (Tenn. Crim. App. Oct. 23, 2020).

7. Illustrative Cases.

In a rape case, a court correctly excluded statements the victim made to her father that arguably suggested that a third party had committed the crimes because the statements were inadmissible extrinsic evidence of prior inconsistent statements and the exclusion did not rise to the level of a constitutional violation because the excluded evidence was not critical to the defense; the statements had little probative value to implicate another in the crime or to rebut the victim's testimony that oral penetration occurred. State v. Flood, 219 S.W.3d 307, 2007 Tenn. LEXIS 274 (Tenn. 2007).

Assuming for the sake of argument that the victim's lack of memory established an inconsistency sufficient to satisfy the requirements of Tenn. R. Evid. 613, the entire video would not have been admissible; if the victim's lack of memory was sufficient to establish inconsistency, then only those portions of the video directly related to a claimed lack of memory would have been admissible. State v. Ackerman, 397 S.W.3d 617, 2012 Tenn. Crim. App. LEXIS 510 (Tenn. Crim. App. July 13, 2012), overruled, State v. Sanders, 452 S.W.3d 300, 2014 Tenn. LEXIS 912 (Tenn. Nov. 10, 2014).

Trial court's erroneous refusal to allow defense counsel to cross-examine the murder victim's spouse about the spouse's prior inconsistent statements to the police, which contained no reference to spouse's affair, did not entitle defendant to relief as the statements had no impact on the jury's verdicts in that the spouse's alibi was established by several other witnesses and there was absolutely no proof (other than motive) tying the spouse to the victim's murder, either by the spouse's own hands or through the actions of another. State v. Bell, 480 S.W.3d 486, 2015 Tenn. LEXIS 720 (Tenn. Sept. 10, 2015), cert. denied, Bell v. Tennessee, 195 L. Ed. 2d 221, 136 S. Ct. 2006, — U.S. —, 2016 U.S. LEXIS 3192 (U.S. 2016).

Trial court properly allowed a portion of a 9-1-1 recording to be played as a prior inconsistent statement for impeachment purposes after a witness testified she did not know what defendant was doing on the night in question but had told the 9-1-1 operator he had been drinking and using cocaine. State v. Rodriguez, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 431 (Tenn. Crim. App. June 5, 2018), appeal dismissed, — S.W.3d —, 2019 Tenn. LEXIS 373 (Tenn. Aug. 19, 2019).

Even though the trial court allowed the victim to review her statements to the detective before cross-examination, the court held that the procedure agreed upon by the parties addressed the purpose and intent of this rule by preserving the interests of efficiency and orderly presentation. State v. Watkins, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 184 (Tenn. Crim. App. Mar. 26, 2019).

Trial court did not err by admitting defendant's brother prior statement because the brother testified at trial that the statement was written and signed by him and the trial court conducted a jury-out hearing during which it determined that the statement was trustworthy. The statement was also properly admitted as a recorded recollection because it was taken shortly after the events in question and the brother no longer remembered the statement, and the trial court allowed the statement to be read into evidence but did not admit it as an exhibit. State v. Rimmer, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 322 (Tenn. Crim. App. May 21, 2019).

Witness's prior inconsistent recorded statement was admissible because the State did not seek admission until after the witness equivocated about whether she told the detective that she saw defendant pull out a gun and fire at her. State v. Lindsey, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 495 (Tenn. Crim. App. Aug. 16, 2019).

Audio-recorded statement of a witness recorded by a police detective the day after a shooting was admissible when the witness testified at trial as to having no recollection of the shooting because the trial court determined that the statement was made pursuant to circumstances indicating trustworthiness as defendant did not appear to be under the influence of drugs, was apprehensive, and had asked for but was denied money; the statement was consistent with the other evidence, and defense counsel cross-examined defendant. State v. Moore, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 352 (Tenn. Crim. App. May 15, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 503 (Tenn. Sept. 16, 2020).

Petitioner failed to show that his trial counsel was ineffective for failing to file a motion to exclude a witness's testimony on the basis that he admitted at the trial that he lied at the preliminary hearing about having seen petitioner during the offenses, and therefore he was properly denied postconviction relief, because the witness's previous testimony was admissible for impeachment purposes as a prior inconsistent statement. Cochran v. State, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 129 (Tenn. Crim. App. Apr. 5, 2021).

8. Trustworthiness.

Codefendant's hearsay statement to police was erroneously admitted, because it did not meet the requirements of Tenn. R. Evid. 613(b) and 803(26), in that it was not made under circumstances indicting trustworthiness and the codefendant admitted or was not asked about making all but a few brief portions of the statement. State v. Foust, 482 S.W.3d 20, 2015 Tenn. Crim. App. LEXIS 735 (Tenn. Crim. App. Sept. 9, 2015).

Rule 614. Calling and interrogation of witness by court. —

(a) Calling by court. — The court may not call witnesses except in extraordinary circumstances or except as provided for court-appointed experts in Rule 706, and all parties are entitled to cross-examine witnesses thus called.

(b) Interrogation by Court. — The court may interrogate witnesses.

(c) Objections. — Objections to the calling of witnesses by the court or to interrogation by it may be made at the time or at the next available opportunity when the jury is not present.

Advisory Commission Comments. Ordinarily the trial judge may question but not call lay witnesses. Rule 706 details procedures for calling court-appointed expert witnesses in a bench trial.

In questioning a witness, the judge must avoid "commenting on the evidence" in violation of the Tennessee Constitution, Art. VI, Sec. 9.

Law Reviews. Comparing the Tennessee and Federal Rules of Evidence (Donald F. Paine), 26 Tenn. B.J. 37 (1990).

NOTES TO DECISIONS

Analysis

1. In General.
2. Appeal.
3. Plain Error.
4. Criminal Cases.
5. Disciplinary Proceedings.

1. In General.

The extent to which the judge may make comments and remarks during a trial before a jury is governed by the fundamental principle that a judge should say or do nothing to prejudice the rights of the parties. State ex rel. Commissioner of DOT v. Williams, 828 S.W.2d 397, 1991 Tenn. App. LEXIS 566 (Tenn. Ct. App. 1991).

Tenn. R. Evid. 614(a), which allows a judge (and a commissioner) to call a witness only in extraordinary circumstances, also applies to the production of documentary evidence. Lien v. Metro. Gov't of Nashville , 117 S.W.3d 753, 2003 Tenn. App. LEXIS 186 (Tenn. Ct. App. 2003), appeal denied, Lien v. Metro. Gov't of Nashville & Davidson County, — S.W.3d —, 2003 Tenn. LEXIS 908 (Tenn. Oct. 6, 2003).

Appellate court held that civil service commission improperly expanded its record by including newspaper articles in the record that contradicted the police officer's representation that he had a spotless record, as the information was obtained by one of the commission's members; but that the error was harmless, as many members of the civil service commission stated that they did not consider the information in making their decision, and there was substantial evidence to support the termination without consideration of the expanded record. Lien v. Metro. Gov't of Nashville , 117 S.W.3d 753, 2003 Tenn. App. LEXIS 186 (Tenn. Ct. App. 2003), appeal denied, Lien v. Metro. Gov't of Nashville & Davidson County, — S.W.3d —, 2003 Tenn. LEXIS 908 (Tenn. Oct. 6, 2003).

2. Appeal.

Although Tenn. R. Evid. 614(c) allows counsel to postpone objection to a judge's comments until out of the jury's presence, commentators have stressed that the rule does not eliminate the need for an objection to preserve the issue for appellate review. State ex rel. Commissioner of DOT v. Williams, 828 S.W.2d 397, 1991 Tenn. App. LEXIS 566 (Tenn. Ct. App. 1991).

3. Plain Error.

Trial court's interrogation of the victim in a child sexual abuse case regarding whether the victim was told to tell the truth and whether she was telling the truth did not constitute plain error because the record was silent as to what happened during the bench conference held immediately prior to the questioning; therefore, it was not clear whether defense counsel objected to such questions, whether defense counsel failed to object for tactical reasons, whether defense counsel requested such questioning, or whether the bench conference regarded another issue. State v. Schiefelbein, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 138 (Tenn. Crim. App. Feb. 8, 2007), modified, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 213 (Tenn. Crim. App. Mar. 7, 2007).

4. Criminal Cases.

There was no plain error in the trial court examining a child victim's mother by asking jury-submitted questions in the absence of any objection because nothing in the judge's questioning left an improper impression with the jury as to his feelings about the evidence, and the judge made no statements that reflected on the weight or credibility of the evidence, State v. Schiefelbein, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 138 (Tenn. Crim. App. Feb. 8, 2007), modified, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 213 (Tenn. Crim. App. Mar. 7, 2007).

5. Disciplinary Proceedings.

There was no indication that the Board of Professional Responsibility Hearing Panel Chair acted inappropriately because the Panel Chair was engaged and questioned the attorney as a witness and an advocate; the Panel Chair had the authority to limit testimony or arguments that were repetitive, and the Panel Chair was balanced in his rulings and sometimes ruled in the attorney's favor on eviden-

tiary objections. Bd. of Prof'l Responsibility v. Reguli, 489 S.W.3d 408, 2015 Tenn. LEXIS 1058 (Tenn. Dec. 28, 2015).

Rule 615. Exclusion of witnesses. —

At the request of a party the court shall order witnesses, including rebuttal witnesses, excluded at trial or other adjudicatory hearing. In the court's discretion, the requested sequestration may be effective before voir dire, but in any event shall be effective before opening statements. The court shall order all persons not to disclose by any means to excluded witnesses any live trial testimony or exhibits created in the courtroom by a witness. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) a person designated by counsel for a party that is not a natural person, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause. This rule does not forbid testimony of a witness called at the rebuttal stage of a hearing if, in the court's discretion, counsel is genuinely surprised and demonstrates a need for rebuttal testimony from an unsequestered witness. [Amended by order effective July 1, 1997.]

Advisory Commission Comments. The Commission took a realistic view of the sequestration rule. If "The Rule" is to be meaningful, witnesses should not only be instructed to refrain from discussing their courtroom testimony, but lawyers and others should be instructed not to transmit what witnesses say in court. Note that rebuttal witnesses are covered by the proposal, contrary to current Tennessee practice.

This rule does not prohibit a witness from reviewing depositions of other witnesses before testifying.

Under subsection (3) in the final sentence, the court has discretion to allow a witness to remain in the courtroom or even at counsel table if the witness's presence is "essential to the presentation of the party's cause." Such a witness might be an expert witness a lawyer needs to help the lawyer understand opposing testimony. Also, an expert witness who is to learn facts only through hearing testimony in court could be allowed to sit in the courtroom under this subsection. See Rule 703.

If a witness inadvertently and unintentionally hears some trial testimony, the sense of the rule would permit the judge to allow the witness to testify if fair under the circumstances.

Advisory Commission Comments [1992]. Under Rule 101, the Evidence Rules apply to rulings in "trial courts." Strictly speaking, Rule 615 is intended to apply only to sequestration of witnesses at trial. A lawyer who wishes to exclude nonparties from oral depositions must resort to T.R.Civ.P. 26.03(5), allowing on motion a protective order "that discovery be conducted with no one present except persons designated by the court."

Advisory Commission Comments [1997]. The amended rule contains three changes. One gives the court discretion to delay sequestration until after voir dire, perhaps because of a need to ask prospective jurors whether they know the witnesses.

The second change modifies the second category of persons not sequested. A "party that is not a natural person" includes, among other entities, a corporation and the State of Tennessee. Consequently, the prosecuting attorney could designate a crime victim, a relative of a crime victim, or an investigating officer. Like category (1), category (2) is a matter of right. Category (3), in contrast, is a matter of judicial discretion.

The third change is addition of a sentence at the end of the rule to give the court authority to make an exception for rebuttal witnesses. Such an exception requires, however, a dual showing of genuine surprise and demonstrable need.

Note that the rule prohibits disclosure of live testimony "by any means." A lawyer may mention subject matter to a witness not yet called, even though the subject matter has been raised by evidence. Care must be taken, however, to avoid implying to the potential witness what an earlier witness said from the stand.

Advisory Commission Comments [2004]. Expert witnesses generally should be considered "essential persons" and therefore should not be sequestered. In *State v. Bane*, 57 S.W.3d 411, 423 (Tenn. 2001), the Court stated: "[W]e believe that the dangers Rule 615 is intended to prevent generally do not arise with regard to expert witnesses in any proceeding."

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), No. 3-23-3.

Law Reviews. Comparing the Tennessee and Federal Rules of Evidence (Donald F. Paine), 26 Tenn. B.J. 37 (1990).

Sequestration of Experts Abolished (Donald

F. Paine), 38 Tenn. B.J. 17 (2002).

NOTES TO DECISIONS

ANALYSIS

1. In General.
2. Purpose.
3. Essential Persons.
4. Crime Victim.
5. Violation of Sequestration Order.
6. Competency to be Executed.
7. Sanctions.
8. No Violation.
9. Illustrative Cases.

1. In General.

Tenn. R. Evid. 615 may be invoked at any time and is mandatory. State v. Anthony, 836 S.W.2d 600, 1992 Tenn. Crim. App. LEXIS 470 (Tenn. Crim. App. 1992).

2. Purpose.

The purpose of the rule of sequestration is to prevent one witness from hearing the testimony of another and adjusting his testimony accordingly. State v. Harris, 839 S.W.2d 54, 1992 Tenn. LEXIS 348 (Tenn. 1992), rehearing denied, — S.W.2d —, 1992 Tenn. LEXIS 557 (Tenn. Sept. 8, 1992), cert. denied, Harris v. Tennessee, 507 U.S. 954, 113 S. Ct. 1368, 122 L. Ed. 2d 746, 1993 U.S. LEXIS 1703 (1993).

3. Essential Persons.

Where the defendant requested Tenn. R. Evid. 615 be applied to exclude a prison warden from the courtroom, the warden, as the chief official at the correctional facility and a participant in the search for the defendant, qualified as the state's designated representative or prosecutor, and was an essential person under Tenn. R. Evid. 615(3). State v. Wingard, 891 S.W.2d 628, 1994 Tenn. Crim. App. LEXIS 595 (Tenn. Crim. App. 1994).

Although the trial court erred by refusing to allow defendant's expert witness to remain in the courtroom, the court's refusal did not affect the outcome to the prejudice of the defendant because defendant's expert had the benefit of the medical examiner's testimony from the initial trial, the medical examiner's testimony was not so detailed or complex that defense counsel could not comprehend it, and the defendant did not make an offer of proof as to how the evidence would have differed had defendant's expert witness been allowed to remain in the courtroom. State v. Bane, 57 S.W.3d 411, 2001 Tenn. LEXIS 540 (Tenn. 2001), cert. denied, Bane v. Tennessee, 534 U.S. 1115, 122 S. Ct. 925, 151 L. Ed. 2d 888, 2002 U.S. LEXIS 557 (2002).

Post-conviction court properly denied petitioner's request to exclude petitioner's trial counsel from the courtroom pursuant to Tenn. R. Evid. 615, because trial counsel was an essential witness for the state; even if the post-conviction court's ruling qualified as an abuse of discretion, petitioner failed to articulate any prejudice. Palmer v. State, 108 S.W.3d 887, 2002 Tenn. Crim. App. LEXIS 563 (Tenn. Crim. App. 2002), appeal denied, — S.W.3d —, 2002 Tenn. LEXIS 536 (Tenn. Nov. 12, 2002).

In defendant's first degree murder case, a detective, the investigating officer in the case, was properly permitted to remain in courtroom as the state's designated representative; also, defendant was not prejudiced by the detective not testifying first because defendant did not specify anything about the detective's improperly changing his testimony while hearing other witnesses testify. State v. Stephens, 264 S.W.3d 719, 2007 Tenn. Crim. App. LEXIS 748 (Tenn. Crim. App. Sept. 21, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 300 (Tenn. Apr. 14, 2008), overruled in part, State v. Beaty, — S.W.3d —, 2016 Tenn. Crim. App. LEXIS 842 (Tenn. Crim. App. Nov. 8, 2016).

4. Crime Victim.

Pursuant to Tenn. R. Evid. 615, the prosecuting attorney could designate a crime victim as a person to remain in the courtroom despite invocation of the rule of sequestration. State v. Elkins, 83 S.W.3d 706, 2002 Tenn. LEXIS 374 (Tenn. 2002).

Because defendant failed to establish that the trial court abused its discretion in allowing the victim to remain in the courtroom while seven other witnesses testified before him, defendant failed to show that the court abused its discretion in denying defendant's motion for a mistrial. State v. Parrish, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 346 (Tenn. Crim. App. May 15, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 545 (Tenn. Oct. 8, 2020).

5. Violation of Sequestration Order.

The rationale in Williams v. State, 491 S.W.2d 862, 1972 Tenn. Crim. App. LEXIS 275 (Tenn. Crim. App. 1972), for holding that if the testimony of a witness who has violated Tenn. R. Evid. 615 is critical, his testimony should not ordinarily be excluded, and may still apply (although that case predated the new rules of evidence); especially when there are sanctions less drastic than prohibiting the violating witness from giving testimony. State v. Anthony, 836 S.W.2d 600, 1992 Tenn. Crim. App. LEXIS 470 (Tenn. Crim. App. 1992).

Tenn. R. Evid. 615 did not prescribe a specific sanction for its violation, instead, courts retained the discretion to impose a variety of sanctions appropriate to the circumstances; the decision to exclude or allow the testimony was a

matter within the discretion of the trial court, subject to a showing of abuse and prejudice to the complaining party. State v. Black, 75 S.W.3d 422, 2001 Tenn. Crim. App. LEXIS 823 (Tenn. Crim. App. 2001).

Witness's sequestration violation did not entitle defendant to relief because (1) nothing showed the witness altered the witness's testimony, and (2) defendant did not choose to cross-examine the witness regarding the violation. State v. Lane, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 600 (Tenn. Crim. App. Sept. 20, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 111 (Tenn. Feb. 19, 2020).

6. Competency to be Executed.

Tenn. R. Evid. 615 should not be applied to exclude expert witnesses from hearings to determine competency to be executed. Coe v. State, 17 S.W.3d 193, 2000 Tenn. LEXIS 116 (Tenn. 2000), cert. denied, Bell v. Coe, 529 U.S. 1034, 120 S. Ct. 1460, 146 L. Ed. 2d 344, 2000 U.S. LEXIS 2200 (2000), cert. denied, Coe v. Tennessee, 146 L. Ed. 2d 344, 120 S. Ct. 1460, 529 U.S. 1034, 2000 U.S. LEXIS 2199 (2000).

7. Sanctions.

Although Tenn. R. Evid. 615 on sequestration of witnesses may be invoked at any time and is mandatory, the rule does not set forth a sanction for its violation; however, in the most egregious cases, possible sanctions include the declaration of a mistrial or the preclusion of a witness from testifying. In contrast, if a witness inadvertently and unintentionally hears some trial testimony, the sense of the rule would permit the judge to allow the witness to testify if fair under the circumstances; in those less egregious cases, a violator may be subjected to cross-examination about the incident and a jury could be instructed to consider the violation of the sequestration order in assessing the witnesses' testimony. State v. Coulter, 67 S.W.3d 3, 2001 Tenn. Crim. App. LEXIS 485 (Tenn. Crim. App. 2001), overruled in part, State v. Johnson, — S.W.3d —, 2013 Tenn. Crim. App. LEXIS 1051 (Tenn. Crim. App. Dec. 3, 2013).

8. No Violation.

Petitioner failed to establish that counsel provided ineffective assistance in failing to request the sequestration of witnesses because the record showed that trial counsel did request the exclusion of witnesses from the courtroom and the post-conviction court found that the officer remained in the courtroom as the State's representative. Carero v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 240 (Tenn. Crim. App. Apr. 14, 2020).

9. Illustrative Cases.

Trial court did not err in permitting a chancellor to testify because there was no hint in the record that the trial court was unduly swayed by chancellor's testimony or that the chancellor's courtroom communications somehow prejudiced the county; the chancellor's text message exchange with a county clerk and master was disclosed and closely scrutinized by the parties and the trial court, and the trial court accounted for chancellor's strongly held preference that a county clerk win. Armstrong v. Morrison, — S.W.3d —, 2019 Tenn. App. LEXIS 540 (Tenn. Ct. App. Nov. 7, 2019).

Rule 616. Impeachment by bias or prejudice. —

A party may offer evidence by cross-examination, extrinsic evidence, or both, that a witness is biased in favor of or prejudiced against a party or another witness.

Advisory Commission Comments. Bias is an important ground for impeachment. See *Creeping Bear v. State*, 113 Tenn. 322, 87 S.W. 653 (1905).

NOTES TO DECISIONS

Analysis

1. Evidence Admissible.
2. Evidence Inadmissible.
3. Harmless Error.

1. Evidence Admissible.

Audiotape of conversation in which drug enforcement agent attempted a derogatory impersonation of an African-American and was complimented by another agent was admissible for the purpose of impeaching the credibility of the agents as state witnesses by showing prejudice against the defendant. State v. Williams, 827 S.W.2d 804, 1991 Tenn. Crim. App. LEXIS 517 (Tenn. Crim. App. 1991).

Whether his allegations were credible or not, the defendant had the right to present evidence about the pending lawsuit for the alleged beating, as tending to demonstrate the bias or prejudice of state witnesses. State v. Wingard, 891 S.W.2d 628, 1994 Tenn. Crim. App. LEXIS 595 (Tenn. Crim. App. 1994).

Evidence of an event occurring two months prior to the subject matter of a trial was admissible because it established a witness's possible

bias against a party. Harper v. Churn, 83 S.W.3d 142, 2001 Tenn. App. LEXIS 896 (Tenn. Ct. App. 2001).

Defendant's conviction for premeditated first-degree murder was appropriate because trial court did not err in allowing questioning of defendant's brother; defendant's brother's letters to defendant constituted evidence of bias, were relevant to witness' credibility, and were therefore admissible. State v. Gilley, 297 S.W.3d 739, 2008 Tenn. Crim. App. LEXIS 660 (Tenn. Crim. App. Aug. 13, 2008).

Trial court did not err by limiting defendant's cross-examination of the witness regarding her probation because the defense was allowed to impeach her credibility by inquiring about her prior convictions for felony failure to appear and theft, crimes which the jury might conclude reflected adversely upon her truthfulness, and the defense was also allowed to ask her whether she had received any benefit from the State in exchange for her cooperation in defendant's case. State v. Ward, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 202 (Tenn. Crim. App. Apr. 1, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 331 (Tenn. July 18, 2019).

2. Evidence Inadmissible.

Where patient's attorney sought to impeach doctors as expert witnesses because they had an ownership interest in an insurance company, the trial court properly excluded the impeachment testimony in the absence of any evidence to support the inference that the experts would be untruthful in order to prevent a possible increase in their premiums. Heath v. Memphis Radiological Prof'l Corp., 79 S.W.3d 550, 2001 Tenn. App. LEXIS 828 (Tenn. Ct. App. 2001).

In defendant's murder case, a court properly excluded the testimony of a witness to discredit another witness, where the inconsistent statements involved collateral facts. Proof that the witness lied to mental health evaluators about his criminal record and personal information was not relevant to a material issue at trial, the witness was thoroughly cross-examined about his criminal record and motive for testifying, and proof that the witness was evasive and manipulative during his mental health evaluation had little probative value in showing that he was biased in favor of the state. State v. Leach, 148 S.W.3d 42, 2004 Tenn. LEXIS 741 (Tenn. 2004), rehearing denied, — S.W.3d —, 2004 Tenn. LEXIS 955 (Tenn. Nov. 8, 2004), cert. denied, Leach v. Tennessee, 544 U.S. 966, 125 S. Ct. 1739, 161 L. Ed. 2d 610, 2005 U.S. LEXIS 3045 (2005).

In a wrongful death case, a court properly denied plaintiff's request to use a prior statement of the doctors' expert witness for impeachment purposes because, although plaintiff made a credible argument that the prior statement was inconsistent with the expert's testimony that his role as an expert witness did not include creating a theory of defense or acting as an advocate, the trial court was concerned with the reliability and probative value of the alleged prior statement; in addition, the trial court concluded that the probative value of the alleged prior statement was substantially outweighed by the risk of unfair prejudice to the defense. Hunter v. Ura, 163 S.W.3d 686, 2005 Tenn. LEXIS 306 (Tenn. 2005), rehearing denied, — S.W.3d —, 2005 Tenn. LEXIS 373 (Tenn. Apr. 27, 2005).

Trial court did not err by excluding photographs of a co-defendant on the ground that the restriction on cross-examination undermined defendant's presentation of the theory that the co-defendant was a gang member and the perpetrator of the crimes because defendant did not show that the jury could appropriately draw inferences relating to the co-defendant's potential bias against defendant based on the photographs. Counsel cross-examined the co-defendant extensively regarding the most potent evidence of potential bias, and brought out inconsistencies in the co-defendant's testimony using his prior statements. State v. Young, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 335 (Tenn. Crim. App. May 12, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 507 (Tenn. Sept. 21, 2020).

3. Harmless Error.

In a felony murder case, the trial court erred in excluding evidence that, two days after a witness testified against defendant, the state dismissed forgery and theft charges against that witness, as this evidence was relevant to show his bias, but the error was harmless in view of defendant's admission to shooting the victim. State v. Echols, 382 S.W.3d 266, 2012 Tenn. LEXIS 738 (Tenn. Oct. 10, 2012).

Rule 617. Impeachment by impaired capacity. —

A party may offer evidence that a witness suffered from impaired capacity at the time of an occurrence or testimony.

Advisory Commission Comments. Only impaired capacity at "occurrence or testimony" will impeach.

NOTES TO DECISIONS

Analysis

1. In General.
2. Review.

1. In General.

If the witness' mental processes are so disturbed that he cannot recall the evidence in question, distinguish between reality and make-believe, or even understand his oath or affirmation, the evidence should be stricken. State v. Carroll, 36 S.W.3d 854, 1999 Tenn. Crim. App. LEXIS 1346 (Tenn. Crim. App. 1999).

Witnesses' testimony about the victim's mother's history of erratic and irrational behavior in stressful situations would have been irrelevant and inadmissible at trial, plus the witnesses' testimony would not have been material to petitioner's defense in light of the fact that the mother testified that she did not handle stressful situations well; therefore, petitioner was properly denied post-conviction relief. Lewis v. State, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 683 (Tenn. Crim. App. Sept. 7, 2018), review denied and ordered not published, — S.W.3d —, 2019 Tenn. LEXIS 15 (Tenn. Jan. 16, 2019).

Evidence of the victims' drug use after leaving defendant's home was not admissible because there was no evidence of drug use by the victims while they were living in defendant's home, nor was there any suggestion that the victims were impaired at the time of their trial testimony. State v. Robinson, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 277 (Tenn. Crim. App. Apr. 21, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 427 (Tenn. Aug. 7, 2020).

2. Review.

In the final analysis, the competency of a witness is a matter entrusted to the sound discretion of the trial judge. State v. Carroll, 36 S.W.3d 854, 1999 Tenn. Crim. App. LEXIS 1346 (Tenn. Crim. App. 1999).

Rule 618. Impeachment of expert by learned treatises. —

To the extent called to the attention of an expert witness upon cross-examination or relied upon by the witness in direct examination, statements contained in published treatises, periodicals, or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness, by other expert testimony, or by judicial notice, may be used to impeach the expert witness's credibility but may not be received as substantive evidence.

Advisory Commission Comments. The rule restates the current Tennessee view. *Sale v. Eichberg*, 105 Tenn. 333, 59 S.W. 1020 (1900); *McCay v. Mitchell*, 62 Tenn. App. 424, 463 S.W.2d 710 (1970).

Law Reviews. Comparing the Tennessee and Federal Rules of Evidence (Donald F. Paine), 26 Tenn. B.J. 37 (1990).

NOTES TO DECISIONS

Analysis

1. Substantive Evidence.
2. Appeal.
3. Improper Impeachment.
4. Proper Impeachment.

1. Substantive Evidence.

It was reversible error to allow portions of the Railroad Highway Crossing Handbook to be admitted as substantive evidence in a negligence action against a railway company. Emery v. Southern Ry., 866 S.W.2d 557, 1993 Tenn. App. LEXIS 368 (Tenn. Ct. App. 1993), appeal denied, Emery v. Southern Ry. Co., — S.W.2d —, 1993 Tenn. LEXIS 365 (Tenn. Oct. 4, 1993).

In a medical malpractice action, the trial court erred in admitting into evidence two medical articles supplied by the physician and allowing jury access to the articles during deliberations because it was prohibited by Tenn. R. Evid. 618. Godbee v. Dimick, 213 S.W.3d 865, 2006 Tenn. App. LEXIS 601 (Tenn. Ct. App. 2006), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 66 (Tenn. 2006).

2. Appeal.

A scientific manual first cited in defendant's appellate brief was not admissible since an appellate court may not consider the introduction of evidence in the first instance. State v. Smith, 893 S.W.2d 908, 1994 Tenn. LEXIS 278 (Tenn. 1994), rehearing denied, 893 S.W.2d 908, 1995 Tenn. LEXIS 48 (Tenn. 1995), cert. denied, Smith v. Tennessee, 516 U.S. 829, 116 S. Ct. 99, 133 L. Ed. 2d 53, 1995 U.S. LEXIS 5601 (1995).

3. Improper Impeachment.

In a medical malpractice action, any error in not admitting a medical article that applying fundal pressure during the delivery of a child was a violation of the acceptable standard of professional practice for impeachment purposes under Tenn. R. Evid. 618 was harmless because the jury was presented with conflicting testimony as to whether the nurse did or did not apply fundal pressure. Olinger v. Univ. Med. Ctr., 269 S.W.3d 560, 2008 Tenn. App. LEXIS 24 (Tenn. Ct. App. Jan. 17, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 462 (Tenn. June 30, 2008).

In an action stemming from an automobile accident, had a forensic pathologist's testimony been limited to his conclusion that there was no reported case in the medical or scientific literature of a person who became unconscious as a result of carbon monoxide poisoning while driving a vehicle, Tenn. R. Evid. 618 might very well have limited the scope of cross-examination to questioning him about articles or case studies in the medical or scientific literature that he had overlooked; however, his opinion went far beyond a simple report of the medical or scientific literature where he testified without equivocation that it was not medically possible for the driver to have lost consciousness. Duran v. Hyundai Motor Am., Inc., 271 S.W.3d 178, 2008 Tenn. App. LEXIS 79 (Tenn. Ct. App. Feb. 13, 2008), rehearing denied, 271 S.W.3d 178, 2008 Tenn. App. LEXIS 127 (Tenn. Ct. App. Feb. 27, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 632 (Tenn. Aug. 25, 2008).

4. Proper Impeachment.

Court properly allowed a wrongful death plaintiff to cross-examine a defense expert regarding a learned treatise where questions were not read from a specific learned treatise, but rather, were based on the testimony and evidence already presented at trial; plaintiff noted that the expert was not asked to compare his testimony to another source and was not asked to explain why his testimony differed from another specific source. Hunter v. Ura, 163 S.W.3d 686, 2005 Tenn. LEXIS 306 (Tenn. 2005), rehearing denied, — S.W.3d —, 2005 Tenn. LEXIS 373 (Tenn. Apr. 27, 2005).

In a medical malpractice case, it was not error to allow a physician's counsel to impeach experts called by a mother bringing suit by using a learned treatise that was allegedly not in effect when the patient in question died because: (1) The requirement that the treatise be established as reliable was met, (2) No authority required that the publication be in effect at the time of the case, and, (3) If there were such a requirement, an expert admitted there was very little change between the publication on which the expert was cross-examined and the publication in effect at the time of the patient's death. Stanfield v. Neblett, 339 S.W.3d 22, 2010 Tenn. App. LEXIS 373 (Tenn. Ct. App. June 4, 2010), appeal denied, — S.W.3d —, 2011 Tenn. LEXIS 39 (Tenn. Jan. 13, 2011).

In a medical malpractice case, it was not error to allow an expert called by the mother bringing suit to be questioned on medical literature that had allegedly not been established as reliable because the witness was merely asked if literature supporting opinions contrary to the opinions of the expert existed. Stanfield v. Neblett, 339 S.W.3d 22, 2010 Tenn. App. LEXIS 373 (Tenn. Ct. App. June 4, 2010), appeal denied, — S.W.3d —, 2011 Tenn. LEXIS 39 (Tenn. Jan. 13, 2011).

ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion testimony by lay witnesses. —

(a) Generally. — If a witness is not testifying as an expert, the witness's testimony in the form of opinions or inferences is limited to those opinions or inferences which are

(1) rationally based on the perception of the witness and

(2) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue.

(b) Value. —

A witness may testify to the value of the witness's own property or services. [Amended by order effective July 1, 1996.]

Advisory Commission Comments [1996]. This rule was amended because the former rule precluded any lay opinion if the lay witness could substitute facts for opinion.

Law Reviews. A Meta-Analysis of the Tennessee Rules of Evidence (Neil P. Cohen), 57 Tenn. L. Rev. 1 (1989).

Comparing the Tennessee and Federal Rules of Evidence (Donald F. Paine), 26 Tenn. B.J. 37 (1990).

Cross-Examination of an Expert with Another Expert's Deposition (Donald F. Paine), 32 Tenn. B.J. 12 (1996).

The Admissibility of Lay and Expert Opinions (J. Houston Gordon), 57 Tenn. L. Rev. 103 (1989).

NOTES TO DECISIONS

Analysis

1. In General.
2. Experimental Evidence.
3. "Owner."
4. Foundation for Testimony.
5. Medical Causation Testimony.
6. Particular Examples.
7. Evidence Properly Included.
8. Admissibility.
9. Evidence Properly Excluded.

1. In General.

A lay witness may offer opinions if they are based on the witness's own observations. State v. Wingard, 891 S.W.2d 628, 1994 Tenn. Crim. App. LEXIS 595 (Tenn. Crim. App. 1994).

Even if a rescue squad worker did not qualify as an expert, he could properly give his opinion as to the fact that the defendant had been driving the vehicle that crashed since such opinion was based on his own perception and was helpful to gain a clear understanding of his testimony. State v. Lee, 969 S.W.2d 414, 1997 Tenn. Crim. App. LEXIS 501 (Tenn. Crim. App. 1997).

Trial court erred in allowing witness to testify that defendant was "weird" and that he had shot victim rather than limiting witness's testimony to describing her observations of the defendant's behavior. State v. Schafer, 973 S.W.2d 269, 1997 Tenn. Crim. App. LEXIS 1243 (Tenn. Crim. App. 1997).

In a capital murder case, a bartender's opinion testimony was properly included concerning defendant's actions in a bar two weeks after the murder, where the testimony was helpful to the jury in understanding why the bartender acted as she did while defendant was in the tavern, and the bartender's assessment of defendant's behavior was unlikely to have resulted in any unfair prejudice. State v. Davidson, 121 S.W.3d 600, 2003 Tenn. LEXIS 1007 (Tenn. 2003), cert. denied, Davidson v. Tennessee, 541 U.S. 1049, 158 L. Ed. 2d 743, 124 S. Ct. 2174, 2004 U.S. LEXIS 3512, 72 U.S.L.W. 3711 (2004).

Testimony from the state trooper opining that defendant's blood alcohol content was rising at the time of the withdrawal of his blood did not qualify as proper opinion testimony by a lay witness; even if the trooper was qualified, there was no indication that the trooper was provided with sufficient information in order to opine as to whether defendant's blood alcohol content was rising or falling at the time of the blood test. State v. Greenwood, 115 S.W.3d 527, 2003 Tenn. Crim. App. LEXIS 243 (Tenn. Crim. App. 2003), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 830 (Tenn. Sept. 8, 2003).

Defendant waived his claim on appeal that the trial court erred in admitting an investigating officer's testimony regarding the consistency of a child victim's statements because the only authority cited in defendant's brief was Tenn. R. Evid. 801 and Tenn. R. Evid. 803 when, at trial, defendant objected on lay opinion grounds only pursuant to Tenn. R. Evid. 701, and defendant was bound on appeal to the basis of his objection at trial pursuant to Tenn. R. Evid. 103(a); furthermore, defendant failed to cite authority to support his claim based on Tenn. R. Evid. 701 in his appellate brief as required by T.R.A.P. 27(a)(7), and therefore the appellate court considered the issue waived under Tenn. Ct. Crim. App. R. 10(b). State v. Schiefelbein, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 138 (Tenn. Crim. App. Feb. 8, 2007), modified, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 213 (Tenn. Crim. App. Mar. 7, 2007).

2. Experimental Evidence.

Experimental evidence is generally admissible if it is relevant and probative. The probative value of the experiment can be ascertained by determining whether the experiment is identical or similar to the conditions of the litigated transaction. Harwell v. Walton, 820 S.W.2d 116, 1991 Tenn. App. LEXIS 392 (Tenn. Ct. App. 1991), rehearing denied, — S.W.2d —, 1991 Tenn. App. LEXIS 557 (Tenn. Ct. App. 1991).

In defendant's murder case, a court did not err by allowing testimony regarding an experiment concerning the length of time the victim's pressure cooker had been on the stove, where the testimony expressed only that the victim's pressure cooker and contents appeared the same after 17 hours on the high setting as it had when seen at the victim's residence following the murder, and therefore, the agent did not testify as to the time of the victim's death. State v. Robertson, 130 S.W.3d 842, 2003 Tenn. Crim. App. LEXIS 358 (Tenn. Crim. App. 2003), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 1068 (Tenn. Oct. 27, 2003).

3. "Owner."

The word "owner" in Tenn. R. Evid. 701 does not include someone other than the person who has title to the stolen property. State v. Bridgeforth, 836 S.W.2d 591, 1992 Tenn. Crim. App. LEXIS 309 (Tenn. Crim. App. 1992).

Although he was not the titled owner of the stolen vehicle, the husband of the titled owner could testify to its value due to the testimony that the vehicle was marital property and the witness's intimate knowledge of the vehicle. State v. Holt, 965 S.W.2d 496, 1997 Tenn. Crim. App. LEXIS 1325 (Tenn. Crim. App. 1997).

4. Foundation for Testimony.

The very limited observation of the defendant's conduct made by the witness was not a sufficient foundation on which to base an opinion of sanity. State v. Sparks, 891 S.W.2d 607, 1995 Tenn. LEXIS 1 (Tenn. 1995).

The lay witness met the three-prong criteria under Tenn. R. Evid. 701 in testifying as to the age and physical condition of her mother, the crime victim. State v. Boggs, 932 S.W.2d 467, 1996 Tenn. Crim. App. LEXIS 198 (Tenn. Crim. App. 1996), appeal denied, — S.W.2d —, 1996 Tenn. LEXIS 648 (Tenn. Oct. 14, 1996).

5. Medical Causation Testimony.

Appellate court could not consider, on the instant summary judgment analysis, a patient's affidavit with respect to her assertions regarding the effects of the medications she was taking or her belief that the taking of the medications caused confusion during her deposition regarding the dates and substance of conversations because the patient, as a lay person, was not competent to opine as to the effects of the medications. Sampson v. Wellmont Health Sys., 228 S.W.3d 124, 2007 Tenn. App. LEXIS 62 (Tenn. Ct. App. Jan. 31, 2007), appeal denied, Sampson v. Wellmont Health Ctr., — S.W.3d —, 2007 Tenn. LEXIS 547 (Tenn. June 18, 2007).

6. Particular Examples.

Where the victim was shot during a robbery of his antiques store, and he told police he knew that defendant was involved in the offenses, the trial court did not err by admitting this statement at defendant's murder trial as a dying declaration under Tenn. R. Evid. 804; the victim's identification of defendant was rationally based upon the perception of the victim in compliance with Tenn. R. Evid. 701. State v. Lewis, 235 S.W.3d 136, 2007 Tenn. LEXIS 649 (Tenn. Aug. 17, 2007).

Because the husband's family did not object to when the trial court allowed the wife's mother to state her opinion as to the value of many of the items of personal property that the husband removed from the house he shared with his wife, the court did not review their claim on appeal; even if the court considered the claim, it would have concluded that it was meritless as the conservator of an absent or deceased party's property stood in the shoes of the absent or deceased party, and therefore could testify with regard to the value of the property under Tenn. R. Evid. 701(b). Levine v. March, 266 S.W.3d 426, 2007 Tenn. App. LEXIS 728 (Tenn. Ct. App. Nov. 27, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 352 (Tenn. Apr. 28, 2008).

In a child sexual abuse case, the trial court did not abuse its discretion in allowing a mother to testify as to why her child did not tell her about the abuse because the mother's opinion was rationally based on her perception and helpful to a clear understanding of her testimony; the state adequately built a foundation by showing the child's close relationship with her mother and the mother's insights into the child's behavior, and furthermore, defense counsel ably attacked the child's credibility on cross-examination. State v. Schiefelbein, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 138 (Tenn. Crim. App. Feb. 8, 2007), modified, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 213 (Tenn. Crim. App. Mar. 7, 2007).

Trial court erred in permitting a police officer to testify that, because defendant suffered the greater injury of the two vehicle occupants and because that injury was to the left side of defendant's body, he concluded that defendant was the driver of the vehicle; because the jury could have easily drawn this conclusion itself based upon the officer's testimony regarding defendant's injuries and the condition of the vehicle, the trial court should not have allowed the officer to offer a lay opinion that defendant was the driver of the vehicle. Because the conclusion was so readily apparent from the evidence and because there was other direct evidence that defendant had been driving at the time of the accident, the erroneous admission of the officer's opinion as a lay witness was harmless. State v. McCloud, 310 S.W.3d 851, 2009 Tenn. Crim. App. LEXIS 437 (Tenn. Crim. App. June 12, 2009).

Although the trial court erred in finding a husband incompetent to testify as to the value of his own personal property, the error was harmless because the trial court court properly determined that the husband failed to prove the wife kept any silver to which he was entitled. Trezevant v. Trezevant, 568 S.W.3d 595, 2018 Tenn. App. LEXIS 213 (Tenn. Ct. App. Apr. 25, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 622 (Tenn. Sept. 18, 2018).

There was no significant distinction between the husband's and wife's respective testimonies regarding their methodologies in valuing the marital residence; each party presented a lay opinion concerning the value of the property, as permitted by the rule, and both parties relied in part on the prices of other homes within the neighborhood when doing so, such that the admission of deeds representing nearby home sales did not constitute reversible error, especially when it was not shown that the trial court relied on such evidence. Brown v. Brown, 577 S.W.3d 206, 2018 Tenn. App. LEXIS 622 (Tenn. Ct. App. Oct. 25, 2018), appeal denied, —

S.W.3d —, 2019 Tenn. LEXIS 109 (Tenn. Feb. 20, 2019).

Trial court properly valued a fifth wheel camper because the value it assigned was within the range of the values a husband and wife presented. Parker v. Parker, — S.W.3d —, 2019 Tenn. App. LEXIS 173 (Tenn. Ct. App. Apr. 9, 2019).

Even though the trial court abused its discretion by allowing a witness to identify defendant in the video, because the evidence did not establish that the witness had personal knowledge of defendant's identity, the error was harmless because an eyewitness, who knew defendant prior to the incident, saw the shooting and positively identified defendant as the shooter. State v. McKenzie, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 412 (Tenn. Crim. App. June 16, 2020).

7. Evidence Properly Included.

Defendant was properly convicted of theft of property over the value of $60,000 because he stipulated at trial that he admitted to police to forging the deeds that conveyed the three properties to him, two appraisals of the properties —one using a cost approach and the other a market value approach—determined the value of property at $60,000 or more, and the trial court did not abuse its discretion by allowing lay witnesses to testify that they believed that the appraised values of the properties were low. State v. Sears, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 686 (Tenn. Crim. App. Sept. 10, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 57 (Tenn. Jan. 18, 2019).

Agent was properly allowed to testify about inferences he made based on his personal observations of defendant when he was interviewing him because the agent's testimony that defendant appeared nervous was rationally based on his perception of defendant and was helpful to the jury in determining the credibility of defendant's alibi, a central issue in the case. State v. Alston, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 296 (Tenn. Crim. App. Apr. 24, 2020).

Because a question to a detective regarding a blood streak did not solicit improper blood spatter expert testimony but was merely seeking the detective's personal observations based upon his experience, the trial court did not abuse its discretion in allowing the detective testify that the blood streak appeared to be from an object that had blood on it that had been placed on the carpet and transferred the pattern from the object onto the carpet. State v. Robinson, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 553 (Tenn. Crim. App. Aug. 13, 2020).

8. Admissibility.

When a motorcyclist alleged that the motorcyclist was in an accident which was caused by loose gravel from a recent paving project on a state highway, the trial court erred in excluding lay witness opinion testimony and in ruling that expert proof was necessary to determine the source of the gravel because the opinions of the lay witnesses were based on personal observation of the gravel and previous experience with newly paved roads, the opinions had a rational basis in the gravel's color and consistency, and the testimony was helpful. Flagg v. Hudson Constr. Co., — S.W.3d —, 2019 Tenn. App. LEXIS 264 (Tenn. Ct. App. May 28, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 474 (Tenn. Sept. 18, 2019).

Inmate was not entitled to post-conviction relief for counsel's failure to object to a victim's granddaughter's lay testimony because (1) the witness could describe what the witness saw during the victim's forensic examination, and (2) the witness's use of common medical terms did not elevate the witness's testimony to that of a medical expert. Denton v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 487 (Tenn. Crim. App. July 16, 2020).

9. Evidence Properly Excluded.

Trial court acted within its discretion by excluding defendant's mother's testimony because defendant failed to show how his mother's testimony regarding his specific mental health issues would have aided the trier of fact regarding his credibility, his motive to give a false confession, or any other determination of a fact in issue. State v. Jordan, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 328 (Tenn. Crim. App. May 8, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 543 (Tenn. Sept. 21, 2020).

Rule 702. Testimony by experts. —

If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

Advisory Commission Comments [2001]. The *Frye* test no longer exists in Tennessee. In *McDaniel v. CSX Transportation, Inc.*, 955 S.W.2d 257 (1997), the Tennessee Supreme Court listed five nonexclusive factors taken from the federal case of *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993):

"(1) whether scientific evidence has been tested and the methodology with which it has been tested;

"(2) whether the evidence has been subjected to peer review or publication;

"(3) whether a potential rate of error is known;

"(4) whether, as formerly required by *Frye*, the evidence is generally accepted in the scientific community; and

"(5) whether the expert's research in the field has been conducted independent of litigation."

Law Reviews. Comparing the Tennessee and Federal Rules of Evidence (Donald F. Paine), 26 Tenn. B.J. 37 (1990).

Daubert v. Merrell Dow Pharmaceuticals: Pushing the Limits of Scientific Reliability — The Questionable Wisdom of Abandoning the Peer Review Standard for Admitting Expert Testimony (Allan W. Tamarelli, Jr.), 47 Vand. L. Rev. 1175 (1994).

Evidence–Expert Testimony–Standards for the Admission of Expert Testimony in Tennessee: State v. Scott, 275 S.W.3d 395 (Tenn. 2009) (Michelle Lynn Veronica Consiglio), 77 Tenn. L. Rev. 207 (2009).

Evidence — McDaniel v. CSX Transportation, Inc.: A Clearer Standard for Determining Admissibility of Scientific Evidence in Tennessee State Courts, 28 U. Mem. L. Rev. 1259 (1998).

Evidence — State v. Begley: When the Tennessee Supreme Court Meets PCR-Method DNA Analysis, Its Love at First Sight, 28 Mem. St. U.L. Rev. 1239 (1998).

Expert Opinion and the Coley Decision (Donald F. Paine), 37 Tenn. B.J. 18 (2001).

Expert Witness Conflicts and Compensation, 67 Tenn. L. Rev. 909 (2000).

For an article, "Can the Legal System Use Experts on Meaning?" see 66 Tenn. L. Rev. 1167 (1999).

Judges Cooperating with Scientists: A Proposal for More Effective Limits on the Federal Trial Judge's Inherent Power to Appoint Technical Advisors, 54 Vand. L. Rev. 547 (2001).

Just What the Doctor Ordered: The Admissibility of Differential Diagnosis in Pharmaceutical Product Litigation (Wendy Michelle Ertmer), 56 Vand. L. Rev. 1227 (2003).

New rules regarding causation and computer-animated visualizations (David L. Raybin), 38 Tenn. B.J. 20 (2002).

Paine on Procedure: Expert Opinion and the Insanity Defense (Donald F. Paine), 49 Tenn. B.J. 27 (2013).

Scientific Uncertainty and Causation in Tort Law, 54 Vand. L. Rev. 1011 (2001).

The Handwriting on the Wall (Bob E. Lype), 34 Tenn. B.J. 18 (1998).

The New McDaniel Test for Expert Opinions (Donald F. Paine), 34 Tenn. B.J. 23 (1998).

The "Same Intellectual Rigor" Test Provides an Effective Method for Determining the Reliability of All Expert Testimony, Without Regard to Whether the Testimony Comprises "Scientific Knowledge" or "Technical or Other Specialized Knowledge," 28 U. Mem. L. Rev. 1053 (1998).

Warping the Rules: How Some Courts Misapply Generic Evidentiary Rules to Exclude Polygraph Evidence, 59 Vand. L. Rev. 539 (2006).

Penile Polygraphy: The Admissibility of Penile-Plethysmograph Results at Sentencing in Tennessee, 72 Vand. L. Rev. 353 (January 2019)

Workers' Compensation Appeals Board Decisions. An employee alleged he sustained head and neck injuries in the course and scope of his work handling livestock. He received authorized medical treatment and was ultimately referred to a neurologist who provided an opinion in a deposition as to the degree of permanent impairment the employee sustained as a result of the work accident. The employer filed a motion to exclude portions of the doctor's testimony concerning the employee's permanent impairment rating, asserting the testimony did not comply with the requirements of Rules 702 and 703 of the Tennessee Rules of Evidence. The trial court properly concluded the doctor's opinions were admissible and denied the employer's motion. Considering the totality of the doctor's testimony, the preponderance of the evidence supported the trial court's determination that she applied the methodology contemplated by the AMA Guides and that her inability to recollect the details of her impairment assessments for the employee's alleged traumatic brain injury and cervical injury during her deposition did not indicate such a lack of trustworthiness as to render her opinions inadmissible. Ailshie v. TN Farm Bureau Federation, 2019 TN Wrk Comp App Bd LEXIS 55.

NOTES TO DECISIONS

Analysis

1. Construction with Federal Rule.
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18. Evidence Improperly Excluded.
19. Evidence Properly Included.
20. Expert Testimony Not Required.

1. Construction with Federal Rule.

Tenn. R. Evid. 702 is more stringent than its federal counterpart; as a matter of contrast, while Fed. R. Evid. 702 requires only that the evidence "assist the trier of fact," Tenn. R. Evid. 702 requires that expert testimony "substantially assist the trier of fact." This distinction indicates that the probative force of the testimony must be stronger before it is admitted in State v. Coley, 32 S.W.3d 831, 2000 Tenn. LEXIS 573 (Tenn. 2000), review or rehearing denied, — S.W.3d —, 2000 Tenn. LEXIS 651 (Tenn. Nov. 22, 2000), overruled in part, State v. Copeland, 226 S.W.3d 287, 2007 Tenn. LEXIS 502 (Tenn. May 23, 2007), overruled, Vermeal v. State, — S.W.3d —, 2008 Tenn. Crim. App. LEXIS 594 (Tenn. Crim. App. July 3, 2008), overruled, Dotson v. State, — S.W.3d —, 2008 Tenn. Crim. App. LEXIS 684 (Tenn. Crim. App. Aug. 26, 2008), overruled in part, Thomas v. State, 298 S.W.3d 610, 2009 Tenn. Crim. App. LEXIS 109 (Tenn. Crim. App. Feb. 12, 2009), overruled, Vermeal v. Parker, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 89830 (E.D. Tenn. Sept. 29, 2009), overruled in part, Bomas v. State, 412 Md. 392, 987 A.2d 92, 2010 Md. LEXIS 10 (2010), overruled, McKinney v. State, — S.W.3d —, 2010 Tenn. Crim. App. LEXIS 219 (Tenn. Crim. App. Mar. 9, 2010), overruled, Thomas v. Carlton, — F. Supp. 2d —, 2013 U.S. Dist. LEXIS 41940 (E.D. Tenn. Mar. 26, 2013), overruled, Pruitt v. State, — S.W.3d —, 2013 Tenn. Crim. App. LEXIS 370 (Tenn. Crim. App. May 2, 2013).

2. Discretion of Trial Court.

The trial judge has wide discretion in the matter of the qualifications of expert witnesses. Otis v. Cambridge Mut. Fire Ins. Co., 850 S.W.2d 439, 1992 Tenn. LEXIS 722 (Tenn. 1992), rehearing denied, — S.W.2d —, 1993 Tenn. LEXIS 142 (Tenn. Mar. 29, 1993).

Qualifications, admissibility, relevancy and competency of expert testimony are matters which largely rest within the sound discretion of the trial court; such discretion, however, is not absolute and may be overturned on appeal where the discretion is arbitrarily exercised. State v. Ballard, 855 S.W.2d 557, 1993 Tenn. LEXIS 193 (Tenn. 1993).

The decision to admit scientific evidence is within the discretion of the trial court and will not be disturbed absent an abuse of discretion. Coe v. State, 17 S.W.3d 193, 2000 Tenn. LEXIS 116 (Tenn. 2000), cert. denied, Bell v. Coe, 529 U.S. 1034, 120 S. Ct. 1460, 146 L. Ed. 2d 344, 2000 U.S. LEXIS 2200 (2000), cert. denied, Coe v. Tennessee, 146 L. Ed. 2d 344, 120 S. Ct. 1460, 529 U.S. 1034, 2000 U.S. LEXIS 2199 (2000).

The rules of evidence do not authorize a court to appoint an expert witness on questions of law. Mayhew v. Wilder, 46 S.W.3d 760, 2001 Tenn. App. LEXIS 17 (Tenn. Ct. App. 2001).

3. Experiments.

The fact that a lay witness rather than a qualified expert conducted the experiment merely goes to the weight of the experimental evidence, not its admissibility. Harwell v. Walton, 820 S.W.2d 116, 1991 Tenn. App. LEXIS 392 (Tenn. Ct. App. 1991), rehearing denied, — S.W.2d —, 1991 Tenn. App. LEXIS 557 (Tenn. Ct. App. 1991).

4. Competency.

The expertise of a physicist who has spent years studying the effects of noise on the human ear, should not be disregarded as incompetent because it was not acquired in conjunction with a medical license. Tucker v. American Tel. & Tel. Corp., 794 F. Supp. 240, 1992 U.S. Dist. LEXIS 7685 (W.D. Tenn. 1992).

To give expert testimony, one must be particularly skilled, learned or experienced in a science, art, trade, business, profession or vocation. The expert must possess a thorough knowledge of the matter upon which he testifies that is not within the general knowledge and experience of the average person. Otis v. Cambridge Mut. Fire Ins. Co., 850 S.W.2d 439, 1992 Tenn. LEXIS 722 (Tenn. 1992), rehearing denied, — S.W.2d —, 1993 Tenn. LEXIS 142 (Tenn. Mar. 29, 1993).

The chancellor did not abuse his discretion in allowing a firefighter to testify as an expert on the cause and origin of a house fire, based on such witness' 31 years experience as a firefighter and the fact that during his long career he was called upon by superiors to give opinions as to the cause and origin of fires, and where his arrival upon the scene, at or very near the start of the blaze, gave him a perspective which could have been lacking to an after-the-fact investigator. Otis v. Cambridge Mut. Fire Ins. Co., 850 S.W.2d 439, 1992 Tenn. LEXIS 722 (Tenn. 1992), rehearing denied, — S.W.2d —, 1993 Tenn. LEXIS 142 (Tenn. Mar. 29, 1993).

Doctor's testimony regarding causation of plaintiff's heart attack was incompetent and should not have been admitted because it was elicited in response to a question calling for an opinion based upon a legal rather than a factual conclusion. Coffey v. City of Knoxville, 866 S.W.2d 516, 1993 Tenn. LEXIS 461 (Tenn. Special Workers' Comp. App. Panel 1993).

Trial court did not err under Tenn. R. Evid. 702 and 703 when it allowed certified latent fingerprint examiner to testify as an expert based on use of "alternate light source technique" to identify palm print. State v. Smith, 868 S.W.2d 561, 1993 Tenn. LEXIS 410 (Tenn. 1993), rehearing denied, — S.W.2d —, 1994 Tenn. LEXIS 2 (1994), cert. denied, Smith v. Tennessee, 513 U.S. 960, 115 S. Ct. 417, 130 L. Ed. 2d 333, 1994 U.S. LEXIS 7536 (1994).

Witness was qualified to give his opinion on the various aspects of fire's progression. Doochin v. United States Fidelity & Guar. Co., 854 S.W.2d 109, 1993 Tenn. App. LEXIS 25 (Tenn. Ct. App. 1993).

Trial court did not abuse its discretion by allowing witness to testify as an expert in the area of gynecological exams where she testified that she was a certified family nurse practitioner, she had performed several hundred post rape gynecological exams, and she stated that her findings in doing a gynecological exam on the victim were not inconsistent with the victim's history of sexual assault. State v. Davis, 872 S.W.2d 950, 1993 Tenn. Crim. App. LEXIS 347 (Tenn. Crim. App. 1993), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 322 (Tenn. Sept. 7, 1993), appeal denied, Tipton v. State, — S.W.2d —, 1993 Tenn. LEXIS 323 (Tenn. Sept. 7, 1993).

In an action for negligence against an engineering firm, an engineer who was licensed and practiced out-of-state was qualified to testify regarding technical aspects of the case. Martin v. Barge, Waggoner, Sumner & Cannon, 894 S.W.2d 750, 1994 Tenn. App. LEXIS 673 (Tenn. Ct. App. 1994), appeal denied, — S.W.2d —, 1995 Tenn. LEXIS 60 (Tenn. Feb. 27, 1995).

Where an accident reconstruction expert formulated his opinions based upon mathematical calculations related to witness testimony regarding the sequence of lights at the intersection, braking times by the vehicles, and distances traveled, his testimony was not simply an evaluation or assessment of the credibility of the witnesses, and the trial court did not abuse its discretion in permitting him to testify on the circumstances leading up to the accident. Herbert by Herbert v. Brazeale, 902 S.W.2d 933, 1995 Tenn. App. LEXIS 86 (Tenn. Ct. App. 1995).

The trial court did not abuse its discretion in permitting a police officer to testify as to the amount of damage done to his patrol car. State v. Brooks, 909 S.W.2d 854, 1995 Tenn. Crim. App. LEXIS 701 (Tenn. Crim. App. 1995).

A medical examiner was qualified to testify concerning the purpose of a hollow-point bullet. State v. Pulliam, 950 S.W.2d 360, 1996 Tenn. Crim. App. LEXIS 672 (Tenn. Crim. App. 1996).

A rescue squad worker would have qualified as an expert for purposes of rendering an opinion that the defendant had been driving the vehicle that had crashed, based on his extensive experience, skill, and training. State v. Lee, 969 S.W.2d 414, 1997 Tenn. Crim. App. LEXIS 501 (Tenn. Crim. App. 1997).

Tenn. R. Evid. 702 governs the qualification of an expert witness at an administrative hearing. Martin v. Sizemore, 78 S.W.3d 249, 2001 Tenn. App. LEXIS 616 (Tenn. Ct. App. 2001).

Trial court erred, in defendant's murder trial, in qualifying police officer as an expert witness qualified to testified about the victim's blood splatters found on defendant's pants, although the trial court correctly determined that, because of the complex nature of the topic, expert testimony was required. State v. Halake, 102 S.W.3d 661, 2001 Tenn. Crim. App. LEXIS 921 (Tenn. Crim. App. 2001).

Substance of the evidence offered by a patient to oppose a physician's summary judgment motion must be admissible at trial but need not be in admissible form, the affidavit must contain sufficient information to demonstrate that the affiant is qualified to render an expert opinion, pursuant to Tenn. R. Evid. 104(a), and that the affiant's opinion will substantially assist the trier of fact, pursuant to Tenn. R. Evid. 702; it must also comply with the requirements of Tenn. R. Civ. P. 56.06 and T.C.A. § 29-26-115. Kenyon v. Handal, 122 S.W.3d 743, 2003 Tenn. App. LEXIS 196 (Tenn. Ct. App. 2003), appeal denied, Kenyon v. Handal, M.D., — S.W.3d —, 2003 Tenn. LEXIS 906 (Tenn. 2003).

Implicit in the *Harris v. Chern* opinion is the Tennessee supreme court's recognition that relief under Tenn. R. Civ. P. 59.04 is available only when the supplemental affidavit effectively remedies the defects or shortcomings in the earlier affidavit opposing the physician's summary judgment motion; trial courts are not required to grant relief from an order granting a summary judgment if the patient remains unable to demonstrate the existence of a material factual dispute requiring a trial. Thus, if a patient files a motion for Tenn. R. Civ. P. 59.04 relief relying on a new affidavit that itself does not satisfy the requirements of Tenn. R. Civ. P. 56.06, Tenn. R. Evid. 104(a), Tenn. R. Evid. 702, or T.C.A. § 29-26-115, the trial court may decline to set aside its previous summary judgment order. Kenyon v. Handal, 122 S.W.3d 743, 2003 Tenn. App. LEXIS 196 (Tenn. Ct. App. 2003), appeal denied, Kenyon v. Handal, M.D., — S.W.3d —, 2003 Tenn. LEXIS 906 (Tenn. 2003).

In addition to the four specific factors identified in *Harris v. Chern*, the Tennessee supreme court invited the consideration of "any other relevant factor;" whether a new or supplemental affidavit effectively rebuts the defendant's affidavit is clearly a relevant consideration. Kenyon v. Handal, 122 S.W.3d 743, 2003 Tenn. App. LEXIS 196 (Tenn. Ct. App. 2003), appeal denied, Kenyon v. Handal, M.D., — S.W.3d —, 2003 Tenn. LEXIS 906 (Tenn. 2003).

Because the statute defining the practice of pharmacy does not contain a prohibition on making a medical diagnosis, it does not render a pharmacist ipso facto incompetent to express any opinion on causation for purposes of satisfying the statute regarding expert testimony in a health care liability action when the pharmacist's expert opinion is otherwise admissible and relevant. Kidd v. Dickerson, — S.W.3d —,

2020 Tenn. App. LEXIS 443 (Tenn. Ct. App. Oct. 5, 2020).

Evidence supported the determination made by the administrative law judge that the expert was qualified to testify to the work of an advanced practice registered nurse involved in the pain management practice area, given the expert's years of practice and her training and education. Tenn. Dep't of Health v. Collins, — S.W.3d —, 2020 Tenn. App. LEXIS 532 (Tenn. Ct. App. Nov. 25, 2020).

5. Form of Testimony.

Expert testimony does not have to be in the form of an opinion. Pichon v. Opryland USA, Inc., 841 S.W.2d 326, 1992 Tenn. App. LEXIS 555 (Tenn. Ct. App. 1992).

6. Substantial Assistance.

The question of what will "substantially" assist the jury is one for the trial court to determine. Primm v. Wickes Lumber Co., 845 S.W.2d 768, 1992 Tenn. App. LEXIS 681 (Tenn. Ct. App. 1992).

Trial court erred in admitting the expert testimony of a doctor concerning symptoms of post-traumatic stress syndrome exhibited by alleged victims of child sexual abuse, as such symptoms do not suffice to confirm the fact of sexual abuse. State v. Ballard, 855 S.W.2d 557, 1993 Tenn. LEXIS 193 (Tenn. 1993); State v. Anderson, 880 S.W.2d 720, 1994 Tenn. Crim. App. LEXIS 34 (Tenn. Crim. App. 1994).

Expert testimony describing the behavior of an allegedly sexually abused child is not reliable enough to "substantially assist" a jury in an inquiry of whether the crime of child sexual abuse has taken place. State v. Ballard, 855 S.W.2d 557, 1993 Tenn. LEXIS 193 (Tenn. 1993).

In a prosecution for aggravated sexual battery, the trial court did not abuse its discretion in ruling inadmissible testimony of a psychologist that defendant did not have the "propensity" to commit crimes involving the sexual abuse of children since the testimony would not substantially assist the jury to understand the proof adduced at the trial. State v. Campbell, 904 S.W.2d 608, 1995 Tenn. Crim. App. LEXIS 189 (Tenn. Crim. App. 1995).

Expert testimony on the "polymerase chain reaction" (PCR) method of DNA analysis was of substantial assistance to the trier of fact as required by Tenn. R. Evid. 702. State v. Begley, 956 S.W.2d 471, 1997 Tenn. LEXIS 522 (Tenn. 1997).

DNA testing evidence "substantially assisted" the trier of fact, despite that the testing excluded neither the defendant nor the victim, where it did conclusively exclude codefendant and the defense's theory was that the codefendant attacked and killed the victim. State v. Price, 46 S.W.3d 785, 2000 Tenn. Crim. App. LEXIS 597 (Tenn. Crim. App. 2000), review or rehearing denied, — S.W.3d —, 2001 Tenn. LEXIS 146 (Tenn. Feb. 26, 2001).

Expert testimony was admissible in child support modification proceedings because (1) the testimony assisted the court in determining whether a father's alleged business expenses were actually personal expenses, and (2) the testimony was based on facts known at or before the hearing and reasonably relied on by experts in the field. Schwager v. Messer, — S.W.3d —, 2019 Tenn. App. LEXIS 477 (Tenn. Ct. App. Sept. 27, 2019).

7. Novel Scientific Basis.

When expert testimony involves a novel kind of scientific basis that has not received judicial approval, a court must first determine whether the basis upon which the testimony is built is reliable enough to assist the jury to reach an accurate result. State v. Ballard, 855 S.W.2d 557, 1993 Tenn. LEXIS 193 (Tenn. 1993).

8. Details Concerning Death.

Because there was plainly other evidence establishing both malice and premeditation, physician's testimony describing, in detail, death by drowning, was, in context, not particularly harmful and did not unduly prejudice the trial. State v. Gaylor, 862 S.W.2d 546, 1992 Tenn. Crim. App. LEXIS 748 (Tenn. Crim. App. 1992), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 234 (Tenn. June 7, 1993).

9. Sobriety Test.

Testimony concerning the Horizontal Gaze Nystagmus field sobriety test constitutes "scientific, technical, or other specialized knowledge" so that it must be offered through an expert witness and meet the requirements of Tenn. R. Evid. 702 and Tenn. R. Evid. 703. State v. Murphy, 953 S.W.2d 200, 1997 Tenn. LEXIS 530 (Tenn. 1997).

Horizontal gaze nystagmus test is a scientific test and must therefore satisfy the requirements of Tenn. R. Evid. 702 and 703 to be admissible into evidence. State v. Bell, 429 S.W.3d 524, 2014 Tenn. LEXIS 121 (Tenn. Feb. 20, 2014).

10. Determining Reliability.

A Tennessee trial court may consider the following non-exclusive list of factors in determining reliability when applying Tenn. R. Evid. 702 and Tenn. R. Evid. 703: (1) Whether scientific evidence has been tested and the methodology with which it has been tested; (2) Whether the evidence has been subjected to peer review or publication; (3) Whether a potential rate of error is known; (4) Whether the evidence is generally accepted in the scientific community; and (5) Whether the expert's research in the field has been conducted independent of litigation. Coe v. State, 17 S.W.3d 193, 2000 Tenn. LEXIS 116 (Tenn. 2000), cert. denied, Bell v. Coe, 529 U.S. 1034, 120 S. Ct. 1460,

146 L. Ed. 2d 344, 2000 U.S. LEXIS 2200 (2000), cert. denied, Coe v. Tennessee, 146 L. Ed. 2d 344, 120 S. Ct. 1460, 529 U.S. 1034, 2000 U.S. LEXIS 2199 (2000).

Directed verdict in a products liability case was reversed because admissible expert testimony was presented regarding the likelihood and seriousness of injury to an operator of a forklift without a door, and such would have prevented an injury without hindering the usefulness of the product. The trial court erred in excluding expert testimony under Tenn. R. Evid. 702 and Tenn. R. Evid. 703 since a consideration of all five factors for the admissibility of expert testimony was not mandated; only the factors necessary to reasonably measure reliability of the methodology were required. Brown v. Crown Equip. Corp., 181 S.W.3d 268, 2005 Tenn. LEXIS 868 (Tenn. 2005).

Attorney argued that the trial court erred in not allowing him to testify as an expert in the area of his own disciplinary proceedings, but this was rejected, as the trial court did not act arbitrarily in determining that the attorney was not qualified; mere personal knowledge about his disciplinary proceedings did not qualify him, and although he was technically considered an expert in the law, his knowledge of the disciplinary process would not have assisted a trial judge, who is an expert in the law himself, plus the attorney's bias indicated a lack of trustworthiness that provided additional grounds for excluding his own opinion. Mabry v. Bd. of Prof'l Responsibility, 458 S.W.3d 900, 2014 Tenn. LEXIS 1046 (Tenn. Dec. 30, 2014).

Trial court did not abuse its discretion in determining that DNA evidence was admissible and that defendant's recourse was to challenge the evidence at trial because under the plain terms of the statute, the DNA evidence was admissible without a prior hearing on its reliability; a forensic DNA analyst testified the testing was a type of DNA testing, and she compared DNA from the Y chromosomes recovered from a swab to DNA from the Y chromosomes recovered from the specimen obtained from defendant. State v. Reed, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 22 (Tenn. Crim. App. Jan. 16, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 288 (Tenn. Aug. 6, 2020).

11. Ultimate Issue to be Decided by Trier of Fact.

Expert testimony about defendant's susceptibility to inducement, proffered to establish an entrapment defense, was admissible even though it embraced an ultimate issue to be decided by the trier of fact. State v. Shuck, 953 S.W.2d 662, 1997 Tenn. LEXIS 487, 70 A.L.R.5th 743 (Tenn. 1997).

Opinion testimony is not admissible on an ultimate issue if the jury could readily draw its own conclusions on the matter without the aid of the witness' opinion. State v. Turner, 30 S.W.3d 355, 2000 Tenn. Crim. App. LEXIS 89 (Tenn. Crim. App. 2000), appeal denied, — S.W.3d —, 2000 Tenn. LEXIS 479 (Tenn. Sept. 5, 2000).

12. Admissibility.

Doctor's testimony on issue of causation was inadmissible where there was no evidence to establish with a reasonable degree of medical certainty that plaintiff's heart attack and bypass surgery resulted from the car accident with defendant. Primm v. Wickes Lumber Co., 845 S.W.2d 768, 1992 Tenn. App. LEXIS 681 (Tenn. Ct. App. 1992).

In a prosecution for aggravated sexual battery of a child, it was error to admit the testimony of a social worker that abused children often confuse or forget the specific dates of the abuse; the testimony was closely related to the "child sexual abuse syndrome" and violated the rule enunciated in State v. Ballard, 855 S.W.2d 557, 1993 Tenn. LEXIS 193 (Tenn. 1993). State v. Bolin, 922 S.W.2d 870, 1996 Tenn. LEXIS 308 (Tenn. 1996).

In a prosecution for aggravated rape, where the state's case rested entirely upon the credibility of the eight-year-old victim, the testimony of an expert as to certain characteristics thought to be typical among child victims of sexual abuse which accredited the testimony of the victim should not have been admitted. State v. Anderson, 880 S.W.2d 720, 1994 Tenn. Crim. App. LEXIS 34 (Tenn. Crim. App. 1994).

Scientific evidence, based upon epidemiological studies, that exposure to solvents may cause toxic encephalopathy was admissible under Tenn. R. Evid. 702 and Tenn. R. Evid. 703. McDaniel v. CSX Transp., 955 S.W.2d 257, 1997 Tenn. LEXIS 471 (Tenn. 1997), rehearing denied, — S.W.2d —, 1997 Tenn. LEXIS 607 (Tenn. Dec. 8, 1997), cert. denied, 524 U.S. 915, 118 S. Ct. 2296, 141 L. Ed. 2d 157, 1998 U.S. LEXIS 3735 (1998).

Where the plaintiff's medical expert gave conflicting and irreconcilable testimony, the trial court could properly exclude this testimony on the grounds that it was without an adequate factual and scientific basis and would not substantially assist the trier of fact. Seffernick v. St. Thomas Hosp., 969 S.W.2d 391, 1998 Tenn. LEXIS 281 (Tenn. 1998).

Forensic and clinical psychology professor's lack of certification as a treatment provider by the sex offender treatment board should not have precluded him from testifying as an expert on defendant's behalf where the professor was not seeking to treat or monitor the defendant but to critique the findings of the court-ordered evaluation. State v. Mounger, 7 S.W.3d 70, 1999 Tenn. Crim. App. LEXIS 172 (Tenn. Crim. App. 1999).

Plaintiffs failed to demonstrate why the doctor was qualified to give expert opinions which

clearly required medical expertise that the doctor did not possess; thus, the doctor's opinions, set as bullet points in plaintiffs' brief, were not admissible pursuant to Tenn. R. Evid. 702. King v. Danek Med., 37 S.W.3d 429, 2000 Tenn. App. LEXIS 182 (Tenn. Ct. App. 2000).

General and unparticularized expert testimony concerning the reliability of eyewitness testimony, which is not specific to the witness whose testimony is in question, does not substantially assist the trier of fact, and such testimony is inadmissible under Tenn. R. Evid. 702. State v. Coley, 32 S.W.3d 831, 2000 Tenn. LEXIS 573 (Tenn. 2000), review or rehearing denied, — S.W.3d —, 2000 Tenn. LEXIS 651 (Tenn. Nov. 22, 2000), overruled in part, State v. Copeland, 226 S.W.3d 287, 2007 Tenn. LEXIS 502 (Tenn. May 23, 2007), overruled, Vermeal v. State, — S.W.3d —, 2008 Tenn. Crim. App. LEXIS 594 (Tenn. Crim. App. July 3, 2008), overruled, Dotson v. State, — S.W.3d —, 2008 Tenn. Crim. App. LEXIS 684 (Tenn. Crim. App. Aug. 26, 2008), overruled in part, Thomas v. State, 298 S.W.3d 610, 2009 Tenn. Crim. App. LEXIS 109 (Tenn. Crim. App. Feb. 12, 2009), overruled, Vermeal v. Parker, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 89830 (E.D. Tenn. Sept. 29, 2009), overruled in part, Bomas v. State, 412 Md. 392, 987 A.2d 92, 2010 Md. LEXIS 10 (2010), overruled, McKinney v. State, — S.W.3d —, 2010 Tenn. Crim. App. LEXIS 219 (Tenn. Crim. App. Mar. 9, 2010), overruled, Thomas v. Carlton, — F. Supp. 2d —, 2013 U.S. Dist. LEXIS 41940 (E.D. Tenn. Mar. 26, 2013), overruled, Pruitt v. State, — S.W.3d —, 2013 Tenn. Crim. App. LEXIS 370 (Tenn. Crim. App. May 2, 2013).

The challenged testimony of police officers that criminal suspects typically deny committing offenses before confessing during police interrogation was not admissible as expert testimony. State v. Smith, 42 S.W.3d 101, 2000 Tenn. Crim. App. LEXIS 398 (Tenn. Crim. App. 2000), review or rehearing denied, — S.W.3d —, 2001 Tenn. LEXIS 39 (Tenn. Jan. 8, 2001).

Tenn. R. Evid. 702 does not require that an expert be neutral; an expert's purpose is to provide an opinion about a disputed issue, and that opinion will often vary from the opinions of other experts and may contradict factual testimony from other witnesses. Rothstein v. Orange Grove Ctr., 60 S.W.3d 807, 2001 Tenn. LEXIS 808 (Tenn. 2001).

Trial court did not err in permitting police officer who had completed courses in accident reconstruction and who had investigated the vehicle accident scene to testify as to the speeds the drag racing vehicles were traveling at the time of the accident and as to what the critical speed for an accident was on the highway curve where the accident occurred. State v. Farner, 66 S.W.3d 188, 2001 Tenn. LEXIS 832 (Tenn. 2001), rehearing denied, 66 S.W.3d 188, 2002 Tenn. LEXIS 20 (Tenn. 2002).

Defendant did not show that the state trooper had sufficient expertise to qualify him to give an opinion that defendant's blood alcohol content was rising at the time of the withdrawal of his blood; even if the trooper were qualified to give such an opinion, there was no indication that the trooper was provided with sufficient information in order to opine as to whether defendant's blood alcohol content was rising or falling at the time of the blood test. State v. Greenwood, 115 S.W.3d 527, 2003 Tenn. Crim. App. LEXIS 243 (Tenn. Crim. App. 2003), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 830 (Tenn. Sept. 8, 2003).

In a malpractice action against a dentist, trial court acted within its discretion, and there was no error in the trial court's denial of the motion in limine pending the offer of the patient's expert witness as an expert at trial, where the trial court reserved final ruling on the admission of the expert's testimony until examination and cross-examination of his knowledge of the relevant standard of care. Pullum v. Robinette, 174 S.W.3d 124, 2004 Tenn. App. LEXIS 473 (Tenn. Ct. App. 2004).

In a malpractice action against a dentist, the trial court's decision was affirmed, where it reserved ruling on the expert's compliance with the locality rule until he was offered as a witness at trial where his knowledge of the applicable standard was established; the dentist was not prejudiced by the expert's efforts to improve his understanding of dental practice in Pullum v. Robinette, 174 S.W.3d 124, 2004 Tenn. App. LEXIS 473 (Tenn. Ct. App. 2004).

Expert's testimony on causation was sufficient where: (1) By training and experience, the expert was qualified to testify as to the types of nerve damage that could result from negligently performed dental procedures; and (2) While a dentist such as the expert may not be able to explain precisely why a nerve probed by an instrument was damaged, he was competent to testify that such damage occurs; and (3) Any deficiencies in his knowledge of the scientific basis for the working of nerves go to the weight of his testimony. Pullum v. Robinette, 174 S.W.3d 124, 2004 Tenn. App. LEXIS 473 (Tenn. Ct. App. 2004).

In a murder case, a court erred by excluding the state's expert's testimony regarding the cause of death (murder or suicide) because the testimony would have provided substantial assistance to the trier of fact, the testimony was not entirely dependent upon statistical studies as the expert specifically contended that his observations, skill, training, and experience were a separate basis for his opinion, and he testified that he had studied many still shots of weapons just after having discharged a bullet and that he had always observed a cloud of soot that was discharged simultaneously with the bullet. State v. Ayers, 200 S.W.3d 618, 2005 Tenn. Crim. App. LEXIS 1108 (Tenn. Crim.

App. 2005), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 261 (Tenn. 2006).

In a consumer protection act case brought by investors, the trial court erred in excluding the investors' expert's opinions regarding an investment advisor's investment advice because: (1) The expert possessed the education and experience that qualified him to render an expert opinion regarding the adequacy of the investment advice; (2) His methodology was sound and reflected the same intellectual rigor that would be required and expected of investment advisors competently practicing their profession; and (3) His testimony would have substantially assisted the triers of fact. Johnson v. John Hancock Funds, 217 S.W.3d 414, 2006 Tenn. App. LEXIS 447 (Tenn. Ct. App. 2006), appeal denied, Johnson v. John Hancock Funds, LLC, — S.W.3d —, 2006 Tenn. LEXIS 1114 (Tenn. Nov. 20, 2006).

In a death penalty case, a court erred by prohibiting expert testimony on the issue of the reliability of eyewitness identification because the facts, especially on the question of identification, were contested at trial, there were conflicts in the testimony, there were significant challenges to the credibility of practically every state witness other than the law enforcement officers, and some witnesses had prior felony convictions and were evasive, perhaps even untruthful, as to collateral matters. State v. Copeland, 226 S.W.3d 287, 2007 Tenn. LEXIS 502 (Tenn. May 23, 2007).

Test in McDaniel is sufficient to allow a trial court to properly evaluate the admissibility of expert testimony on the reliability of eyewitness identification; to the extent that State v. Coley, 32 S.W.3d 831, 2000 Tenn. LEXIS 573 (Tenn. 2000) holds otherwise, it is overruled. State v. Copeland, 226 S.W.3d 287, 2007 Tenn. LEXIS 502 (Tenn. May 23, 2007).

Trial court did not err in admitting the testimony of an occupational health physician specializing in internal medicine and clinical toxicology in a class action based on claims of nuisance by riverside landowners caused by an upstream paper company's pollutants because the thrust of the testimony was that class members should have reasonable concern, because in part so little was known about the amounts of chemicals released into the river and the company itself admitted that it did not know the amount of each chemical discharged into the river on a daily basis. Freeman v. Blue Ridge Paper Prods., 229 S.W.3d 694, 2007 Tenn. App. LEXIS 48 (Tenn. Ct. App. Jan. 25, 2007), appeal denied, Freeman v. Blue Ridge Paper Prods., Inc., — S.W.3d —, 2007 Tenn. LEXIS 623 (Tenn. June 25, 2007).

Trial court did not err in admitting the testimony of an occupational health physician specializing in internal medicine and clinical toxicology in a class action based on claims of nuisance by riverside landowners caused by an upstream paper company's pollutants because the *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 1997 Tenn. LEXIS 471, factors indicated that the doctor's testimony regarding the chemicals' potentially adverse health effects was reliable. Freeman v. Blue Ridge Paper Prods., 229 S.W.3d 694, 2007 Tenn. App. LEXIS 48 (Tenn. Ct. App. Jan. 25, 2007), appeal denied, Freeman v. Blue Ridge Paper Prods., Inc., — S.W.3d —, 2007 Tenn. LEXIS 623 (Tenn. June 25, 2007).

Trial court did not err in admitting the testimony of a real estate expert in a class action based on the claims of nuisance by riverside landowners caused by an upstream paper company's pollutants, because the expert's testimony regarding the loss in value of the riverside land employed the same level of intellectual rigor that characterized the practice of an expert in the field of real estate appraisal. Freeman v. Blue Ridge Paper Prods., 229 S.W.3d 694, 2007 Tenn. App. LEXIS 48 (Tenn. Ct. App. Jan. 25, 2007), appeal denied, Freeman v. Blue Ridge Paper Prods., Inc., — S.W.3d —, 2007 Tenn. LEXIS 623 (Tenn. June 25, 2007).

In a product liability case, a trial court should have admitted a patient's expert testimony under Tenn. R. Evid. 702 and Tenn. R. Evid. 703 because the expert's education, training, and experience with the mechanical engineering of biomedical devices was extensive; further, the expert was qualified due to his direct observation, disassembly, and analysis of the device that cut the patient's aorta during surgery. Sparks v. Mena, 294 S.W.3d 156, 2008 Tenn. App. LEXIS 65 (Tenn. Ct. App. Feb. 6, 2008).

Pursuant to T.C.A. § 29-26-115 and Tenn. R. Evid. 702 and 703, summary judgment on the husband's medical malpractice action against the doctor and employer was vacated as the husband's expert was qualified to offer his expert opinion and the weight to be afforded the expert's testimony was to be determined by the finder of fact. Jackson v. Joyner, 309 S.W.3d 910, 2009 Tenn. App. LEXIS 127 (Tenn. Ct. App. Apr. 7, 2009).

Where a police officer testified that he had been trained in accident investigation at the police academy and that he had taken further training in the investigation of fatal accidents, which he described as including training to discern the relative positions of the vehicle's occupants at the time of the accident, and where the officer noted that he had investigated more than 100 non-fatal accidents and 20 fatal accidents prior to the accident at issue in defendant's trial, the trial court did not err in permitting the police officer to testify as an expert witness because his training and experience qualified him to testify as an expert regarding the mechanics of the accident, particularly the movement of the vehicle during

the accident and the force applied to the car at various points of impact. Further, because the officer testified that he had been trained to use the mechanics of the accident to determine the positions of the occupants within the vehicle, the trial court properly determined that he was entitled to provide an expert opinion that defendant was driving the vehicle at the time of the accident. State v. McCloud, 310 S.W.3d 851, 2009 Tenn. Crim. App. LEXIS 437 (Tenn. Crim. App. June 12, 2009).

Finding that appellant, an inmate, failed to demonstrate by a preponderance of the evidence that he met the requirements of T.C.A. § 39-13-203(a)(2) was improper and a remand was required because categorically excluding expert testimony was erroneous. Coleman v. State, 341 S.W.3d 221, 2011 Tenn. LEXIS 319 (Tenn. Apr. 11, 2011), overruled, Dellinger v. State, — S.W.3d —, 2015 Tenn. Crim. App. LEXIS 669 (Tenn. Crim. App. Aug. 18, 2015).

T.C.A. § 39-13-203(a)(1) does not require that raw scores on I.Q. tests be accepted at their face value and the courts may consider competent expert testimony showing that a test score does not accurately reflect a person's functional I.Q. or that the raw I.Q. test score is artificially inflated or deflated. Coleman v. State, 341 S.W.3d 221, 2011 Tenn. LEXIS 319 (Tenn. Apr. 11, 2011), overruled, Dellinger v. State, — S.W.3d —, 2015 Tenn. Crim. App. LEXIS 669 (Tenn. Crim. App. Aug. 18, 2015).

Proffered medical expert is not required to demonstrate firsthand and direct knowledge of a medical community and the appropriate standard of medical care there in order to qualify as competent to testify in a medical malpractice case; a proffered expert may educate himself or herself on the characteristics of a medical community in order to provide competent testimony in a variety of ways, including but not limited to reading reference materials on pertinent statistical information such as community and/or hospital size and the number and type of medical facilities in the area, conversing with other medical providers in the pertinent community or a neighboring or similar one, visiting the community or hospital where the defendant practices, or other means. The Supreme Court of Tennessee expressly rejects the personal, firsthand, direct knowledge standard formulated by the Tennessee Court of Appeals in *Eckler* and *Allen*. Shipley v. Williams, 350 S.W.3d 527, 2011 Tenn. LEXIS 749 (Tenn. Aug. 11, 2011), rehearing denied, — S.W.3d —, 2011 Tenn. LEXIS 882 (Tenn. Sept. 8, 2011).

While Tennessee has not adopted a national standard of care in medical malpractice cases, as any change in the locality rule must come from the legislature, not the judiciary, Tennessee courts recognizes that, in many instances, the national standard is representative of the local standard. A number of medical experts have testified in Tennessee cases that there is either a uniform national standard of care or a standard pertinent to a broad geographic area applicable to medical care providers. Shipley v. Williams, 350 S.W.3d 527, 2011 Tenn. LEXIS 749 (Tenn. Aug. 11, 2011), rehearing denied, — S.W.3d —, 2011 Tenn. LEXIS 882 (Tenn. Sept. 8, 2011).

Trial court's decision to accept or disqualify an expert medical witness is reviewed under the abuse of discretion standard, and a trial court abuses its discretion when it disqualifies a witness who meets the competency requirements of T.C.A. § 29-26-115(b) and excludes testimony that meets the requirements of Tenn. R. Evid. 702 and 703. Tennessee continues to follow the majority rule and apply the abuse of discretion standard to decisions regarding the admissibility of evidence. Shipley v. Williams, 350 S.W.3d 527, 2011 Tenn. LEXIS 749 (Tenn. Aug. 11, 2011), rehearing denied, — S.W.3d —, 2011 Tenn. LEXIS 882 (Tenn. Sept. 8, 2011).

Trial court properly excluded as hearsay portions of the expert's proffered testimony because the expert would have testified that he received instruction from unnamed officials and that he conformed his evaluation to the instructions he received; the evidence was offered for the truth of the information provided to the expert and was hearsay, and its admission was not to assist the jury in understanding the expert's opinion but to insert the opinion of another expert. Holder v. Westgate Resorts Ltd., 356 S.W.3d 373, 2011 Tenn. LEXIS 1144 (Tenn. Dec. 12, 2011).

On appeal from a finding in favor of defendants in plaintiffs lawsuit for damages arising out of an explosion, because a doctor's testimony about causation, or the lack thereof, was made to a reasonable degree of medical certainty, it was not speculative, it assisted the trier of fact at trial, and therefore, it was admissible under Tenn. R. Evid. 702. The trial court did not abuse its discretion in denying plaintiffs' motion in limine to exclude the testimony. Roach v. Dixie Gas Co., 371 S.W.3d 127, 2011 Tenn. App. LEXIS 612 (Tenn. Ct. App. Nov. 14, 2011).

Even if an objection was properly preserved, there was no merit to parents' challenge on appeal to the admission of medical experts' testimony in their parental rights termination proceeding, as the parents failed to show that the experts' qualifications or the substance of their testimony was not admissible under Tenn. R. Evid. 702, 703, and 705 with respect to the determinative issue of the cause of their child's lack of growth and development, which the doctors' opined was caused by malnutrition and neglect. In re Keara J., 376 S.W.3d 86, 2012 Tenn. App. LEXIS 26 (Tenn. Ct. App. Jan. 13, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 274 (Tenn. Apr. 11, 2012).

Trial court did not abuse its discretion by excluding a doctor's testimony on grounds that

it would not substantially assist the trier of fact because the trial court's conclusion that the doctor's expertise in this area was "limited" was essentially a ruling that the doctor was not qualified to offer expert testimony on the propriety of the interview techniques employed by the forensic interviewer, and that conclusion was supported by the record. State v. Ackerman, 397 S.W.3d 617, 2012 Tenn. Crim. App. LEXIS 510 (Tenn. Crim. App. July 13, 2012), overruled, State v. Sanders, 452 S.W.3d 300, 2014 Tenn. LEXIS 912 (Tenn. Nov. 10, 2014).

Forensic psyciatrist's testimony about a prisoner convicted of murder was properly admitted, as even if "pseudologia fantastica" was a scientifically questionable diagnosis once the psychiatrist realized that the term created confusion the psychiatrist decided the term was unnecessary and abandoned it; another expert similarly testified that the prisoner sometimes exaggerated or fabricated symptoms, and the the psychiatrist's testimony was never challenged for lack of reliability. Reid ex rel. Martiniano v. State, 396 S.W.3d 478, 2013 Tenn. LEXIS 84 (Tenn. Jan. 24, 2013), cert. denied, Reid ex rel. Martiniano v. Tennessee, 2013 U.S. LEXIS 6016, 134 S. Ct. 224, 571 U.S. 894, 2013 U.S. LEXIS 6016 (U.S. 2013).

T.C.A. § 50-6-204(d)(5) did not violate separation of powers because the provision did not impermissibly strike at the heart of the exercise of judicial authority, as the provision did not impermissibly conflict with Tenn. R. Evid. 702, as: (1) a medical impairment rating physician likely met the requirements of Tenn. R. Evid. 702, and (2) a trial court could still employ the factors used under Tenn. R. Evid. 702 when deciding if clear and convincing evidence rebutted the physician's opinion. Mansell v. Bridgestone Firestone N. Am. Tire, 417 S.W.3d 393, 2013 Tenn. LEXIS 645 (Tenn. Aug. 20, 2013).

Because a doctor's misdiagnosis of thyroid cancer was relevant to his credibility as an expert and the validity of his opinion as to the issues, the admission of his testimony about the misdiagnosis was not erroneous and did not amount to a substantial error in the admission of evidence warranting a new trial. Payne v. CSX Transp., Inc., 467 S.W.3d 413, 2015 Tenn. LEXIS 547 (Tenn. July 1, 2015).

In this Federal Employers' Liability Act case, plaintiff's experts were not required to establish a dose exposure above a certain amount before they could testify about causation, and it was well within the province of the jury to review the expert testimony and determine whether the worker's exposure to asbestos, diesel fumes, or radiation was substantial enough to be a contributing cause of his cancer; the evidence was properly admitted. Payne v. CSX Transp., Inc., 467 S.W.3d 413, 2015 Tenn. LEXIS 547 (Tenn. July 1, 2015).

When a medical examiner—a doctor—testified that the examiner had been trained to assess the muzzle-to-target distance when conducting autopsies, explained the method the examiner used, and explained how the examiner used that methodology to arrive at the examiner's conclusions, the examiner's conclusions as to the muzzle-to-target distance went to the weight of the evidence and not to he admissibility of the examiner's opinion. Given the overwhelming proof of defendant's guilt, the admission of the evidence, even if erroneous, was harmless. State v. Glass, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 402 (Tenn. Crim. App. June 9, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 553 (Tenn. Oct. 7, 2020).

In a reckless homicide case, the trial court did not err by admitting expert testimony concerning the hydrostatic, a/k/a float test, which was used in part to determine whether the baby was born alive or stillborn, because it was generally accepted; questions about the reliability of the technique that was used went to the weight rather than the reliability of the test; the test had been subjected to peer review and publication; and the disagreements and criticisms in the scientific community surrounding the test could be addressed at trial on cross-examination and went to the weight and not admissibility of the test. State v. Brown, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 441 (Tenn. Crim. App. June 25, 2020).

13. Considerations.

In applying Tenn. R. Evid. 702 and Tenn. R. Evid. 703, a trial court may consider in determining the reliability of scientific evidence: (1) Whether it has been tested and the methodology with which it has been tested; (2) Whether it has been subjected to peer review or publication; (3) Whether a potential rate of error is known; (4) Whether it is generally accepted in the scientific community; and (5) Whether the expert's research has been conducted independent of litigation. McDaniel v. CSX Transp., 955 S.W.2d 257, 1997 Tenn. LEXIS 471 (Tenn. 1997), rehearing denied, — S.W.2d —, 1997 Tenn. LEXIS 607 (Tenn. Dec. 8, 1997), cert. denied, 524 U.S. 915, 118 S. Ct. 2296, 141 L. Ed. 2d 157, 1998 U.S. LEXIS 3735 (1998).

14. Witnesses.

Appellate court could not consider, on the instant summary judgment analysis, a patient's affidavit with respect to her assertions regarding the effects of the medications she was taking or her belief that the taking of the medications caused confusion during her deposition regarding the dates and substance of conversations because the patient, as a lay person, was not competent to opine as to the effects of the medications. Sampson v. Wellmont Health Sys., 228 S.W.3d 124, 2007 Tenn. App. LEXIS 62 (Tenn. Ct. App. Jan. 31, 2007), appeal denied, Sampson v. Wellmont Health

Ctr., — S.W.3d —, 2007 Tenn. LEXIS 547 (Tenn. June 18, 2007).

15. Equivocal Testimony.

Exclusion of defense medical expert's testimony in a child sexual abuse case was harmless because the medical report prepared by the expert, which was present in the record, indicated that the victim's examination neither confirmed nor ruled out the possibility of any type of sexual contact. State v. Schiefelbein, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 138 (Tenn. Crim. App. Feb. 8, 2007), modified, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 213 (Tenn. Crim. App. Mar. 7, 2007).

16. Expert Qualified.

In a workers' compensation case, the admission of expert medical testimony by a pulmonary specialist was proper under Tenn. R. Evid. 702, 203 because the specialist was a highly credentialed expert who had devoted a life's work to the actual exercise of the methodology upon which the testimony was based. Excel Polymers, LLC v. Broyles, 302 S.W.3d 268, 2009 Tenn. LEXIS 894 (Tenn. Dec. 22, 2009).

Trial court did not err by permitting a detective to testify as an expert witness in the terminology utilized in the illegal drug trade where the primary focus of the detective's law enforcement career had been the investigation of large-scale drug conspiracies and the detective's training and experience had afforded the detective specialized knowledge in the jargon or slang used by drug dealers and users in the exchange of illegal drugs. State v. Elliot, 366 S.W.3d 139, 2010 Tenn. Crim. App. LEXIS 294 (Tenn. Crim. App. Apr. 9, 2010), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 802 (Tenn. Aug. 26, 2010).

Firearms examiner was properly qualified as an expert based on her training and 10 years of experience. State v. Davidson, 509 S.W.3d 156, 2016 Tenn. LEXIS 913 (Tenn. Dec. 19, 2016), cert. denied, Davidson v. Tennessee, 199 L. Ed. 2d 66, 138 S. Ct. 105, 2017 U.S. LEXIS 5551 (U.S. Oct. 2, 2017).

Trial court properly exercised its discretion when it allowed an agent to testify as a firearms and ballistics expert, as the agent has education, training, and experience related to the testing of ballistics and had previously been admitted as an expert over 300 times, primarily in the field of firearms analysis State v. Smoot, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 739 (Tenn. Crim. App. Oct. 1, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 77 (Tenn. Jan. 16, 2019).

Trial court did not err when it found an insurance expert was not qualified due to a lack of experience with a cut-through endorsement to testify as to the standard of care necessary when offering a client of a cut-through endorsement. However, the expert had sufficient experience with general insurance matters and financial ratings to render the expert qualified to opine as to the remaining breaches of the applicable standard of care alleged against an insurance agent regarding the failures to inform a client of an insurer's financial rating. Littleton v. TIS Ins. Servs., — S.W.3d —, 2019 Tenn. App. LEXIS 13 (Tenn. Ct. App. Jan. 9, 2019).

Trial court did not abuse its discretion in qualifying the county's expert regarding the use of force because his experience and training made him fully qualified to give his opinion regarding the use of force and compliance with the county's policies and procedures. His testimony and expert disclosure indicated that he had more than 10 years of experience in the field of corrections and has participated in approximately 60 to 80 hours of training per year concerning different topics in corrections. Merolla v. Wilson Cty., — S.W.3d —, 2019 Tenn. App. LEXIS 213 (Tenn. Ct. App. May 1, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 482 (Tenn. Sept. 18, 2019).

Trial court did not plainly err by admitting an expert's testimony regarding the general effects of the drugs found in defendant's system and the general effects of heroin because the expert testified she had studied the effects of the drugs both through her graduate coursework and as part of her general training. State v. Dye, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 652 (Tenn. Crim. App. Oct. 15, 2019).

In a vehicular homicide by intoxication case, defendant was not entitled to relief on the issue that the trial court abused its discretion by admitting a police chief as a drug recognition expert. While not explicitly naming the McDaniel factors, the trial court aptly considered the development of the test and its reliability when determining whether to admit the testimony, and it put all its findings and conclusions in a well-developed, well-reasoned, six-page written order. State v. Brewer, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 221 (Tenn. Crim. App. Apr. 6, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 421 (Tenn. Aug. 6, 2020), cert. denied, Brewer v. Tennessee, — L. Ed. 2d —, — S. Ct. —, — U.S. —, 2020 U.S. LEXIS 6062 (U.S. Dec. 14, 2020).

Doctor was qualified to testify as a medical expert given his first-hand work as a child neurologist, previous employment, and board certification in child neurology. Spearman v. Shelby Cty. Bd. of Educ., — S.W.3d —, 2021 Tenn. App. LEXIS 17 (Tenn. Ct. App. Jan. 15, 2021).

Doctor was qualified to testify as to a minor student's medical bills where through the independent medical exam, the review, and his background in neurology, the doctor was familiar with the surgery and subsequent treatment rendered to a minor student as a result of the incident, he was familiar with the treatment options for a depressed skull fracture in the

Memphis area, he testified that the surgery to repair the student's depressed skull fracture was the accepted approach, and he testified that he was familiar with the usual and customary charges in the Memphis area for the medical services in the instant case. Spearman v. Shelby Cty. Bd. of Educ., — S.W.3d —, 2021 Tenn. App. LEXIS 17 (Tenn. Ct. App. Jan. 15, 2021).

17. Evidence Properly Excluded.

Medical expert's testimony as to an injured driver's possible future need for surgery and the costs thereof was properly excluded by a motion in limine in a negligence trial, as pursuant to Tenn. R. Evid. 702 and 703, the testimony was speculative; the expert was not at all certain what, if any, future surgeries would be medically necessary. Singh v. Larry Fowler Trucking, Inc., 390 S.W.3d 280, 2012 Tenn. App. LEXIS 598 (Tenn. Ct. App. Aug. 15, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 920 (Tenn. Dec. 11, 2012).

Failure to consult a mental health expert and to obtain an evaluation of petitioner was deficient performance, as the State was required to prove a premeditated, intentional killing, but defendant was not prejudiced because the doctor's testimony was not admissible and prompt consultation would not have affected the defense; he only said it was a possibility that due to a mental disease, petitioner lacked capacity, and evidence of certain diagnoses was not relevant and admissible without an opinion regarding the ultimate issue of petitioner's capacity to form the required mens rea, such that he was not entitled to post-conviction relief. Williamson v. State, 476 S.W.3d 405, 2015 Tenn. Crim. App. LEXIS 267 (Tenn. Crim. App. Apr. 14, 2015), appeal denied, — S.W.3d —, 2015 Tenn. LEXIS 595 (Tenn. July 21, 2015).

Trial court did not err in finding an expert's testimony inadmissible; the expert's proffered opinion was based on facts that indicated a lack of trustworthiness, and because she had not reviewed the interview in question, her proffered opinion was based on incomplete data and would not have substantially assisted the trial court. State v. Lowe, 552 S.W.3d 842, 2017 Tenn. LEXIS 904 (Tenn. Sept. 6, 2017).

Trial court did not abuse its discretion in ruling inadmissible an expert's proffered testimony about the reliability of the defendant's statement in light of the detective's interviewing technique; the expert engaged in sheer bootstrapping to support his claim that the detective had engaged in an interviewing technique based on an alleged stereotype allegedly taught to police officers. State v. Lowe, 552 S.W.3d 842, 2017 Tenn. LEXIS 904 (Tenn. Sept. 6, 2017).

In a health care liability action, because the pharmacist's affidavit did not show how his education and experience as a pharmacist made him competent to opine as to the cause of the patient's stroke or to rule out other possible causes for her death, the pharmacist's causation proof was properly excluded, and summary judgment was properly granted to the pharmacy defendants on the claim that they caused the patient's death by failing to provide adequate instructions to her regarding the potentially dangerous and irreversible side effects of the prescribed drug. Kidd v. Dickerson, — S.W.3d —, 2020 Tenn. App. LEXIS 443 (Tenn. Ct. App. Oct. 5, 2020).

Trial court did not err by excluding the testimony of defendant's expert witness concerning the investigation because it concluded that his proffered testimony was an assessment of the strength of the evidence and the credibility of the witnesses, which were issues squarely in the province of the jury, and his testimony would not have substantially assisted the jury in understanding the evidence or in determining a fact in issue. State v. Cox, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 584 (Tenn. Crim. App. Aug. 25, 2020).

18. Evidence Improperly Excluded.

In a wrongful death case brought by the decedent's mother, the trial court abused its discretion in striking paragraphs of a private investigator's declaration and the ruling was vacated because she had been a licensed private investigator since 2004 and had logged more than 10,000 hours of investigatory work; and she was qualified to express her opinions that the decedent could not have drowned as there was no water found in her lungs; that the decedent's death was a homicide caused by defendants; that defendants conspired to cover up the decedent's homicide; and that the police investigation into the decedent's death was inadequate. Smith ex rel. Agee v. Palmer, — S.W.3d —, 2019 Tenn. App. LEXIS 53 (Tenn. Ct. App. Jan. 30, 2019).

In a wrongful death case brought by the decedent's mother, the trial court abused its discretion in striking paragraphs of a former police officer's declaration and the ruling was vacated because he investigated homicides for 18 years as part of his 34 year history with the Los Angeles Police Department, and he worked as a private investigator, also investigating homicides since that time; and he was qualified to express his opinions as to certain physical and circumstantial evidence and the information that he would expect to see as part of the investigation; and that there was evidence that the decedent's death was a homicide caused by defendants. Smith ex rel. Agee v. Palmer, — S.W.3d —, 2019 Tenn. App. LEXIS 53 (Tenn. Ct. App. Jan. 30, 2019).

In a wrongful death case brought by the decedent's mother, the trial court erred in striking paragraphs of a sergeant's declaration because he had worked in law enforcement since

2006 and had been present during the law enforcement response to the death of the decedent and observed the investigation; and he was qualified to express his opinions that the decedent's death was suspicious and that the official explanation of her death could not have been correct; that her body could not have landed in the water had she fallen from the cliff; that, even if her body had fallen into the water in some way, it would not have been carried by natural forces to where it was ultimately found; and that her body was moved. Smith ex rel. Agee v. Palmer, — S.W.3d —, 2019 Tenn. App. LEXIS 53 (Tenn. Ct. App. Jan. 30, 2019).

In a wrongful death case brought by the decedent's mother, the trial court abused its discretion in striking paragraphs of a reserve deputy's declaration because he had been a law enforcement officer since 2011, a police officer since 2012, a patrolman with a sheriff's department since 2014, and a detective since 2016; and he was qualified to express his opinions that the decedent did not drown and that she had died before entering the water; that the decedent's injuries were not consistent with a fall down a cliff; and that, based on his experiment at the scene of the decedent's death, her death did not result from an accidental fall from the cliff. Smith ex rel. Agee v. Palmer, — S.W.3d —, 2019 Tenn. App. LEXIS 53 (Tenn. Ct. App. Jan. 30, 2019).

In a customer's slip and fall action against a restaurant, the trial court abused its discretion by excluding the testimony of the customer's expert, a structural engineer, because, although not conclusive as to the restaurant's alleged negligence, the expert's testimony that the portable restroom facility's installation and use were not compliant with the Standard Building Code may have been probative on the question of the restaurant's negligence and constructive knowledge of the alleged defect. Linkous v. Tiki Club, Inc., — S.W.3d —, 2019 Tenn. App. LEXIS 568 (Tenn. Ct. App. Nov. 22, 2019).

19. Evidence Properly Included.

Trial court erred by disregarding the worker's experts' opinions on the ground that their opinions lacked sufficient foundation because the certified industrial hygienist's testimony was admissible because he was not required to have firsthand knowledge of the employer's facility or the products to which the worker was exposed in order to give his expert opinion on the seriousness of the worker's cumulative exposure to asbestos. The hygienist was entitled to rely on the deposition of the worker and his co-worker to develop an opinion on the matter. Coffman v. Armstrong Int'l, — S.W.3d —, 2019 Tenn. App. LEXIS 357 (Tenn. Ct. App. July 22, 2019), rev'd, Coffman v. Armstrong Int'l, Inc., — S.W.3d —, 2021 Tenn. LEXIS 1 (Tenn. Jan. 4, 2021).

Trial court erred by disregarding the worker's experts' opinions on the ground that their opinions lacked sufficient foundation because the pathologist's testimony was admissible because it essentially responded to the following hypothetical question: if the worker was exposed to asbestos-containing products as often as he said he was, then was the worker's exposure to those products a substantial contributing factor to the development of his disease. Coffman v. Armstrong Int'l, — S.W.3d —, 2019 Tenn. App. LEXIS 357 (Tenn. Ct. App. July 22, 2019), rev'd, Coffman v. Armstrong Int'l, Inc., — S.W.3d —, 2021 Tenn. LEXIS 1 (Tenn. Jan. 4, 2021).

Trial court did not err in admitting expert testimony regarding cell tower evidence because the reliability of historical cell-site analysis similar to that conducted by the detective had been recognized by other jurisdictions, his testimony regarding the use of cell site location information was not novel, he testified that such information is used regularly by law enforcement, he received extensive training in the area, and he readily acknowledged that he could not determine the exact location of the headsets and that cell site location information was only used as corroborative, not primary, evidence. State v. Brown, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 220 (Tenn. Crim. App. Apr. 8, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 387 (Tenn. Aug. 15, 2019).

Testimony of an expert in forensic pathology, who performed the victim's autopsy, as to the bruises on the victim's body being not medically consistent with normal injuries for a one-year-old child, the force required to cause such injuries, and whether the victim's injuries could have been caused by defendant's performing CPR was admissible because the expert was qualified to give the testimony and the testimony was relevant given the defense theory that the victim's injuries resulted from a two-foot fall from an ottoman. State v. Batiz, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 721 (Tenn. Crim. App. Nov. 1, 2019), review denied and ordered not published, — S.W.3d —, 2020 Tenn. LEXIS 140 (Tenn. Mar. 26, 2020).

Trial court properly admitted the testimony of the executive director of a doctor-owned, independent practice association purusuant to Tenn. R. Evid. 702 and 703 where the association demonstrated that he held significant experience in the healthcare industry with more than 40 years of relevant work history. During that time period, the director had been employed by a number of hospitals, insurance companies, and other organizations in the healthcare field, in addition to his work as Executive Director of HPI, and he testified that during his tenure at the association, he had been involved in negotiating and implementing more than 50 payor contracts. Furthermore, he expressed considerable familiarity with the

procedures and financial concerns associated with such contracts. Highlands Physicians, Inc. v. Wellmont Health Sys., — S.W.3d —, 2020 Tenn. App. LEXIS 430 (Tenn. Ct. App. Sept. 25, 2020).

Trial court did not err by allowing an officer to testify as an expert on the illegal drug business because the officer testified about his extensive training and experience in drug investigation and interdiction and the trial court found that the jury would be aided by his testimony. State v. Jones, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 313 (Tenn. Crim. App. Apr. 30, 2020).

A detective was properly permitted to testify as an expert, as the detective had received hundreds of hours of training on computer and cell phone extractions and had experience in conducting such extractions. Although the detective had never previously testified as an expert and was unfamiliar with the proprietary technology of the computer codes utilized by the platforms to extract the data, such arguments were for exploration by counsel on cross-examination. State v. Morales, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 619 (Tenn. Crim. App. Sept. 18, 2020).

20. Expert Testimony Not Required.

Because an escrow agent's breach of fiduciary duty was easily gleaned based on deductions made and inferences drawn from ordinary knowledge, common sense, and practical experience gained in the ordinary affairs of life, no expert testimony outlining the duty of an escrow agent in the county was necessary. Penklor Props. LLC v. Buehler, — S.W.3d —, 2019 Tenn. App. LEXIS 158 (Tenn. Ct. App. Mar. 25, 2019).

Rule 703. Bases of opinion testimony by experts. —

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect. The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness. [As amended by order filed January 8, 2009, effective July 1, 2009.]

Advisory Commission Comments. Experts in the field may base opinions on facts not in evidence under this rule. Requisite foundations are that (1) the facts must be "reasonably relied upon by experts in the particular field" and (2) the facts must be trustworthy. With such foundations, inadmissible hearsay could support an admissible expert opinion.

New Jersey Zinc Co. v. Cole, 532 S.W.2d 246 (Tenn. 1975), allows a treating doctor to base an opinion on reports of other professionals.

If the bases of expert testimony are not independently admissible, the trial judge should either prohibit the jury from hearing the foundation testimony or should deliver a cautionary instruction. Unfairly prejudicial facts or data should be dealt with under Rule 403. With respect to cross-examination, see Rule 705.

Advisory Commission Comments [2009]. The third sentence is new. Normally a jury should not be allowed to hear the reliable but inadmissible bases underlying an expert's opinion.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 8, 2009, was ratified and approved by 2009 House Resolution 14 and Senate Resolution 17. The order promulgating the amendment of this rule provided that it take effect July 1, 2009.

Law Reviews. Competency and Impeachment of Witnesses (Leo Bearman, Jr.), 57 Tenn. L. Rev. 89 (1989).

Cross-Examination of an Expert with Another Expert's Deposition (Donald F. Paine), 32 Tenn. B.J. 12 (1996).

Daubert v. Merrell Dow Pharmaceuticals: Pushing the Limits of Scientific Reliability — The Questionable Wisdom of Abandoning the Peer Review Standard for Admitting Expert Testimony (Allan W. Tamarelli, Jr.), 47 Vand. L. Rev. 1175 (1994).

Evidence–Expert Testimony–Standards for the Admission of Expert Testimony in Tennessee: State v. Scott, 275 S.W.3d 395 (Tenn. 2009) (Michelle Lynn, Veronica Consiglio), 77 Tenn. L. Rev. 207 (2009).

Evidence — McDaniel v. CSX Transportation, Inc.: A Clearer Standard for Determining Admissibility of Scientific Evidence in Tennessee State Courts, 28 U. Mem. L. Rev. 1259 (1998).

Evidence — State v. Begley: When the Tennessee Supreme Court Meets PCR-Method DNA Analysis, Its Love at First Sight, 28 U. Mem. L. Rev. 1239 (1998).

Expert Testimony and Summary Judgment: What Went Wrong in Omni Aviation v. Perry (June F. Entman), 28 Tenn. B.J. 30 (1992).

Expert Witness Conflicts and Compensation, 67 Tenn. L. Rev. 909 (2000).

Hearsay in 10 Easy Steps (Donald F. Paine), 33 Tenn. B.J. 3 (1997).

New rules regarding causation and computer-animated visualizations (David L. Raybin),38 Tenn. B.J. 20 (2002).

Obtaining medical records for mental health evaluations (David L. Raybin), 37 Tenn. B.J. 27 (2001).

Paine on Procedure: Expert Opinion and the Insanity Defense (Donald F. Paine), 49 Tenn. B.J. 27 (2013).

Physical Condition in the New Tennessee Rules of Evidence (Donald F. Paine), 26 Tenn. B.J. 25 (1990).

Sequestration of experts abolished (Donald F. Paine), 38 Tenn. B.J. 17 (2002).

The New McDaniel Test for Expert Opinions (Donald F. Paine), 34 Tenn. B.J. 23 (1998).

The Ten Commandments of Direct Examination (Donald F. Paine), 36 Tenn. B.J. 20 (2000)

Penile Polygraphy: The Admissibility of Penile-Plethysmograph Results at Sentencing in Tennessee, 72 Vand. L. Rev. 353 (January 2019).

Workers' Compensation Appeals Board Decisions. An employee alleged he sustained head and neck injuries in the course and scope of his work handling livestock. He received authorized medical treatment and was ultimately referred to a neurologist who provided an opinion in a deposition as to the degree of permanent impairment the employee sustained as a result of the work accident. The employer filed a motion to exclude portions of the doctor's testimony concerning the employee's permanent impairment rating, asserting the testimony did not comply with the requirements of Rules 702 and 703 of the Tennessee Rules of Evidence. The trial court properly concluded the doctor's opinions were admissible and denied the employer's motion. Considering the totality of the doctor's testimony, the preponderance of the evidence supported the trial court's determination that she applied the methodology contemplated by the AMA Guides and that her inability to recollect the details of her impairment assessments for the employee's alleged traumatic brain injury and cervical injury during her deposition did not indicate such a lack of trustworthiness as to render her opinions inadmissible. Ailshie v. TN Farm Bureau Federation, 2019 TN Wrk Comp App Bd LEXIS 55.

NOTES TO DECISIONS

Analysis

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1. In General.

Tenn. R. Evid. 703 and Fed. R. Evid. 703 are almost identical with the exception that Tenn. R. Evid. 703 adds the sentence: "The court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness." In this respect, Tenn. R. Evid. 703 expresses a greater concern with the bases of expert testimony than does Fed. R. Evid. 703. Omni Aviation v. Perry, 807 S.W.2d 276, 1990 Tenn. App. LEXIS 882 (Tenn. Ct. App. 1990).

2. Discretion of Trial Court.

Qualifications, admissibility, relevancy and competency of expert testimony are matters which largely rest within the sound discretion of the trial court; such discretion, however, is not absolute and may be overturned on appeal where the discretion is arbitrarily exercised. State v. Ballard, 855 S.W.2d 557, 1993 Tenn. LEXIS 193 (Tenn. 1993).

The decision to admit scientific evidence is within the discretion of the trial court and will not be disturbed absent an abuse of discretion. Coe v. State, 17 S.W.3d 193, 2000 Tenn. LEXIS 116 (Tenn. 2000), cert. denied, Bell v. Coe, 529 U.S. 1034, 120 S. Ct. 1460, 146 L. Ed. 2d 344, 2000 U.S. LEXIS 2200 (2000), cert. denied, Coe v. Tennessee, 146 L. Ed. 2d 344, 120 S. Ct. 1460, 529 U.S. 1034, 2000 U.S. LEXIS 2199 (2000).

Trial court erred in weighing expert affidavits upon summary judgment in a civil conspiracy suit. The trial court had the discretion to determine whether the expert evidence was admissible; however, once admitted, the trial court was not permitted to weigh the evidence upon summary judgment. That role was re-

versed for the trier of fact. Beaudreau v. GMAC, 118 S.W.3d 700, 2003 Tenn. App. LEXIS 315 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 893 (Tenn. Oct. 6, 2003).

3. Post-Traumatic Stress.

Trial court erred in admitting the expert testimony of a doctor concerning symptoms of post-traumatic stress syndrome exhibited by alleged victims of child sexual abuse, as such symptoms do not suffice to prove fact of sexual abuse. State v. Ballard, 855 S.W.2d 557, 1993 Tenn. LEXIS 193 (Tenn. 1993).

4. Novel Scientific Basis.

When expert testimony involves a novel kind of scientific basis that has not received judicial approval, a court must first determine whether the basis upon which the testimony is built is reliable enough to assist the jury to reach an accurate result. State v. Ballard, 855 S.W.2d 557, 1993 Tenn. LEXIS 193 (Tenn. 1993).

Trial court did not err under Tenn. R. Evid. 702 and Tenn. R. Evid. 703 when it allowed certified latent fingerprint examiner to testify as an expert based on use of "alternate light source technique" to identify palm print. State v. Smith, 868 S.W.2d 561, 1993 Tenn. LEXIS 410 (Tenn. 1993), rehearing denied, — S.W.2d —, 1994 Tenn. LEXIS 2 (1994), cert. denied, Smith v. Tennessee, 513 U.S. 960, 115 S. Ct. 417, 130 L. Ed. 2d 333, 1994 U.S. LEXIS 7536 (1994).

5. Cross-Examination of Expert.

In a medical malpractice action, the defendant's expert could be cross-examined for purposes of impeachment using portions of a deposition given by a former codefendant which the expert testified that he had read when formulating his opinion. Steele v. Ft. Sanders Anesthesia Group, P.C., 897 S.W.2d 270, 1994 Tenn. App. LEXIS 677 (Tenn. Ct. App. 1994), appeal denied, — S.W.2d —, 1995 Tenn. LEXIS 154 (Tenn. Apr. 3, 1995).

In a dental malpractice action, the trial court acted within its discretion, and there was no error in the trial court's denial of the motion in limine pending the offer of the patient's expert witness as an expert at trial, where the trial court reserved final ruling on the admission of the expert's testimony until examination and cross-examination of his knowledge of the relevant standard of care. Pullum v. Robinette, 174 S.W.3d 124, 2004 Tenn. App. LEXIS 473 (Tenn. Ct. App. 2004).

6. Opinion Based on Inadmissible Evidence.

Testimony of an accident reconstruction expert based upon depositions that were not entered into evidence was permitted by Tenn. R. Evid. 703. Herbert by Herbert v. Brazeale, 902 S.W.2d 933, 1995 Tenn. App. LEXIS 86 (Tenn. Ct. App. 1995).

The admission of an expert's opinion based on hearsay evidence not in itself admissible does not violate the confrontation clause of either the United States or Tennessee constitutions so long as the expert providing the opinion is available for cross-examination. State v. Kennedy, 7 S.W.3d 58, 1999 Tenn. Crim. App. LEXIS 136 (Tenn. Crim. App. 1999).

Defendant's confrontation rights were not violated by admission of DNA expert's testimony even though some portions of the testing were conducted by other person's in expert's laboratory. State v. Kennedy, 7 S.W.3d 58, 1999 Tenn. Crim. App. LEXIS 136 (Tenn. Crim. App. 1999).

Trial court properly excluded as hearsay portions of the expert's proffered testimony because the expert would have testified that he received instruction from unnamed officials and that he conformed his evaluation to the instructions he received; the evidence was offered for the truth of the information provided to the expert and was hearsay, and its admission was not to assist the jury in understanding the expert's opinion but to insert the opinion of another expert. Holder v. Westgate Resorts Ltd., 356 S.W.3d 373, 2011 Tenn. LEXIS 1144 (Tenn. Dec. 12, 2011).

7. Sobriety Tests.

Testimony concerning the Horizontal Gaze Nystagmus field sobriety test constitutes "scientific, technical, or other specialized knowledge" so that it must be offered through an expert witness and meet the requirements of Tenn. R. Evid. 702 and Tenn. R. Evid. 703. State v. Murphy, 953 S.W.2d 200, 1997 Tenn. LEXIS 530 (Tenn. 1997).

Horizontal gaze nystagmus test is a scientific test and must therefore satisfy the requirements of Tenn. R. Evid. 702 and 703 to be admissible into evidence. State v. Bell, 429 S.W.3d 524, 2014 Tenn. LEXIS 121 (Tenn. Feb. 20, 2014).

8. Ultimate Issue for Trier of Fact.

Expert testimony about defendant's susceptibility to inducement, proffered to establish an entrapment defense, was admissible even though it embraced an ultimate issue to be decided by the trier of fact. State v. Shuck, 953 S.W.2d 662, 1997 Tenn. LEXIS 487, 70 A.L.R.5th 743 (Tenn. 1997).

Trial court did not err by excluding the testimony of defendant's expert witness concerning the investigation because it concluded that his proffered testimony was an assessment of the strength of the evidence and the credibility of the witnesses, which were issues squarely in the province of the jury, and his testimony would not have substantially assisted the jury in understanding the evidence or in determining a fact in issue. State v. Cox, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 584 (Tenn. Crim. App. Aug. 25, 2020).

9. Admissibility.

Scientific evidence, based upon epidemiological studies, that exposure to solvents may cause toxic encephalopathy was admissible under Tenn. R. Evid. 702 and Tenn. R. Evid. 703. McDaniel v. CSX Transp., 955 S.W.2d 257, 1997 Tenn. LEXIS 471 (Tenn. 1997), rehearing denied, — S.W.2d —, 1997 Tenn. LEXIS 607 (Tenn. Dec. 8, 1997), cert. denied, 524 U.S. 915, 118 S. Ct. 2296, 141 L. Ed. 2d 157, 1998 U.S. LEXIS 3735 (1998).

Test in McDaniel is sufficient to allow a trial court to properly evaluate the admissibility of expert testimony on the reliability of eyewitness identification; to the extent that State v. Coley, 32 S.W.3d 831, 2000 Tenn. LEXIS 573 (Tenn. 2000) holds otherwise, it is overruled. State v. Copeland, 226 S.W.3d 287, 2007 Tenn. LEXIS 502 (Tenn. May 23, 2007).

Trial court did not err in permitting police officer who had completed courses in accident reconstruction and who had investigated the vehicle accident scene to testify as to the speeds the drag racing vehicles were traveling at the time of the accident and as to what the critical speed for an accident was on the highway curve where the accident occurred. State v. Farner, 66 S.W.3d 188, 2001 Tenn. LEXIS 832 (Tenn. 2001), rehearing denied, 66 S.W.3d 188, 2002 Tenn. LEXIS 20 (Tenn. 2002).

Defendant did not show that the state trooper had sufficient expertise to qualify him to give an opinion that defendant's blood alcohol content was rising at the time of the withdrawal of his blood; even if the trooper were qualified to give such an opinion, there was no indication that the trooper was provided with sufficient information in order for him to opine as to whether defendant's blood alcohol content was rising or falling at the time of the blood test. State v. Greenwood, 115 S.W.3d 527, 2003 Tenn. Crim. App. LEXIS 243 (Tenn. Crim. App. 2003), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 830 (Tenn. Sept. 8, 2003).

In a dental malpractice action, the expert's testimony on causation was sufficient where: (1) By training and experience, the expert was qualified to testify as to the types of nerve damage that could result from negligently performed dental procedures; and (2) While a dentist such as the expert may not be able to explain precisely why a nerve probed by an instrument was damaged, he was competent to testify that such damage occurs; and (3) Any deficiencies in his knowledge of the scientific basis for the working of nerves go to the weight of his testimony. Pullum v. Robinette, 174 S.W.3d 124, 2004 Tenn. App. LEXIS 473 (Tenn. Ct. App. 2004).

In a dental malpractice action, the trial court's decision to reserve ruling on the expert's compliance with locality rule until he was offered as a witness at trial where his knowledge of the applicable standard was established was not error; the dentist was not prejudiced by the expert's efforts to improve his understanding of dental practice in Pullum v. Robinette, 174 S.W.3d 124, 2004 Tenn. App. LEXIS 473 (Tenn. Ct. App. 2004).

In a murder case, a court erred by excluding the state's expert's testimony regarding the cause of death (murder or suicide) because the testimony would have provided substantial assistance to the trier of fact, the testimony was not entirely dependent upon statistical studies as the expert specifically contended that his observations, skill, training, and experience were a separate basis for his opinion, and he testified that he had studied many still shots of weapons just after having discharged a bullet and that he had always observed a cloud of soot that was discharged simultaneously with the bullet. State v. Ayers, 200 S.W.3d 618, 2005 Tenn. Crim. App. LEXIS 1108 (Tenn. Crim. App. 2005), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 261 (Tenn. 2006).

In a consumer protection act case brought by investors, the trial court erred in excluding the investors' expert's opinions regarding an investment advisor's investment advice because: (1) The expert possessed the education and experience that qualified him to render an expert opinion regarding the adequacy of the investment advice; (2) His methodology was sound and reflected the same intellectual rigor that would be required and expected of investment advisors competently practicing their profession; and (3) His testimony would have substantially assisted the triers of fact. Johnson v. John Hancock Funds, 217 S.W.3d 414, 2006 Tenn. App. LEXIS 447 (Tenn. Ct. App. 2006), appeal denied, Johnson v. John Hancock Funds, LLC, — S.W.3d —, 2006 Tenn. LEXIS 1114 (Tenn. Nov. 20, 2006).

In a death penalty case, a court erred by prohibiting expert testimony on the issue of the reliability of eyewitness identification because the facts, especially on the question of identification, were contested at trial, there were conflicts in the testimony, there were significant challenges to the credibility of practically every state witness other than the law enforcement officers, and some witnesses had prior felony convictions and were evasive, perhaps even untruthful, as to collateral matters. State v. Copeland, 226 S.W.3d 287, 2007 Tenn. LEXIS 502 (Tenn. May 23, 2007).

Trial court did not err in admitting the testimony of an occupational health physician specializing in internal medicine and clinical toxicology in a class action based on claims of nuisance by riverside landowners caused by an upstream paper company's pollutants because the thrust of the testimony was that class members should have reasonable concern, because in part so little was known about the amounts of chemicals released into the river and the company itself admitted that it did not

know the amount of each chemical discharged into the river on a daily basis. Freeman v. Blue Ridge Paper Prods., 229 S.W.3d 694, 2007 Tenn. App. LEXIS 48 (Tenn. Ct. App. Jan. 25, 2007), appeal denied, Freeman v. Blue Ridge Paper Prods., Inc., — S.W.3d —, 2007 Tenn. LEXIS 623 (Tenn. June 25, 2007).

In a product liability case, a trial court should have admitted a patient's expert testimony under Tenn. R. Evid. 702 and Tenn. R. Evid. 703 because the expert's education, training, and experience with the mechanical engineering of biomedical devices was extensive; further, the expert was qualified due to his direct observation, disassembly, and analysis of the device that cut the patient's aorta during surgery. Sparks v. Mena, 294 S.W.3d 156, 2008 Tenn. App. LEXIS 65 (Tenn. Ct. App. Feb. 6, 2008).

Pursuant to T.C.A. § 29-26-115 and Tenn. R. Evid. 702 and 703, summary judgment on the husband's medical malpractice action against the doctor and employer was vacated as the husband's expert was qualified to offer his expert opinion and the weight to be afforded the expert's testimony was to be determined by the finder of fact. Jackson v. Joyner, 309 S.W.3d 910, 2009 Tenn. App. LEXIS 127 (Tenn. Ct. App. Apr. 7, 2009).

Where a police officer testified that he had been trained in accident investigation at the police academy and that he had taken further training in the investigation of fatal accidents, which he described as including training to discern the relative positions of the vehicle's occupants at the time of the accident, and where the officer noted that he had investigated more than 100 non-fatal accidents and 20 fatal accidents prior to the accident at issue in defendant's trial, the trial court did not err in permitting the police officer to testify as an expert witness because his training and experience qualified him to testify as an expert regarding the mechanics of the accident, particularly the movement of the vehicle during the accident and the force applied to the car at various points of impact. Further, because the officer testified that he had been trained to use the mechanics of the accident to determine the positions of the occupants within the vehicle, the trial court properly determined that he was entitled to provide an expert opinion that defendant was driving the vehicle at the time of the accident. State v. McCloud, 310 S.W.3d 851, 2009 Tenn. Crim. App. LEXIS 437 (Tenn. Crim. App. June 12, 2009).

Finding that appellant, an inmate, failed to demonstrate by a preponderance of the evidence that he met the requirements of T.C.A. § 39-13-203(a)(2) was improper and a remand was required because categorically excluding expert testimony was erroneous. Coleman v. State, 341 S.W.3d 221, 2011 Tenn. LEXIS 319 (Tenn. Apr. 11, 2011), overruled, Dellinger v. State, — S.W.3d —, 2015 Tenn. Crim. App. LEXIS 669 (Tenn. Crim. App. Aug. 18, 2015).

T.C.A. § 39-13-203(a)(1) does not require that raw scores on I.Q. tests be accepted at their face value and courts may consider competent expert testimony showing that a test score does not accurately reflect a person's functional I.Q. or that the raw I.Q. test score is artificially inflated or deflated. Coleman v. State, 341 S.W.3d 221, 2011 Tenn. LEXIS 319 (Tenn. Apr. 11, 2011), overruled, Dellinger v. State, — S.W.3d —, 2015 Tenn. Crim. App. LEXIS 669 (Tenn. Crim. App. Aug. 18, 2015).

While Tennessee has not adopted a national standard of care in medical malpractice cases, as any change in the locality rule must come from the legislature, not the judiciary, Tennessee courts recognizes that, in many instances, the national standard is representative of the local standard. A number of medical experts have testified in Tennessee cases that there is either a uniform national standard of care or a standard pertinent to a broad geographic area applicable to medical care providers. Shipley v. Williams, 350 S.W.3d 527, 2011 Tenn. LEXIS 749 (Tenn. Aug. 11, 2011), rehearing denied, — S.W.3d —, 2011 Tenn. LEXIS 882 (Tenn. Sept. 8, 2011).

Trial court's decision to accept or disqualify an expert medical witness is reviewed under the abuse of discretion standard, and a trial court abuses its discretion when it disqualifies a witness who meets the competency requirements of T.C.A. § 29-26-115(b) and excludes testimony that meets the requirements of Tenn. R. Evid. 702 and 703. Tennessee continues to follow the majority rule and apply the abuse of discretion standard to decisions regarding the admissibility of evidence. Shipley v. Williams, 350 S.W.3d 527, 2011 Tenn. LEXIS 749 (Tenn. Aug. 11, 2011), rehearing denied, — S.W.3d —, 2011 Tenn. LEXIS 882 (Tenn. Sept. 8, 2011).

Proffered medical expert is not required to demonstrate firsthand and direct knowledge of a medical community and the appropriate standard of medical care there in order to qualify as competent to testify in a medical malpractice case; a proffered expert may educate himself or herself on the characteristics of a medical community in order to provide competent testimony in a variety of ways, including but not limited to reading reference materials on pertinent statistical information such as community and/or hospital size and the number and type of medical facilities in the area, conversing with other medical providers in the pertinent community or a neighboring or similar one, visiting the community or hospital where the defendant practices, or other means. The Supreme Court of Tennessee expressly rejects the personal, firsthand, direct knowledge standard formulated by the Tennessee Court of Appeals in *Eckler* and *Allen*. Shipley v. Williams, 350 S.W.3d 527, 2011 Tenn. LEXIS 749 (Tenn. Aug.

11, 2011), rehearing denied, — S.W.3d —, 2011 Tenn. LEXIS 882 (Tenn. Sept. 8, 2011).

Court of appeals erred in concluding that the trial court erred in excluding an expert's testimony because it applied a version of Tenn. R. Evid. 703 that was not in effect on the date of the trial and could not have been considered by the trial court. Holder v. Westgate Resorts Ltd., 356 S.W.3d 373, 2011 Tenn. LEXIS 1144 (Tenn. Dec. 12, 2011).

Even if an objection was properly preserved, there was no merit to parents' challenge on appeal to the admission of medical experts' testimony in their parental rights termination proceeding, as the parents failed to show that the experts' qualifications or the substance of their testimony was not admissible under Tenn. R. Evid. 702, 703, and 705 with respect to the determinative issue of the cause of their child's lack of growth and development, which the doctors' opined was caused by malnutrition and neglect. In re Keara J., 376 S.W.3d 86, 2012 Tenn. App. LEXIS 26 (Tenn. Ct. App. Jan. 13, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 274 (Tenn. Apr. 11, 2012).

Trial court did not abuse its discretion by excluding a doctor's testimony on grounds that it would not substantially assist the trier of fact because the trial court's conclusion that the doctor's expertise in this area was "limited" was essentially a ruling that the doctor was not qualified to offer expert testimony on the propriety of the interview techniques employed by the forensic interviewer, and that conclusion was supported by the record. State v. Ackerman, 397 S.W.3d 617, 2012 Tenn. Crim. App. LEXIS 510 (Tenn. Crim. App. July 13, 2012), overruled, State v. Sanders, 452 S.W.3d 300, 2014 Tenn. LEXIS 912 (Tenn. Nov. 10, 2014).

Forensic psychiatrist's testimony about a prisoner convicted of murder was properly admitted, as even if "pseudologia fantastica" was a scientifically questionable diagnosis once the psychiatrist realized that the term created confusion the psychiatrist decided the term was unnecessary and abandoned it; another expert similarly testified that the prisoner sometimes exaggerated or fabricated symptoms, and the the psychiatrist's testimony was never challenged for lack of reliability. Reid ex rel. Martiniano v. State, 396 S.W.3d 478, 2013 Tenn. LEXIS 84 (Tenn. Jan. 24, 2013), cert. denied, Reid ex rel. Martiniano v. Tennessee, 2013 U.S. LEXIS 6016, 134 S. Ct. 224, 571 U.S. 894, 2013 U.S. LEXIS 6016 (U.S. 2013).

In this Federal Employers' Liability Act case, plaintiff's experts were not required to establish a dose exposure above a certain amount before they could testify about causation, and it was well within the province of the jury to review the expert testimony and determine whether the worker's exposure to asbestos, diesel fumes, or radiation was substantial enough to be a contributing cause of his cancer; the evidence was properly admitted. Payne v. CSX Transp., Inc., 467 S.W.3d 413, 2015 Tenn. LEXIS 547 (Tenn. July 1, 2015).

Trial court erred by disregarding the worker's experts' opinions on the ground that their opinions lacked sufficient foundation because the certified industrial hygienist's testimony was admissible because he was not required to have firsthand knowledge of the employer's facility or the products to which the worker was exposed in order to give his expert opinion on the seriousness of the worker's cumulative exposure to asbestos. The hygienist was entitled to rely on the deposition of the worker and his co-worker to develop an opinion on the matter. Coffman v. Armstrong Int'l, — S.W.3d —, 2019 Tenn. App. LEXIS 357 (Tenn. Ct. App. July 22, 2019), rev'd, Coffman v. Armstrong Int'l, Inc., — S.W.3d —, 2021 Tenn. LEXIS 1 (Tenn. Jan. 4, 2021).

Trial court erred by disregarding the worker's experts' opinions on the ground that their opinions lacked sufficient foundation because the pathologist's testimony was admissible because it essentially responded to the following hypothetical question: if the worker was exposed to asbestos-containing products as often as he said he was, then was the worker's exposure to those products a substantial contributing factor to the development of his disease. Coffman v. Armstrong Int'l, — S.W.3d —, 2019 Tenn. App. LEXIS 357 (Tenn. Ct. App. July 22, 2019), rev'd, Coffman v. Armstrong Int'l, Inc., — S.W.3d —, 2021 Tenn. LEXIS 1 (Tenn. Jan. 4, 2021).

In a customer's slip and fall action against a restaurant, the trial court abused its discretion by excluding the testimony of the customer's expert, a structural engineer, because, although not conclusive as to the restaurant's alleged negligence, the expert's testimony that the portable restroom facility's installation and use were not compliant with the Standard Building Code may have been probative on the question of the restaurant's negligence and constructive knowledge of the alleged defect. Linkous v. Tiki Club, Inc., — S.W.3d —, 2019 Tenn. App. LEXIS 568 (Tenn. Ct. App. Nov. 22, 2019).

Trial court did not err in admitting expert testimony regarding cell tower evidence because the reliability of historical cell-site analysis similar to that conducted by the detective had been recognized by other jurisdictions, his testimony regarding the use of cell site location information was not novel, he testified that such information is used regularly by law enforcement, he received extensive training in the area, and he readily acknowledged that he could not determine the exact location of the headsets and that cell site location information was only used as corroborative, not primary, evidence. State v. Brown, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 220 (Tenn. Crim. App.

Apr. 8, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 387 (Tenn. Aug. 15, 2019).

Testimony of an expert in forensic pathology, who performed the victim's autopsy, as to the bruises on the victim's body being not medically consistent with normal injuries for a one-year-old child, the force required to cause such injuries, and whether the victim's injuries could have been caused by defendant's performing CPR was admissible because the expert was qualified to give the testimony and the testimony was relevant given the defense theory that the victim's injuries resulted from a two-foot fall from an ottoman. State v. Batiz, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 721 (Tenn. Crim. App. Nov. 1, 2019), review denied and ordered not published, — S.W.3d —, 2020 Tenn. LEXIS 140 (Tenn. Mar. 26, 2020).

When a medical examiner—a doctor—testified that the examiner had been trained to assess the muzzle-to-target distance when conducting autopsies, explained the method the examiner used, and explained how the examiner used that methodology to arrive at the examiner's conclusions, the examiner's conclusions as to the muzzle-to-target distance went to the weight of the evidence and not to he admissibility of the examiner's opinion. Given the overwhelming proof of defendant's guilt, the admission of the evidence, even if erroneous, was harmless. State v. Glass, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 402 (Tenn. Crim. App. June 9, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 553 (Tenn. Oct. 7, 2020).

10. Judicial Determination of Reliability.

Trial court did not err in admitting the testimony of an occupational health physician specializing in internal medicine and clinical toxicology in a class action based on claims of nuisance by riverside landowners caused by an upstream paper company's pollutants because the McDaniel v. CSX Transp., Inc., 955 S.W.2d 257, 1997 Tenn. LEXIS 471, factors indicated that the doctor's testimony regarding the chemicals' potentially adverse health effects was reliable. Freeman v. Blue Ridge Paper Prods., 229 S.W.3d 694, 2007 Tenn. App. LEXIS 48 (Tenn. Ct. App. Jan. 25, 2007), appeal denied, Freeman v. Blue Ridge Paper Prods., Inc., — S.W.3d —, 2007 Tenn. LEXIS 623 (Tenn. June 25, 2007).

The "polymerase chain reaction" (PCR) method of DNA analysis is a "DNA analysis" within the definition of that term in T.C.A. § 24-7-117(a) (now T.C.A. § 24-7-118(a)) and is therefore exempt from a judicial determination of reliability and trustworthiness, as would normally be required under this rule. State v. Begley, 956 S.W.2d 471, 1997 Tenn. LEXIS 522 (Tenn. 1997).

A Tennessee trial court may consider the following non-exclusive list of factors in determining reliability when applying this rule and Tenn. R. Evid., Rule 702: (1) Whether scientific evidence has been tested and the methodology with which it has been tested; (2) Whether the evidence has been subjected to peer review or publication; (3) Whether a potential rate of error is known; (4) Whether the evidence is generally accepted in the scientific community; and (5) Whether the expert's research in the field has been conducted independent of litigation. Coe v. State, 17 S.W.3d 193, 2000 Tenn. LEXIS 116 (Tenn. 2000), cert. denied, Bell v. Coe, 529 U.S. 1034, 120 S. Ct. 1460, 146 L. Ed. 2d 344, 2000 U.S. LEXIS 2200 (2000), cert. denied, Coe v. Tennessee, 146 L. Ed. 2d 344, 120 S. Ct. 1460, 529 U.S. 1034, 2000 U.S. LEXIS 2199 (2000).

While mitochondrial DNA testing (mtDNA) must satisfy the other admissions standards of the Tennessee Rules of Evidence before it is properly considered by the jury, T.C.A. § 24-7-117 (now T.C.A. § 24-7-118) clearly exempts such evidence from a judicial determination under Tenn. R. Evid. 703 of its general reliability as a method of proving identification. State v. Scott, 33 S.W.3d 746, 2000 Tenn. LEXIS 682 (Tenn. 2000).

Because DNA evidence is statutorily regarded as trustworthy and reliable under T.C.A. § 24-4-117 (now T.C.A. § 24-7-118), it is exempted from the trial court's determination under Tenn. R. Evid. 703; moreover, even before T.C.A. § 24-7-117 (now T.C.A. § 24-7-118) became effective, it was already determined that the "restriction fragment length polymorphism" (RFLP) method of DNA analysis was reliable and trustworthy. State v. Spratt, 31 S.W.3d 587, 2000 Tenn. Crim. App. LEXIS 465 (Tenn. Crim. App. 2000).

T.C.A. § 24-7-118 effectively exempts DNA evidence from the reliability and trustworthiness inquiry required by Tenn. R. Evid. 703. State v. Price, 46 S.W.3d 785, 2000 Tenn. Crim. App. LEXIS 597 (Tenn. Crim. App. 2000), review or rehearing denied, — S.W.3d —, 2001 Tenn. LEXIS 146 (Tenn. Feb. 26, 2001).

Directed verdict in a products liability case was reversed because admissible expert testimony was presented regarding the likelihood and seriousness of injury to an operator of a forklift without a door, and such would have prevented an injury without hindering the usefulness of the product. The trial court erred in excluding expert testimony under Tenn. R. Evid. 702 and Tenn. R. Evid. 703 since a consideration of all five factors for the admissibility of expert testimony was not mandated; only the factors necessary to reasonably measure reliability of the methodology were required. Brown v. Crown Equip. Corp., 181 S.W.3d 268, 2005 Tenn. LEXIS 868 (Tenn. 2005).

Trial court did not abuse its discretion in determining that DNA evidence was admissible and that defendant's recourse was to challenge the evidence at trial because under the plain

terms of the statute, the DNA evidence was admissible without a prior hearing on its reliability; a forensic DNA analyst testified the testing was a type of DNA testing, and she compared DNA from the Y chromosomes recovered from a swab to DNA from the Y chromosomes recovered from the specimen obtained from defendant. State v. Reed, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 22 (Tenn. Crim. App. Jan. 16, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 288 (Tenn. Aug. 6, 2020).

11. Defendant's Mental Capacity.

To gain admissibility, expert testimony regarding a defendant's incapacity to form the required mental state must satisfy the general relevancy standards as well as the evidentiary rules which specifically govern expert testimony. Assuming that those standards are satisfied, psychiatric evidence that the defendant lacks the capacity, because of mental disease or defect, to form the requisite culpable mental state to commit the offense charged is admissible under Tennessee law. To avoid confusion, however, such evidence should not be proffered as proof of "diminished capacity," but rather, such evidence should be presented to the trial court as relevant to negate the existence of the culpable mental state required to establish the criminal offense for which the defendant is being tried. State v. Hall, 958 S.W.2d 679, 1997 Tenn. LEXIS 617 (Tenn. 1997), cert. denied, Hall v. Tennessee, 524 U.S. 941, 118 S. Ct. 2348, 141 L. Ed. 2d 718, 1998 U.S. LEXIS 4097 (1998).

12. Trustworthiness.

Where the plaintiff's medical expert gave conflicting and irreconcilable testimony, the trial court could properly exclude this testimony on the grounds that it was fundamentally untrustworthy. Seffernick v. St. Thomas Hosp., 969 S.W.2d 391, 1998 Tenn. LEXIS 281 (Tenn. 1998).

Attorney argued that the trial court erred in not allowing him to testify as an expert in the area of his own disciplinary proceedings, but this was rejected, as the trial court did not act arbitrarily in determining that the attorney was not qualified; mere personal knowledge about his disciplinary proceedings did not qualify him, and although he was technically considered an expert in the law, his knowledge of the disciplinary process would not have assisted a trial judge, who is an expert in the law himself, plus the attorney's bias indicated a lack of trustworthiness that provided additional grounds for excluding his own opinion. Mabry v. Bd. of Prof'l Responsibility, 458 S.W.3d 900, 2014 Tenn. LEXIS 1046 (Tenn. Dec. 30, 2014).

13. Medical Bills.

Medical bills were not inadmissible hearsay where medical malpractice plaintiff was not introducing any statements from her bills for their truths; rather, she was stating the charges incurred and the amounts for which she was liable, and any evidence concerning the actual treatments she received was largely addressed by either herself, or the physicians who testified. Russell v. Crutchfield, 988 S.W.2d 168, 1998 Tenn. App. LEXIS 294 (Tenn. Ct. App. 1998), appeal denied, — S.W.3d —, 1999 Tenn. LEXIS 77 (Tenn. Feb. 16, 1999).

Medical expert's testimony as to an injured driver's possible future need for surgery and the costs thereof was properly excluded by a motion in limine in a negligence trial, as pursuant to Tenn. R. Evid. 702 and 703, the testimony was speculative; the expert was not at all certain what, if any, future surgeries would be medically necessary. Singh v. Larry Fowler Trucking, Inc., 390 S.W.3d 280, 2012 Tenn. App. LEXIS 598 (Tenn. Ct. App. Aug. 15, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 920 (Tenn. Dec. 11, 2012).

14. Real Estate Experts.

Witnesses were entitled to rely upon statements from various buyers and sellers of property where the record indicated that obtaining information from buyers and sellers of property is a common practice utilized by real estate experts in forming opinions such as those at issue. Willamette Indus., Inc. v. Tennessee Assessment Appeals Comm'n, 11 S.W.3d 142, 1999 Tenn. App. LEXIS 611 (Tenn. Ct. App. 1999).

Trial court did not err in admitting the testimony of a real estate expert in a class action based on the claims of nuisance by riverside landowners caused by an upstream paper company's pollutants, because the expert's testimony regarding the loss in value of the riverside land employed the same level of intellectual rigor that characterized the practice of an expert in the field of real estate appraisal. Freeman v. Blue Ridge Paper Prods., 229 S.W.3d 694, 2007 Tenn. App. LEXIS 48 (Tenn. Ct. App. Jan. 25, 2007), appeal denied, Freeman v. Blue Ridge Paper Prods., Inc., — S.W.3d —, 2007 Tenn. LEXIS 623 (Tenn. June 25, 2007).

There was no error in the utilization by an expert witness, who was a forensic accountant and economist and business valuation analyst, of the tax appraisals as the basis of the opinions of the witness as to the value of real property in a divorce case. Furthermore, there was no error in the trial court's adoption of those values for the real property. Lucchesi v. Lucchesi, — S.W.3d —, 2019 Tenn. App. LEXIS 27 (Tenn. Ct. App. Jan. 23, 2019).

15. Inadmissible Evidence.

General and unparticularized expert testimony concerning the reliability of eyewitness testimony, which is not specific to the witness whose testimony is in question, does not substantially assist the trier of fact, and such

testimony is inadmissible. State v. Coley, 32 S.W.3d 831, 2000 Tenn. LEXIS 573 (Tenn. 2000), review or rehearing denied, — S.W.3d —, 2000 Tenn. LEXIS 651 (Tenn. Nov. 22, 2000), overruled in part, State v. Copeland, 226 S.W.3d 287, 2007 Tenn. LEXIS 502 (Tenn. May 23, 2007), overruled, Vermeal v. State, — S.W.3d —, 2008 Tenn. Crim. App. LEXIS 594 (Tenn. Crim. App. July 3, 2008), overruled, Dotson v. State, — S.W.3d —, 2008 Tenn. Crim. App. LEXIS 684 (Tenn. Crim. App. Aug. 26, 2008), overruled in part, Thomas v. State, 298 S.W.3d 610, 2009 Tenn. Crim. App. LEXIS 109 (Tenn. Crim. App. Feb. 12, 2009), overruled, Vermeal v. Parker, — F. Supp. 2d —, 2009 U.S. Dist. LEXIS 89830 (E.D. Tenn. Sept. 29, 2009), overruled in part, Bomas v. State, 412 Md. 392, 987 A.2d 92, 2010 Md. LEXIS 10 (2010), overruled, McKinney v. State, — S.W.3d —, 2010 Tenn. Crim. App. LEXIS 219 (Tenn. Crim. App. Mar. 9, 2010), overruled, Thomas v. Carlton, — F. Supp. 2d —, 2013 U.S. Dist. LEXIS 41940 (E.D. Tenn. Mar. 26, 2013), overruled, Pruitt v. State, — S.W.3d —, 2013 Tenn. Crim. App. LEXIS 370 (Tenn. Crim. App. May 2, 2013).

The challenged testimony of police officers that criminal suspects typically deny committing offenses before confessing during police interrogation was not admissible as expert testimony. State v. Smith, 42 S.W.3d 101, 2000 Tenn. Crim. App. LEXIS 398 (Tenn. Crim. App. 2000), review or rehearing denied, — S.W.3d —, 2001 Tenn. LEXIS 39 (Tenn. Jan. 8, 2001).

Failure to consult a mental health expert and to obtain an evaluation of petitioner was deficient performance, as the state was required to prove a premeditated, intentional killing, but defendant was not prejudiced because the doctor's testimony was not admissible and prompt consultation would not have affected the defense; he only said it was a possibility that due to a mental disease, petitioner lacked capacity, and evidence of certain diagnoses was not relevant and admissible without an opinion regarding the ultimate issue of petitioner's capacity to form the required mens rea, such that he was not entitled to post-conviction relief. Williamson v. State, 476 S.W.3d 405, 2015 Tenn. Crim. App. LEXIS 267 (Tenn. Crim. App. Apr. 14, 2015), appeal denied, — S.W.3d —, 2015 Tenn. LEXIS 595 (Tenn. July 21, 2015).

16. Basis of Expert's Opinion.

In a murder trial, an expert witness was permitted to testify that she analyzed the laboratory work that was performed by her colleague; while the expert admittedly based her testimony upon the hearsay contained within that data, because defendant did not contend that the data was untrustworthy or otherwise not of a type generally relied on in the field of mitochondrial DNA analysis, the testimony was admissible under Tenn. R. Evid. 703. State v. Lewis, 235 S.W.3d 136, 2007 Tenn. LEXIS 649 (Tenn. Aug. 17, 2007).

In an action stemming from an automobile accident, the driver's attorney was not attempting to impeach a forensic pathologist's testimony with a learned treatise during his cross-examination; rather, the attorney was inquiring into the factual basis for the pathologist's assertion that it was medically impossible for a driver to lose consciousness while driving a moving automobile. Duran v. Hyundai Motor Am., Inc., 271 S.W.3d 178, 2008 Tenn. App. LEXIS 79 (Tenn. Ct. App. Feb. 13, 2008), rehearing denied, 271 S.W.3d 178, 2008 Tenn. App. LEXIS 127 (Tenn. Ct. App. Feb. 27, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 632 (Tenn. Aug. 25, 2008).

Trial court did not err in relying on market analysis report in determining damages arising out of the breach of a covenant not to compete because employee and his new employer introduced the report into evidence, and employee's and the new employer's own expert testified that the report would have been very helpful. Hanger Prosthetics & Orthotics East, Inc. v. Kitchens, 280 S.W.3d 192, 2008 Tenn. App. LEXIS 357 (Tenn. Ct. App. June 23, 2008), appeal denied, — S.W.3d —, 2009 Tenn. LEXIS 182 (Tenn. Jan. 20, 2009).

Trial curt did not err in finding that a medical doctor's expert testimony demonstrated causation by a preponderance of the evidence because the essence of the doctor's testimony was that the gangrene which necessitated the amputation of the decedent's leg was a natural progression of the foot wound in a patient with the decedent's pre-existing problems and the foot wound more probably than not necessitated the amputation of the leg. Wilson v. Monroe County, 411 S.W.3d 431, 2013 Tenn. App. LEXIS 53 (Tenn. Ct. App. Jan. 30, 2013), appeal denied, — S.W.3d —, 2013 Tenn. LEXIS 511 (Tenn. June 12, 2013).

Trial curt did not err in either admitting a medical doctor's expert testimony regarding causation, even though the doctor lacked personal knowledge that the decedent's foot injury happened inside an ambulance, because the doctor testified he relied upon the decedent's medical records "history" for the fact that there was a foot wound, and, as such, his lack of personal knowledge of the wound did not make his testimony inadmissible. Wilson v. Monroe County, 411 S.W.3d 431, 2013 Tenn. App. LEXIS 53 (Tenn. Ct. App. Jan. 30, 2013), appeal denied, — S.W.3d —, 2013 Tenn. LEXIS 511 (Tenn. June 12, 2013).

Appellant laid the foundation for the reports of the physicians when he questioned a doctor on direct examination; it was clear that he received and relied on another physician's reports in the course of his treatment of appellant, and there was no abuse of discretion on the part of the trial court. Allen v. Albea, 476 S.W.3d 366, 2015 Tenn. App. LEXIS 241 (Tenn. Ct. App. Apr. 23, 2015).

Expert testimony was admissible in child support modification proceedings because (1) the testimony assisted the court in determining whether a father's alleged business expenses were actually personal expenses, and (2) the testimony was based on facts known at or before the hearing and reasonably relied on by experts in the field. Schwager v. Messer, — S.W.3d —, 2019 Tenn. App. LEXIS 477 (Tenn. Ct. App. Sept. 27, 2019).

Defendant showed no discovery violation when the state's expert witnesses testified beyond the exact scope of the witnesses' expert reports because (1) defendant was notified of the substance of the witnesses' testimony, and (2) the witnesses were allowed to base opinions on information introduced at trial. State v. Lane, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 600 (Tenn. Crim. App. Sept. 20, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 111 (Tenn. Feb. 19, 2020).

Because the child's therapist relied on statements made by others that were of the sort commonly relied upon by mental health experts, the juvenile court did not err in permitting the child therapist to testify regarding the reasons for the children's therapy. In re River L., — S.W.3d —, 2021 Tenn. App. LEXIS 83 (Tenn. Ct. App. Mar. 6, 2021).

17. Specialized Knowledge, Nonscientific Opinion.

Trial court discretion was not abused in exclusion of behavioral analysis portion of retired F.B.I. crime scene investigator's testimony on behalf of defendant because defendant's guilt or innocence could not be determined by such specialized-knowledge, nonscientific opinion evidence that the crime scene exhibited certain patterns or clues consistent with previous sexual homicides triggered by precipitating stressors and thus it was more likely that this crime was similarly motivated. State v. Stevens, 78 S.W.3d 817, 2002 Tenn. LEXIS 223 (Tenn. 2002), rehearing denied, — S.W.3d —, 2002 Tenn. LEXIS 333 (Tenn. July 9, 2002), cert. denied, Stevens v. Tennessee, 537 U.S. 1115, 123 S. Ct. 873, 154 L. Ed. 2d 790, 2003 U.S. LEXIS 730, 71 U.S.L.W. 3471 (2003).

18. Expert Qualified.

In a workers' compensation case, the admission of expert medical testimony by a pulmonary specialist was proper under Tenn. R. Evid. 702, 203 because the specialist was a highly credentialed expert who had devoted a life's work to the actual exercise of the methodology upon which the testimony was based. Excel Polymers, LLC v. Broyles, 302 S.W.3d 268, 2009 Tenn. LEXIS 894 (Tenn. Dec. 22, 2009).

Trial court did not err when it found an insurance expert was not qualified due to a lack of experience with a cut-through endorsement to testify as to the standard of care necessary when offering a client of a cut-through endorsement. However, the expert had sufficient experience with general insurance matters and financial ratings to render the expert qualified to opine as to the remaining breaches of the applicable standard of care alleged against an insurance agent regarding the failures to inform a client of an insurer's financial rating. Littleton v. TIS Ins. Servs., — S.W.3d —, 2019 Tenn. App. LEXIS 13 (Tenn. Ct. App. Jan. 9, 2019).

Trial court did not plainly err by admitting an expert's testimony regarding the general effects of the drugs found in defendant's system and the general effects of heroin because the expert testified she had studied the effects of the drugs both through her graduate coursework and as part of her general training. State v. Dye, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 652 (Tenn. Crim. App. Oct. 15, 2019).

Trial court properly admitted the testimony of the executive director of a doctor-owned, independent practice association purusuant to Tenn. R. Evid. 702 and 703 where the association demonstrated that he held significant experience in the healthcare industry with more than 40 years of relevant work history. During that time period, the director had been employed by a number of hospitals, insurance companies, and other organizations in the healthcare field, in addition to his work as Executive Director of HPI, and he testified that during his tenure at the association, he had been involved in negotiating and implementing more than 50 payor contracts. Furthermore, he expressed considerable familiarity with the procedures and financial concerns associated with such contracts. Highlands Physicians, Inc. v. Wellmont Health Sys., — S.W.3d —, 2020 Tenn. App. LEXIS 430 (Tenn. Ct. App. Sept. 25, 2020).

Evidence supported the determination made by the administrative law judge that the expert was qualified to testify to the work of an advanced practice registered nurse involved in the pain management practice area, given the expert's years of practice and her training and education. Tenn. Dep't of Health v. Collins, — S.W.3d —, 2020 Tenn. App. LEXIS 532 (Tenn. Ct. App. Nov. 25, 2020).

In a vehicular homicide by intoxication case, defendant was not entitled to relief on the issue that the trial court abused its discretion by admitting a police chief as a drug recognition expert. While not explicitly naming the McDaniel factors, the trial court aptly considered the development of the test and its reliability when determining whether to admit the testimony, and it put all its findings and conclusions in a well-developed, well-reasoned, six-page written order. State v. Brewer, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 221 (Tenn. Crim. App. Apr. 6, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 421 (Tenn. Aug. 6, 2020), cert. denied, Brewer v. Tennessee, — L. Ed. 2d —, — S. Ct.

—, — U.S. —, 2020 U.S. LEXIS 6062 (U.S. Dec. 14, 2020).

Rule 704. Opinion on ultimate issue. —

Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

Advisory Commission Comments. The Supreme Court has already approved this language. *City of Columbia v. C.F.W. Construction Co.*, 557 S.W.2d 734 (Tenn. 1977). But *Blackburn v. Murphy*, 737 S.W.2d 529 (Tenn. 1987), places limitations on lay witnesses testifying to some ultimate issues, such as whether an accident was unavoidable.

Advisory Commission Comments [1996]. "One ultimate issue is outside the scope of expert testimony. Tenn. Code Ann. § 39-11-501 provides that 'no expert witness may testify as to whether the defendant was or was not insane.'"

Law Reviews. Daubert v. Merrell Dow Pharmaceuticals: Pushing the Limits of Scientific Reliability — The Questionable Wisdom of Abandoning the Peer Review Standard for Admitting Expert Testimony (Allan W. Tamarelli, Jr.), 47 Vand. L. Rev. 1175 (1994).

Paine on Procedure: Expert Opinion and the Insanity Defense (Donald F. Paine), 49 Tenn. B.J. 27 (2013).

The New McDaniel Test for Expert Opinions (Donald F. Paine), 34 Tenn. B.J. 23 (1998).

Warping the Rules: How Some Courts Misapply Generic Evidentiary Rules to Exclude Polygraph Evidence, 59 Vand. L. Rev. 539 (2006).

NOTES TO DECISIONS

ANALYSIS

1. Expert Testimony.
2. Lay Testimony.

1. Expert Testimony.

Expert testimony about defendant's susceptibility to inducement, proffered to establish an entrapment defense, was admissible even though it embraced an ultimate issue to be decided by the trier of fact. State v. Shuck, 953 S.W.2d 662, 1997 Tenn. LEXIS 487, 70 A.L.R.5th 743 (Tenn. 1997).

Opinion testimony is not admissible on an ultimate issue if the jury could readily draw its own conclusions on the matter without the aid of the witness' opinion. State v. Turner, 30 S.W.3d 355, 2000 Tenn. Crim. App. LEXIS 89 (Tenn. Crim. App. 2000), appeal denied, — S.W.3d —, 2000 Tenn. LEXIS 479 (Tenn. Sept. 5, 2000).

2. Lay Testimony.

Trial court erred in permitting a police officer to testify that, because defendant suffered the greater injury of the two vehicle occupants and because that injury was to the left side of defendant's body, he concluded that defendant was the driver of the vehicle; because the jury could have easily drawn this conclusion itself based upon the officer's testimony regarding defendant's injuries and the condition of the vehicle, the trial court should not have allowed the officer to offer a lay opinion that defendant was the driver of the vehicle. Because the conclusion was so readily apparent from the evidence and because there was other direct evidence that defendant had been driving at the time of the accident, the erroneous admission of the officer's opinion as a lay witness was harmless. State v. McCloud, 310 S.W.3d 851, 2009 Tenn. Crim. App. LEXIS 437 (Tenn. Crim. App. June 12, 2009).

Rule 705. Disclosure of facts or data underlying expert opinion. —

The expert may testify in terms of opinion or inference and give reasons without prior disclosure of the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Advisory Commission Comments. This rule gives a lawyer the option of not using a hypothetical question in examining an expert; the lawyer can ask the expert simply to state an opinion. Tennessee presently requires the hypothetical unless the expert bases testimony on personal observation. See, e.g., *Valentine v. Conchemco*, 588 S.W.2d 871 (Tenn. Ct. App. 1979).

Law Reviews. Daubert v. Merrell Dow Pharmaceuticals: Pushing the Limits of Scientific Reliability — The Questionable Wisdom of

Abandoning the Peer Review Standard for Admitting Expert Testimony (Allan W. Tamarelli, Jr.), 47 Vand. L. Rev. 1175 (1994).

Expert Witness Conflicts and Compensation, 67 Tenn. L. Rev. 909 (2000).

Physical Condition in the New Tennessee Rules of Evidence (Donald F. Paine), 26 Tenn. B.J. 25 (1990).

The Ten Commandments of Direct Examination (Donald F. Paine), 36 Tenn. B.J. 20 (2000).

NOTES TO DECISIONS

Analysis

1. Cross-Examination of Expert.
2. Disclosure of Data Underlying Opinion.

1. Cross-Examination of Expert.

In a medical malpractice action, the defendant's expert could be cross-examined for purposes of impeachment using portions of a deposition given by a former codefendant which the expert testified that he had read when formulating his opinion. Steele v. Ft. Sanders Anesthesia Group, P.C., 897 S.W.2d 270, 1994 Tenn. App. LEXIS 677 (Tenn. Ct. App. 1994), appeal denied, — S.W.2d —, 1995 Tenn. LEXIS 154 (Tenn. Apr. 3, 1995).

In an action stemming from an automobile accident, the driver's attorney was not attempting to impeach a forensic pathologist's testimony with a learned treatise during his cross-examination; rather, the attorney was inquiring into the factual basis for the pathologist's assertion that it was medically impossible for a driver to lose consciousness while driving a moving automobile. Duran v. Hyundai Motor Am., Inc., 271 S.W.3d 178, 2008 Tenn. App. LEXIS 79 (Tenn. Ct. App. Feb. 13, 2008), rehearing denied, 271 S.W.3d 178, 2008 Tenn. App. LEXIS 127 (Tenn. Ct. App. Feb. 27, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 632 (Tenn. Aug. 25, 2008).

Evidentiary errors more probably than not affected a judgment, pursuant to T.R.A.P. 36(b), requiring that it be set aside, because pervasive cross examination of appellant railway company's expert based on an investigator's deposition was improper under Tenn. R. Evid. 705, since it included a theory that the rail car that struck the widow's husband was moving at eight miles an hour, which did not appear anywhere else in evidence. Melton v. BNSF Ry. Co., 322 S.W.3d 174, 2010 Tenn. App. LEXIS 128 (Tenn. Ct. App. Feb. 22, 2010), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 740 (Tenn. Aug. 25, 2010).

Cross examination of appellant railway company's expert based on an investigator's deposition was improper under Tenn. R. Evid. 705, because there was simply no indication that any material from the deposition, while read by the expert, formed a basis for the expert's opinion. Melton v. BNSF Ry. Co., 322 S.W.3d 174, 2010 Tenn. App. LEXIS 128 (Tenn. Ct. App. Feb. 22, 2010), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 740 (Tenn. Aug. 25, 2010).

In a medical malpractice case, it was not error to allow an expert called by the mother bringing suit to be questioned on medical literature that had allegedly not been established as reliable because, under Tenn. R. Evid. 705, cross-examination could be used to require an expert to disclose and explain the facts or data upon which the expert's opinion was based. Stanfield v. Neblett, 339 S.W.3d 22, 2010 Tenn. App. LEXIS 373 (Tenn. Ct. App. June 4, 2010), appeal denied, — S.W.3d —, 2011 Tenn. LEXIS 39 (Tenn. Jan. 13, 2011).

2. Disclosure of Data Underlying Opinion.

Defendant was not entitled to the raw data upon which the state's expert under Tenn. R. Crim. P. 16 and Tenn. R. Crim. P. 26.2 nor Tenn. R. Evid. 705 because the expert was not a person defendant knew to be a law enforcement officer, and the statement was not a statement of the expert, but defendant's own statement; moreover, any error in not disclosing the raw data was harmless pursuant to Tenn. R. Crim. P. 52(a) and T.R.A.P. 36(b). State v. Schiefelbein, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 138 (Tenn. Crim. App. Feb. 8, 2007), modified, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 213 (Tenn. Crim. App. Mar. 7, 2007).

State death row inmate who elected to put forth a psychiatrist's testimony based upon the inmate's statements to that psychiatrist waived any privilege on those subjects; thus, state trial court did not err in requiring disclosure of the expert's notes to the prosecution pursuant to Tenn. R. Evid. 705, and inmate was not entitled to habeas corpus relief based on the disclosure of the notes. Hodges v. Bell, 548 F. Supp. 2d 485, 2008 U.S. Dist. LEXIS 25780 (M.D. Tenn. Mar. 27, 2008), aff'd, Hodges v. Colson, 711 F.3d 589, 2013 FED App. 75P, 2013 U.S. App. LEXIS 6050 (6th Cir. Mar. 26, 2013).

Even if an objection was properly preserved, there was no merit to parents' challenge on appeal to the admission of medical experts' testimony in their parental rights termination proceeding, as the parents failed to show that the experts' qualifications or the substance of their testimony was not admissible under Tenn. R. Evid. 702, 703, and 705 with respect to the determinative issue of the cause of their child's lack of growth and development, which the doctors' opined was caused by malnutrition and neglect. In re Keara J., 376 S.W.3d 86, 2012 Tenn. App. LEXIS 26 (Tenn. Ct. App. Jan. 13,

2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 274 (Tenn. Apr. 11, 2012).

Rule 706. Court-appointed experts. —

(a) Appointment. — The court may not appoint expert witnesses of its own selection on issues to be tried by a jury except as provided otherwise by law. As to bench-tried issues, the court may on its own motion or on the motion of any party enter an order to show cause why expert witnesses should not be appointed and may request the parties to submit nominations. The court ordinarily should appoint expert witnesses agreed upon by the parties, but in appropriate cases, for reasons stated on the record, the court may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless the witness consents to act. A witness so appointed shall be informed of the witness's duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have opportunity to participate. A witness so appointed shall advise the parties of the witness's findings, the witness's deposition may be taken by any party, and the witness may be called to testify by the court or any party. The witness shall be subject to cross-examination by each party, including a party calling the witness.

(b) Compensation. — Expert witnesses so appointed are entitled to reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law in criminal cases and civil actions and condemnation proceedings. In other civil actions and proceedings the compensation shall be paid by the parties in such proportion and at such time as the court directs and thereafter charged in like manner as other costs.

(c) Disclosure of Appointment. — Where a court-appointed expert is permitted otherwise by law to testify on an issue to be tried by a jury, no one may disclose to the jury the fact that the court appointed the expert witness.

(d) Parties' Experts of Own Selection. — Nothing in this rule limits the parties in calling expert witnesses of their own selection.

Advisory Commission Comments. The Commission was wary of the undue impact a court-appointed expert might have on a jury, and the rule prohibits such experts in jury trials unless expressly permitted by statute. Even where the trial court wants its own expert in a bench trial, the judge normally should defer to the parties' suggestions. Either party may discover and cross-examine the court's expert.

Law Reviews. Comparing the Tennessee and Federal Rules of Evidence (Donald F. Paine), 26 Tenn. B.J. 37 (1990).

Competency and Impeachment of Witnesses (Leo Bearman, Jr.), 57 Tenn. L. Rev. 89 (1989).

Daubert v. Merrell Dow Pharmaceuticals: Pushing the Limits of Scientific Reliability — The Questionable Wisdom of Abandoning the Peer Review Standard for Admitting Expert Testimony (Allan W. Tamarelli, Jr.), 47 Vand. L. Rev. 1175 (1994).

Expert Witness Conflicts and Compensation, 67 Tenn. L. Rev. 909 (2000).

Physical Condition in the New Tennessee Rules of Evidence (Donald F. Paine), 26 Tenn. B.J. 25 (1990).

NOTES TO DECISIONS

Analysis

1. In General.
2. Findings by an Expert.
3. Written Reports.
4. Workers' Compensation.

1. In General.

The rules of evidence do not authorize a court to appoint an expert witness on questions of law. Mayhew v. Wilder, 46 S.W.3d 760, 2001

Tenn. App. LEXIS 17 (Tenn. Ct. App. 2001).

2. Findings by an Expert.

Tenn. R. Evid. 706 contemplates that if the findings of an expert witness are to be considered as evidence, the expert will be called to testify. Dover v. Dover, 821 S.W.2d 593, 1991 Tenn. App. LEXIS 585 (Tenn. Ct. App. 1991).

3. Written Reports.

Tenn. R. Evid. 706 does not authorize a potential expert witness to file an unsworn written report as evidence over the objection of a party. Dover v. Dover, 821 S.W.2d 593, 1991 Tenn. App. LEXIS 585 (Tenn. Ct. App. 1991).

4. Workers' Compensation.

T.C.A. § 50-6-204(d)(5) did not violate separation of powers because the provision did not impermissibly strike at the heart of the exercise of judicial authority, as the provision did not impermissibly conflict with a court's authority under Tenn. R. Evid. 706 to appoint an expert by limiting the circumstances under which such an appointment could occur, as the court could still appoint a physician for purposes not barred by the statute. Mansell v. Bridgestone Firestone N. Am. Tire, 417 S.W.3d 393, 2013 Tenn. LEXIS 645 (Tenn. Aug. 20, 2013).

ARTICLE VIII. HEARSAY

Rule 801. Definitions. —

The following definitions apply under this article:

(a) Statement. — A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person if it is intended by the person as an assertion.

(b) Declarant. — A "declarant" is a person who makes a statement.

(c) Hearsay. — "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

Advisory Commission Comments. This rule, generally defining hearsay, is the first of a series covering hearsay evidence. The next provision, Rule 802, states the general rule that hearsay evidence is inadmissible unless otherwise provided by law. Rules 803 and 804 describe hearsay exceptions. Rule 805 deals with multiple hearsay, and Rule 806 provides a general rule for impeaching hearsay declarants.

Except for the definition of conduct as hearsay, Rule 801 restates Tennessee common law. Part (a) makes hearsay only such nonverbal conduct as the declarant actor intends as an assertion. The common law, stemming from *Wright v. Tatham*, 112 Eng. Rep. 488 (Exch. Ch. 1837), included in the hearsay definition assertions that might be inferred from the conduct but that were unintended by the actor. Consequently, Tennessee has defined flight from a crime scene as hearsay, although the courts admit the evidence through the exception for party admissions. Under the proposed rule, the evidence would be admissible as nonhearsay, the declarant obviously not intending to assert guilt by flight.

Law Reviews. A Meta-Analysis of the Tennessee Rules of Evidence (Neil P. Cohen), 57 Tenn. L. Rev. 1 (1989).

Bogus Offers of Hearsay (Donald F. Paine), 37 Tenn. B.J. 18 (2001).

Can Conduct be Hearsay? (Donald F. Paine), 35 Tenn. B.J. 32 (1999).

Confrontation and the Law of Evidence: Can the Language Conduit Theory Survive in the Wake of Crawford? 67 Vand. L. Rev. 1497 (2014).

Hearsay and Informal Reasoning (Craig R. Callen), 47 Vand. L. Rev. 43 (1994).

Juvenile Court Hearsay (Donald F. Paine), 36 Tenn. B.J. 35 (2000).

Some Comparisons Between the New Tennessee Rules of Evidence and the Federal Rules of Evidence Part I (Robert Banks, Jr.), 20 Mem. St. U.L. Rev. 283 (1990).

The Admissibility of Lay and Expert Opinions (J. Houston Gordon), 57 Tenn. L. Rev. 103 (1989).

The Federal Influence on the Tennessee Hearsay Rule (Alfred H. Knight, III), 57 Tenn. L. Rev. 117 (1989).

The Nature and Purpose of Evidence Theory, 66 Vand. L. Rev. 547 (2013).

NOTES TO DECISIONS

Analysis

1. Constitutionality.
2. Hearsay.
3. Doctrine of Curative Admissibility.
4. Assertion.
5. Admission of Hearsay.
6. Not Hearsay.
7. Prior Consistent Statements.
8. Harmless Error.

1. Constitutionality.

In determining whether the constitutional right to present a defense has been violated by the exclusion of evidence, the analysis should consider whether: (1) The excluded evidence is critical to the defense; (2) The evidence bears sufficient indicia of reliability; and (3) The interest supporting exclusion of the evidence is substantially important. State v. Brown, 29 S.W.3d 427, 2000 Tenn. LEXIS 24 (Tenn. 2000), cert. denied, Tennessee v. Brown, 531 U.S. 916, 121 S. Ct. 275, 148 L. Ed. 2d 200, 2000 U.S. LEXIS 6506 (2000).

Although evidence that complainant admitted to two friends that she had sexual intercourse with an adolescent male during the same time period the defendant allegedly committed aggravated rape was inadmissible hearsay under Tenn. R. Evid. 801(c), the defendant's constitutional right to present a defense was violated by the exclusion of evidence. State v. Brown, 29 S.W.3d 427, 2000 Tenn. LEXIS 24 (Tenn. 2000), cert. denied, Tennessee v. Brown, 531 U.S. 916, 121 S. Ct. 275, 148 L. Ed. 2d 200, 2000 U.S. LEXIS 6506 (2000).

In a rape case, a court correctly excluded statements the victim made to her father that arguably suggested that a third party had committed the crimes because the statements were inadmissible extrinsic evidence of prior inconsistent statements and the exclusion did not rise to the level of a constitutional violation because the excluded evidence was not critical to the defense; the statements had little probative value to implicate another in the crime or to rebut the victim's testimony that oral penetration occurred. State v. Flood, 219 S.W.3d 307, 2007 Tenn. LEXIS 274 (Tenn. 2007).

2. Hearsay.

Testimony, as it related to the victim's statements, was not hearsay where it was not offered to prove the truth of the matter asserted. State v. Caughron, 855 S.W.2d 526, 1993 Tenn. LEXIS 189 (Tenn. 1993), cert. denied, Caughron v. Tennessee, 510 U.S. 979, 114 S. Ct. 475, 126 L. Ed. 2d 426, 1993 U.S. LEXIS 7207 (1993).

If the declarant's credibility is irrelevant because it does not matter whether the declarant is telling the truth, the dangers of hearsay are not present and the statement is not viewed as hearsay. State v. Price, 46 S.W.3d 785, 2000 Tenn. Crim. App. LEXIS 597 (Tenn. Crim. App. 2000), review or rehearing denied, — S.W.3d —, 2001 Tenn. LEXIS 146 (Tenn. Feb. 26, 2001).

While trial court could review a guardian ad litem's report, which was hearsay, it could not be used as the sole basis for determining custody. Toms v. Toms, 98 S.W.3d 140, 2003 Tenn. LEXIS 1 (Tenn. 2003).

Doctor's letter, which was used to bolster the defendant physician's position that he was not negligent in assessing the patient's MRI scan, was improperly admitted into evidence because it was clearly hearsay as it contained a statement made by the doctor other than while testifying at trial in which he stated that he would have interpreted the MRI scan the same as the defendant physician. Godbee v. Dimick, 213 S.W.3d 865, 2006 Tenn. App. LEXIS 601 (Tenn. Ct. App. 2006), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 66 (Tenn. 2006).

During defendant's robbery trial, the court did not err by excluding co-defendant's statement made during an interrogation after police caught both co-defendants with stolen merchandise in their car; the statements were inadmissible hearsay under Tenn. R. Evid. 801 or Tenn. R. Evid. 802. State v. Dotson, 254 S.W.3d 378, 2008 Tenn. LEXIS 277 (Tenn. Apr. 28, 2008).

Automobile license tag number observed and written down by a bystander near a crime scene was hearsay, pursuant to Tenn. R. Evid. 801(a) and (c), because this written statement asserted that the tag number belonged to the white minivan that the bystander observed leaving the strip mall parking lot. State v. Franklin, 308 S.W.3d 799, 2010 Tenn. LEXIS 415 (Tenn. Apr. 29, 2010), cert. denied, Franklin v. Tennessee, 179 L. Ed. 2d 503, 131 S. Ct. 1598, 562 U.S. 1272, 2011 U.S. LEXIS 1989 (U.S. 2011).

Defendant's conviction for the aggravated rape of a child was proper because the trial court did not improperly admit a transcript of a telephone call between defendant and the victim's father; the father testified that he made the phone call and that the call was recorded. Moreover, even though the statements on the recording and transcript were hearsay, they were not offered for the truth of the matter asserted under Tenn. R. Evid. 801(c); the transcript was used by the state after defendant denied doing anything wrong to the victim and during the conversation, defendant had admitted to touching the victim as opposed to admitting that he had raped her. State v. Ramos, 331 S.W.3d 408, 2010 Tenn. Crim. App. LEXIS 195 (Tenn. Crim. App. Mar. 3, 2010), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 754 (Tenn. Aug. 26, 2010).

Trial court properly excluded as hearsay portions of the expert's proffered testimony because the expert would have testified that he received instruction from unnamed officials and that he conformed his evaluation to the instructions he received; the evidence was offered for the truth of the information provided to the expert and was hearsay, and its admission was not to assist the jury in understanding the expert's opinion but to insert the opinion of another expert. Holder v. Westgate Resorts Ltd., 356 S.W.3d 373, 2011 Tenn. LEXIS 1144 (Tenn. Dec. 12, 2011).

Though hearsay statements were improperly admitted into evidence because they were not offered against the insured but were offered to bolster his case, the appellate court declined to grant a new trial based upon that error since the information was properly admitted through other witnesses and the trial court's error did not affect the outcome of the trial when the evidence was introduced through other avenues. Riad v. Erie Ins. Exch., 436 S.W.3d 256, 2013 Tenn. App. LEXIS 712 (Tenn. Ct. App. Oct. 31, 2013), appeal denied, Riad v. Erie Ins. Exch., — S.W.3d —, 2014 Tenn. LEXIS 196 (Tenn. Mar. 4, 2014), superseded by statute as stated in, Lindenberg v. Jackson Nat'l Life Ins. Co., — F. Supp. 2d —, 2014 U.S. Dist. LEXIS 184081 (W.D. Tenn. Dec. 9, 2014).

There was no competent evidence to support a principal's allegation that a tenured teacher ordered an unruly student's grandmother to remove the student from the school because the principal repeating what a grandmother told him was classic inadmissible hearsay and did not qualify for any exception to the hearsay rule. Elmi v. Cheatham Cty. Bd. of Educ., 546 S.W.3d 630, 2017 Tenn. App. LEXIS 568 (Tenn. Ct. App. Aug. 18, 2017).

Because the state offered the information on a temporary licence tag for the victim's car for its truth, namely that the tag for the car was issued to the victim, and it was hearsay; the temporary tag contained a written statement, namely a name and address, and that written statement reflected that the temporary tag for the car had been issued to the victim. State v. Collins, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 295 (Tenn. Crim. App. Apr. 18, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 489 (Tenn. Aug. 8, 2018), cert. denied, Collins v. Tennessee, 139 S. Ct. 649, 202 L. Ed. 2d 498, -- U.S. --, 2018 U.S. LEXIS 7182 (U.S. Dec. 10, 2018).

Trial court did not abuse its discretion in refusing to admit certain videos into evidence because a decedent's daughter did not demonstrate that the videos fit within any hearsay exception. Bottorff v. Sears, — S.W.3d —, 2018 Tenn. App. LEXIS 430 (Tenn. Ct. App. July 25, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 764 (Tenn. Dec. 6, 2018), cert. denied, 204 L. Ed. 2d 1145, 139 S. Ct. 2759, — U.S. —, 2019 U.S. LEXIS 4286 (U.S. June 24, 2019).

Trial court did not err by excluding defendant's mother's testimony about who shot her apartment because it was not relevant to defendant's criminal trial, as the facts of who shot her apartment were not presented to the jury, and any portion of her testimony that might have included another's statement about who committed the shooting would have been hearsay. State v. Battle, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 673 (Tenn. Crim. App. Aug. 31, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 99 (Tenn. Jan. 18, 2019).

During defendant's murder trial, the trial court did not err by excluding an agent's testimony that he had heard about the victim's advertising for someone to kill the agent because it was inadmissible hearsay, as the agent's proffered testimony made it clear that the threats were communicated to him by a prison informant and never acknowledged by the victim. State v. Gregoire, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 126 (Tenn. Crim. App. Feb. 25, 2019).

Newspaper article and a web posting on which a health club member relied to establish that a health club knew or should have known of the criminal conduct of another member of the health club, as set forth in the newspaper article and web posting advertisements, were inadmissible hearsay. Boswell v. YMCA, — S.W.3d —, 2019 Tenn. App. LEXIS 160 (Tenn. Ct. App. Mar. 29, 2019).

Health club member offered a recitation of the statement purportedly made by staff member of the health club to prove that the health club had prior knowledge of the criminal conduct of another member of the health club. Accordingly, the staff member's statement was inadmissible at trial because the purported statement was hearsay, as it was offered for the truth of the matter asserted, and the health club member failed to establish that the hearsay statement fit one of the exceptions to the hearsay rule. Boswell v. YMCA, — S.W.3d —, 2019 Tenn. App. LEXIS 160 (Tenn. Ct. App. Mar. 29, 2019).

Witness's testimony about the contents of her recorded statement to a detective, as opposed to her recollection of prior events after having refreshed her recollection by reviewing the statement, was inadmissible hearsay because it was evidence of the contents of her prior statement and was offered to prove the truth of the matter asserted. State v. Ward, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 202 (Tenn. Crim. App. Apr. 1, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 331 (Tenn. July 18, 2019).

Trial court did not err by refusing to introduce into evidence a letter sent to the husband from his personnel manager advising him to review his draw on his bonus because it was inadmissible hearsay as the author of the letter

was not present for cross-examination, the author could not be observed by the trial court, and the letter was not attached to an oath and therefore the letter was not reliable. Pearson v. Pearson, — S.W.3d —, 2019 Tenn. App. LEXIS 288 (Tenn. Ct. App. June 6, 2019).

Because the victim merely was repeating what someone else said the cost of the repairs to his vehicle were, without having first-hand knowledge of the information, his testimony was inadmissible hearsay and the trial court erred by ruling that the victim's testimony was admissible. State v. Hurt, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 213 (Tenn. Crim. App. Apr. 1, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 385 (Tenn. Aug. 11, 2020).

Trial court did not abuse its discretion by not permitting defendant to present a police sergeant as a defense witness in an effort to establish that an individual was present on the night of a shooting because the sergeant would not have been permitted to testify about the substance of the sergeant's interview with the individual after the shooting, as it would have elicited inadmissible hearsay evidence. State v. Corbin, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 664 (Tenn. Crim. App. Oct. 9, 2020).

Case worker's testimony about what she heard a probation officer state in court regarding the mother's drug screen results was improperly admitted where the results had not been properly admitted as business records exception due to a lack of foundation, but the error was harmless because the record contained alternative admissible evidence regarding the mother's continued substance abuse. In re River L., — S.W.3d —, 2021 Tenn. App. LEXIS 83 (Tenn. Ct. App. Mar. 6, 2021).

Doctor's letter explaining a child's medical diagnosis and providing the date the child was last seen by a doctor was improperly admitted as it was an out of court statement offered for the truth of the matter asserted, and no exceptions to the hearsay rule applied. The error was harmless, however, because other credible evidence supported the juvenile court's finding that the child had a medical condition and that the foster mother had taken the child to the doctor every six months to have his blood drawn and tested. In re River L., — S.W.3d —, 2021 Tenn. App. LEXIS 83 (Tenn. Ct. App. Mar. 6, 2021).

3. Doctrine of Curative Admissibility.

Hearsay statements that do not fall within a recognized hearsay exception may, nonetheless, be admitted during redirect examination under the doctrine of curative admissibility. The doctrine of curative admissibility permits the state, on redirect, to question the witness to clarify or explain the matters brought out during, or to remove or correct unfavorable inferences left by, previous cross-examination; where a defendant has injected an issue into the case, the state may be allowed to admit otherwise inadmissible evidence in order to explain or counteract a negative inference raised by the issue defendant injects. In a criminal case, the doctrine of curative admissibility operates to prevent an accused from successfully gaining exclusion of inadmissible prosecution evidence and then extracting selected pieces of this evidence for his own advantage, without the government being able to place them in their proper context. State v. Land, 34 S.W.3d 516, 2000 Tenn. Crim. App. LEXIS 369 (Tenn. Crim. App. 2000).

4. Assertion.

Statement by defendant to police officer that, "the charge of theft is not correct, it should have been unauthorized use of a vehicle since it was my parents' vehicle," was an assertion; furthermore, because the statement was offered for the truth of the matter asserted it was not admissible unless it met a recognized exception to the hearsay rule. State v. Land, 34 S.W.3d 516, 2000 Tenn. Crim. App. LEXIS 369 (Tenn. Crim. App. 2000).

As it was not apparent that defendant's wife intended to declare his guilt by arranging an interview with police officers, her conduct was not an "assertion" and thus did not qualify as hearsay; therefore, the testimony of the officers relating to her conduct did not violate defendant's right of confrontation. State v. Sexton, 368 S.W.3d 371, 2012 Tenn. LEXIS 377 (Tenn. May 29, 2012).

5. Admission of Hearsay.

Victim's mother's testimony that the victim owned four burial plots and intended a traditional burial was properly admitted under the state-of-mind exception to the hearsay rule, and the jury might have reasonably inferred that defendant intended cremation as a method to destroy evidence of the crime. Another witness recalled defendant's remark that she intended to cremate the victim and place the victim's ashes beside her bed as a reminder not to remarry; that statement, which was relevant to establish defendant's regrets about her relationship with the victim, was admissible as a qualified admission by a party-opponent. State v. Wilson, 164 S.W.3d 355, 2003 Tenn. Crim. App. LEXIS 841 (Tenn. Crim. App. 2003), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 226 (Tenn. Mar. 8, 2004).

Witness should not have been allowed to testify that a victim said that he was talking with defendant because the identification was inadmissible hearsay; however, the witness was properly allowed to testify that the victim received a telephone call, the voice on the other end of the line was male, and the victim made arrangements to meet that male at an apartment complex for a rendezvous with a girl because those statements were admissible since they related to the victim's state of mind.

State v. Robinson, 239 S.W.3d 211, 2006 Tenn. Crim. App. LEXIS 902 (Tenn. Crim. App. Nov. 17, 2006).

Court did not err in admitting the victim's statement under the dying declaration exception because there was testimony regarding the victim's condition after defendant shot him four times, the victim was fading in and out of consciousness, was in shock, was bleeding heavily from multiple gunshot wounds, and the victim appeared to be in distress, looked concerned, scared, and worried, and was using an oxygen mask. State v. Taylor, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 160 (Tenn. Crim. App. Apr. 20, 2021).

6. Not Hearsay.

In a child sexual abuse case, defendant's statement that he told the child-victim that she could not move to the next gymnastic level unless she could perform a back handspring was not offered for its truth, but was offered to show circumstantially that friction developed between the child and defendant regarding gymnastic skills, and thus the statement was important in the fact that it was made, not its truth; however, the error in not admitting the statement was harmless because, in light of other testimony that was essentially the same, the error did not prejudice defendant. State v. Schiefelbein, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 138 (Tenn. Crim. App. Feb. 8, 2007), modified, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 213 (Tenn. Crim. App. Mar. 7, 2007).

Denial of inmate's petition for post-conviction relief was improper because witness testimony at issue was not being offered for the truth of the matter asserted, which was that the mother was responsible for the victim's death, but rather to demonstrate that trial counsel was deficient in not calling the witnesses to trial; therefore, post-conviction court erred in striking the testimony as hearsay, and in doing so abused its discretion. Pylant v. State, 263 S.W.3d 854, 2008 Tenn. LEXIS 626 (Tenn. Sept. 25, 2008).

Insured's attorney was attempting to elicit third-party testimony regarding a matter allegedly asserted by insurance agent, but he was not doing so in order to prove the truth of that alleged assertion, but rather was trying to prove simply that the assertion was made regardless of its truth or falsity; eliciting such testimony in support of estoppel defense did not implicate the hearsay rule. Harvey v. Farmers Ins. Exch., 286 S.W.3d 298, 2008 Tenn. App. LEXIS 574 (Tenn. Ct. App. Sept. 29, 2008).

In a child custody proceeding, witnesses' testimony describing their observations of a child's demeanor and actions in response to her father's telephone calls did not constitute hearsay under Tenn. R. Evid. 801(c) because the witnesses did not testify to any statements made by the child; the witnesses testified only to their interpretation of the child's body language and behavior. H.A.S. v. H.D.S., 414 S.W.3d 115, 2013 Tenn. App. LEXIS 218 (Tenn. Ct. App. Apr. 1, 2013), appeal denied, — S.W.3d —, 2013 Tenn. LEXIS 760 (Tenn. Sept. 10, 2013).

Because the video recording did not qualify as a statement as it was not an oral or written assertion or nonverbal conduct intended to be an assertion, the trial court did not err by permitting the store's owner and a detective to testify as to what they observed when they watched the video recording of the theft that occurred at the store. State v. Amail John Land, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 665 (Tenn. Crim. App. Aug. 29, 2018), appeal denied, State v. Land, — S.W.3d —, 2019 Tenn. LEXIS 51 (Tenn. Jan. 16, 2019).

Trial court did not err by admitting into evidence a witness's statement to the police that led to the discovery of one of the victims because neither investigator provided an out-of-court statement made by the witness during her interview, and because the state did not offer hearsay evidence, defendant's confrontation rights were not violated. State v. Cool, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 691 (Tenn. Crim. App. Sept. 12, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 58 (Tenn. Jan. 18, 2019).

Statements by school staff members to the child's parents about the teacher's conduct were not hearsay because the school staff members' statements were relevant to the parent's state of mind when the made the statements about the teacher that were subject of the teacher's defamation claim regardless of their truth. Finney v. Jefferson, — S.W.3d —, 2020 Tenn. App. LEXIS 428 (Tenn. Ct. App. Sept. 23, 2020).

Statements about the affidavit admitted through the officers' testimonies were properly admitted as non-hearsay and were probative as to the effect the information had on the officers and their actions; therefore, the trial court did not abuse its discretion in denying the defendant's motion in limine. State v. Campbell, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 294 (Tenn. Crim. App. Apr. 24, 2020), review denied and ordered not published, — S.W.3d —, 2020 Tenn. LEXIS 305 (Tenn. Sept. 17, 2020).

Witness's testimony that the victim told her that the victim held yard sales to raise enough money to purchase a bus ticket in order to send defendant back to Mississippi was not an express declaration of the victim's mental state but was hearsay as it was circumstantial evidence of the victim's feelings toward defendant at the time the statement was made; however, the victim's statement was circumstantial evidence of the her mental state toward defendant at the time the statement was made, and therefore, was admissible as nonhearsay as it was

admissible for the circumstantial implication that the victim intended to end her relationship with defendant, and was relevant to refute defendant's claims that he acted without premeditation. State v. Stewart, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 714 (Tenn. Crim. App. Nov. 5, 2020).

Trial court did not err in allowing a scotch-taped together paper with a police investigator's notes on it to from an interview with a co-defendant to be admitted as evidence in defendant's criminal trial because the evidence was admitted as non-hearsay evidence offered not for the truth of the matter asserted in the notes, but for the purpose of establishing defendant's mens rea in attempting to destroy the evidence by tearing up the paper. Furthermore, the court gave an appropriate limiting instruction. State v. Schubert, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 83 (Tenn. Crim. App. Mar. 9, 2021).

7. Prior Consistent Statements.

Trial court did not err in allowing a witness to testify about conversations she had with defendant's prior cellmate because the testimony was properly admitted to rebut defendant's implication of recent fabrication. During the cellmate's cross-examination, the defense implied that he fabricated defendant's statement in 1997 because he faced years in prison and wanted to secure favorable treatment and early release, and thereafter the state called the witness who testified that the cellmate relayed defendant's threat to her in 1993 when the cellmate had already been granted parole and had no motivation to lie in order to cut a deal with police. State v. Rimmer, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 322 (Tenn. Crim. App. May 21, 2019).

8. Harmless Error.

Even though the trial court erred by admitting the testimony of a sergeant concerning statements made by two witnesses because they were not prior consistent statements and the trial court's comments indicated that they were allowed merely to bolster the witness's credibility, the error was harmless because defendant did not offer any argument related to the prejudicial effect of the error, the defense was able to cross-examine the witnesses about their motivations to lie in exchange for more favorable treatment, the substance of the testimony was already in evidence, and the jury was instructed not to consider the consistent statements as substantive evidence. State v. Rimmer, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 322 (Tenn. Crim. App. May 21, 2019).

Even though the trial court erred by admitting hearsay evidence from a sergeant relaying an eyewitness' statement that the suspect was wearing a pair of gray shoes, the error was harmless because there was other evidence that provided a much stronger connection between defendant and the crime, including the cell phone records of the victim and defendant and the fact that defendant had gunshot residue on his pants. State v. Padgett, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 327 (Tenn. Crim. App. May 23, 2019).

Investigator's testimony that another fingerprint examiner had verified his identification of defendant's palm print was hearsay and improperly admitted, but the error was harmless; the most damaging testimony, the investigator's own identification of defendant's palm print and his possession of the recently stolen property, was not impacted by the inadmissible hearsay, and the evidence against the defendant was more than sufficient. State v. Kiser, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 340 (Tenn. Crim. App. June 6, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 473 (Tenn. Sept. 18, 2019).

Even though incoming texts on a cell phone were hearsay and should have been excluded, as the State sought to prove that messages documenting an ongoing series of drug transactions were found on a cell phone in the car, relied on the messages' truth, the error was harmless because of the overwhelming evidence against defendant. State v. Austin, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 695 (Tenn. Crim. App. Oct. 27, 2020).

Rule 802. Hearsay rule. —

Hearsay is not admissible except as provided by these rules or otherwise by law.

Advisory Commission Comments. The rule does not change Tennessee law.

Law Reviews. Hearsay and Informal Reasoning (Craig R. Callen), 47 Vand. L. Rev. 43 (1994).

Misunderstanding Hearsay (Donald F. Paine), 39 Tenn. B.J. 25 (2003).

NOTES TO DECISIONS

Analysis

1. Application.
2. Admissibility.
3. Inadmissible Hearsay.

1. Application.

License tag number written by a bystander to a robbery was hearsay pursuant to Tenn. R. Evid. 802. State v. Franklin, 308 S.W.3d 799, 2010 Tenn. LEXIS 415 (Tenn. Apr. 29, 2010), cert. denied, Franklin v. Tennessee, 179 L. Ed. 2d 503, 131 S. Ct. 1598, 562 U.S. 1272, 2011 U.S. LEXIS 1989 (U.S. 2011).

Though hearsay statements were improperly admitted into evidence because they were not offered against the insured but were offered to bolster his case, the appellate court declined to grant a new trial based upon that error since the information was properly admitted through other witnesses and the trial court's error did not affect the outcome of the trial when the evidence was introduced through other avenues. Riad v. Erie Ins. Exch., 436 S.W.3d 256, 2013 Tenn. App. LEXIS 712 (Tenn. Ct. App. Oct. 31, 2013), appeal denied, Riad v. Erie Ins. Exch., — S.W.3d —, 2014 Tenn. LEXIS 196 (Tenn. Mar. 4, 2014), superseded by statute as stated in, Lindenberg v. Jackson Nat'l Life Ins. Co., — F. Supp. 2d —, 2014 U.S. Dist. LEXIS 184081 (W.D. Tenn. Dec. 9, 2014).

2. Admissibility.

While trial court could review a guardian ad litem's report, which was hearsay, the report could not be used as the sole basis for determining custody. Toms v. Toms, 98 S.W.3d 140, 2003 Tenn. LEXIS 1 (Tenn. 2003).

Victim's mother's testimony that the victim owned four burial plots and intended a traditional burial was properly admitted under the state-of-mind exception to the hearsay rule, and the jury might have reasonably inferred that defendant intended cremation as a method to destroy evidence of the crime. Another witness recalled defendant's remark that she intended to cremate the victim and place the victim's ashes beside her bed as a reminder not to remarry; that statement, which was relevant to establish defendant's regrets about her relationship with the victim, was admissible as a qualified admission by a party-opponent. State v. Wilson, 164 S.W.3d 355, 2003 Tenn. Crim. App. LEXIS 841 (Tenn. Crim. App. 2003), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 226 (Tenn. Mar. 8, 2004).

In a child sexual abuse case, defendant's statement that he told the child-victim that she could not move to the next gymnastic level unless she could perform a back handspring was not offered for its truth, but was offered to show circumstantially that friction developed between the child and defendant regarding gymnastic skills, and thus the statement was important in the fact that it was made, not its truth; however, the error in not admitting the statement was harmless because, in light of other testimony that was essentially the same, the error did not prejudice defendant. State v. Schiefelbein, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 138 (Tenn. Crim. App. Feb. 8, 2007), modified, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 213 (Tenn. Crim. App. Mar. 7, 2007).

Denial of inmate's petition for post-conviction relief was improper because witness testimony at issue was not being offered for the truth of the matter asserted, which was that the mother was responsible for the victim's death, but rather to demonstrate that trial counsel was deficient in not calling the witnesses to trial; therefore, post-conviction court erred in striking the testimony as hearsay, and in doing so abused its discretion. Pylant v. State, 263 S.W.3d 854, 2008 Tenn. LEXIS 626 (Tenn. Sept. 25, 2008).

In an action stemming from an automobile accident, there was no question that the substance of the two consumer complaints at issue was hearsay and there was likewise no question that the trial court's limiting instruction could have been more artfully worded; however, the manufacturer did not object to either the substance of the limiting instruction or insist that the evidence regarding the two consumer complaints was so prejudicial that it should have been excluded, and after considering the trial court's limiting instruction in context, the instruction conveyed to the members of the jury an understanding that they should not take the substance of the consumer complaints as true. Duran v. Hyundai Motor Am., Inc., 271 S.W.3d 178, 2008 Tenn. App. LEXIS 79 (Tenn. Ct. App. Feb. 13, 2008), rehearing denied, 271 S.W.3d 178, 2008 Tenn. App. LEXIS 127 (Tenn. Ct. App. Feb. 27, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 632 (Tenn. Aug. 25, 2008).

On appeal from defendant's criminal convictions, given the proof of the on-again, off-again nature of the victim's relationship with defendant, the statements that she made shortly before her death about her fear of defendant were relevant and admissible under the state of mind exception to show not only the victim's state of mind at the time she uttered the statements, but also her probable mental state and behavior at the time of her death, including whether she would have been likely to initiate contact with defendant or willingly accompany him in her vehicle, Tenn. R. Evid. 803(3). State v. Trusty, 326 S.W.3d 582, 2010 Tenn. Crim. App. LEXIS 339 (Tenn. Crim. App. Apr. 23,

2010), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 906 (Tenn. Sept. 27, 2010).

Trial court properly excluded as hearsay portions of the expert's proffered testimony because the expert would have testified that he received instruction from unnamed officials and that he conformed his evaluation to the instructions he received; the evidence was offered for the truth of the information provided to the expert and was hearsay, and its admission was not to assist the jury in understanding the expert's opinion but to insert the opinion of another expert. Holder v. Westgate Resorts Ltd., 356 S.W.3d 373, 2011 Tenn. LEXIS 1144 (Tenn. Dec. 12, 2011).

Trial court properly admitted defendant's cell phone and images it contained because the State provided an unbroken chain of custody, and the document was properly admitted as a business record where it was made at or near the time of the event recorded, was routinely kept in the course of "business," and did not contain opinion or hearsay. State v. Norton, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 149 (Tenn. Crim. App. Mar. 8, 2019).

Trial court did not err in allowing a scotch-taped together paper with a police investigator's notes on it to from an interview with a co-defendant to be admitted as evidence in defendant's criminal trial because the evidence was admitted as non-hearsay evidence offered not for the truth of the matter asserted in the notes, but for the purpose of establishing defendant's mens rea in attempting to destroy the evidence by tearing up the paper. Furthermore, the court gave an appropriate limiting instruction. State v. Schubert, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 83 (Tenn. Crim. App. Mar. 9, 2021).

3. Inadmissible Hearsay.

Doctor's letter, which was used to bolster the defendant physician's position that he was not negligent in assessing the patient's MRI scan, was improperly admitted into evidence because it was clearly hearsay as it contained a statement made by the doctor other than while testifying at trial in which he stated that he would have interpreted the MRI scan the same as the defendant physician. Godbee v. Dimick, 213 S.W.3d 865, 2006 Tenn. App. LEXIS 601 (Tenn. Ct. App. 2006), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 66 (Tenn. 2006).

In a rape case, a court correctly excluded statements the victim made to her father that arguably suggested that a third party had committed the crimes because the statements were inadmissible extrinsic evidence of prior inconsistent statements and the exclusion did not rise to the level of a constitutional violation because the excluded evidence was not critical to the defense; the statements had little probative value to implicate another in the crime or to rebut the victim's testimony that oral penetration occurred. State v. Flood, 219 S.W.3d 307, 2007 Tenn. LEXIS 274 (Tenn. 2007).

During defendant's robbery trial, the court did not err by excluding co-defendant's statement made during an interrogation after police caught both co-defendants with stolen merchandise in their car; the statements were inadmissible hearsay under Tenn. R. Evid. 801 or Tenn. R. Evid. 802. State v. Dotson, 254 S.W.3d 378, 2008 Tenn. LEXIS 277 (Tenn. Apr. 28, 2008).

Trial court did not abuse its discretion in refusing to admit certain videos into evidence because a decedent's daughter did not demonstrate that the videos fit within any hearsay exception. Bottorff v. Sears, — S.W.3d —, 2018 Tenn. App. LEXIS 430 (Tenn. Ct. App. July 25, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 764 (Tenn. Dec. 6, 2018), cert. denied, 204 L. Ed. 2d 1145, 139 S. Ct. 2759, — U.S. —, 2019 U.S. LEXIS 4286 (U.S. June 24, 2019).

In a wrongful death action, the trial court erred in granting defendant's motion for summary judgment as defendant could not rely on the documents that accompanied her motion for summary judgment to satisfy her initial burden of proof because, inter alia, the unverified documents constituted inadmissible hearsay; and the presentation of the documents wholly failed to meet the requirement that the documents be authenticated as a condition precedent to admissibility. Smith ex rel. Agee v. Palmer, — S.W.3d —, 2019 Tenn. App. LEXIS 53 (Tenn. Ct. App. Jan. 30, 2019).

Petitioner failed to show that the postconviction court erred by failing to consider his brother's recorded interview as substantive evidence because it properly admitted the brother's postconviction testimony as substantive evidence. The postconviction court expressly accredited the brother's testimony over his recorded statements and implicitly held that his recorded interview was inadmissible hearsay. Lackey v. State, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 99 (Tenn. Crim. App. Feb. 19, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 355 (Tenn. July 18, 2019).

Witness's testimony about the contents of her recorded statement to a detective, as opposed to her recollection of prior events after having refreshed her recollection by reviewing the statement, was inadmissible hearsay because it was evidence of the contents of her prior statement and was offered to prove the truth of the matter asserted. State v. Ward, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 202 (Tenn. Crim. App. Apr. 1, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 331 (Tenn. July 18, 2019).

Trial court did not abuse its discretion by not permitting defendant to present a police sergeant as a defense witness in an effort to establish that an individual was present on the night of a shooting because the sergeant would not have been permitted to testify about the

substance of the sergeant's interview with the individual after the shooting, as it would have elicited inadmissible hearsay evidence. State v. Corbin, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 664 (Tenn. Crim. App. Oct. 9, 2020).

Rule 803. Hearsay exceptions. —

The following are not excluded by the hearsay rule:

(1) [Reserved.]

Advisory Commission Comments.

The proposed rules contain no present sense impression exception.

Textbooks.

Tennessee Forms (Robinson, Ramsey and Harwell), No. 3-16-1.

(1.1) Prior Statement of Identification by Witness. — A statement of identification of a person made after perceiving the person if the declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement.

Advisory Commission Comments.

Tennessee recognizes declarations of eye-witness identification as an exception to hearsay exclusion, and the rule generally follows Tennessee precedent. Note that the declarant must also be a witness, affording at least delayed cross-examination as to the extrajudicial statement. Note also, however, that witnesses other than the declarant may testify about the identifying declaration. Perhaps the rule changes Tennessee law in this respect. See *Blankenship v. State*, 432 S.W.2d 679, 684 (Tenn. Crim. App. 1967).

(1.2) Admission by Party-Opponent. — A statement offered against a party that is (A) the party's own statement in either an individual or a representative capacity, or (B) a statement in which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by an agent or servant concerning a matter within the scope of the agency or employment made during the existence of the relationship under circumstances qualifying the statement as one against the declarant's interest regardless of declarant's availability, or (E) a statement by a co-conspirator of a party during the course of and in furtherance of the conspiracy, or (F) a statement by a person in privity of estate with the party. An admission is not excluded merely because the statement is in the form of an opinion. Statements admissible under this exception are not conclusive.

Advisory Commission Comments.

Most of the rule embodies Tennessee common law. In part (D), though, present law is extended to clearly allow an agent's post-accident declarations to come in against the principal if the subject matter of the declarations is "within the scope of the agency." A driver who tells bystanders about driving mistakes may face those declarations in court, and likewise the driver's employer may have to deal with these vicarious admissions at trial. In the absence of a rule such as that proposed, Tennessee has excluded such declarations. *Citizens' Street R.R. Co. v. Howard*, 102 Tenn. 474, 52 S.W. 864 (1899).

Other requirements for vicarious admissions are (1) that the agency relationship exist at the time of a declaration and (2) that the declarant's statement be against his or her own interest. The latter proviso is to prevent agents and employees from gratuitously harming superiors for their own benefit.

The rule at part (F) retains common law admissibility of declarations by predecessors in title.

The final sentence is intended to abolish the distinction between evidentiary (unsworn) and judicial (sworn) admissions. Unless made con-

clusive by statute or another court rule, such as Tenn. R. Civ. P. 36.02 on requests for admission, party admissions are subject to being explained away by contradictory proof. But the final sentence is not intended to affect the doctrine of judicial estoppel. That doctrine involves two separate lawsuits and bars contradiction by a party in the second suit of that party's sworn statement in the first suit. See *Marcus v. Marcus*, 993 S.W.2d 596 (Tenn. 1999). In contrast the last sentence of this evidence rule contemplates a single lawsuit in which a party's admissions, sworn or not, can be contradicted.

This rule changes the law as stated in Tennessee decisions excluding party admissions phrased in terms of fault. See, e.g., *King v. Leeman*, 30 Tenn. App. 206, 204 S.W.2d 384 (1946), excluding the plaintiff's admission that a driver other than the defendant was "to blame." Such an admission, even though in opinion form, is competent evidence under Rule 803(1.2).

(2) Excited Utterance. — A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

Advisory Commission Comments.
The rule restates Tennessee law.

(3) Then Existing Mental, Emotional, or Physical Condition. — A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will.

Advisory Commission Comments.
This is the state of mind hearsay exception, long recognized by Tennessee courts. Combining the hearsay exception with relevancy principles, declarations of mental state will be admissible to prove mental state at issue or subsequent conduct consistent with that mental state.

Normally such declarations are inadmissible to prove past conduct. Most jurisdictions, however, admit express mental state to prove the prior making or revocation of a will. Tennessee is in the minority by excluding the evidence in wills cases. *Hickey v. Beeler*, 180 Tenn. 31, 171 S.W.2d 277 (1943). The proposal would change the *Hickey* result and make declarations of mental state competent to prove past conduct in lawsuits concerning wills.

The Commission contemplates that only the declarant's conduct, not some third party's conduct, is provable by this hearsay exception. It views decisions such as *Ford v. State*, 184 Tenn. 443, 201 S.W.2d 539 (1945), as based on faulty analysis.

In addition to declarations of mental state, this proposal also governs declarations of present ("then existing") physical condition. The declaration need not be made to a doctor; any witness who overheard the hearsay statement could repeat it in court under this exception.

(4) Statements for Purposes of Medical Diagnosis and Treatment. — Statements made for purposes of medical diagnosis and treatment describing medical history; past or present symptoms, pain, or sensations; or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis and treatment.

Advisory Commission Comments.
The proposal continues the Tennessee position of limiting declarations of past physical condition to those made to treating doctors. See *Gulf Refining Co. v. Frazier*, 15 Tenn. App. 662, 688-95 (1932). The declaration must be for both diagnosis and treatment. Declarations of present bodily condition fall within Rule 803(3).

It is important to distinguish declarations of bodily condition, admissible as substantive evidence, from similar declarations used by a physician to support an expert opinion. The latter are not evidence, but rather give weight to the opinion — which is the evidence. Tenn. Code Ann. § 24-7-114; *State v. Holt*, 222 Tenn. 721, 440 S.W.2d 591 (1969); see Rule 703.

(5) Recorded Recollection. — A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness's memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.

Advisory Commission Comments.

The proposed rule recognizes the traditional Tennessee hearsay exception for past recollection recorded, but it expands common law in two respects. It allows the admissibility of the contents of a document reflecting past recollection recorded even though the witness has some recollection of the recorded facts but not enough to testify "fully and accurately." Second, it permits the witness to adopt a record made by another not acting under the witness's supervision. The safeguard is the requirement of adoption at the time when the witness could vouch for the document's correctness.

The proposal restricts the common law by confining presentation of the document to reading the contents rather than exhibiting the paper to the jury. Tennessee law presently permits the writing to be handed to the jurors and, in civil cases, to be taken to the jury room. Tenn. Code Ann. § 20-9-510. This change is designed to prevent the jury from giving more weight to this hearsay evidence than would have been given to the declarant's live testimony had the declarant been able to testify from present memory.

But note Tenn. Code Ann. § 55-10-114(b) and *McBee v. Williams*, 56 Tenn. App. 232, 405 S.W.2d 668 (1966), concerning accident reports. See the Comment to Rule 803(8).

(6) Records of Regularly Conducted Activity. — A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses made at or near the time by or from information transmitted by a person with knowledge and a business duty to record or transmit if kept in the course of a regularly conducted business activity and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness or by certification that complies with Rule 902(11) or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, profession, occupation, and calling of every kind, whether or not conducted for profit. [As amended by order entered January 23, 2001, effective July 1, 2001.]

Advisory Commission Comments.

This rule essentially is the same as the Uniform Business Records as Evidence Act, Tenn. Code Ann. § 24-7-111 [repealed]. To avoid interpretive mistakes such as that in *Wheeler v. Cain*, 62 Tenn. App. 126, 459 S.W.2d 618 (1970), the proposal specifically requires that the declarant have "a business duty to record or transmit" information. Without that duty, a business record would lack the trustworthiness necessary to carve out a hearsay exception.

Advisory Commission Comments [1994].

Police reports of traffic accidents are inadmissible under Tenn. Code Ann. § 55-10-114(b) and Tenn. R. Evid. 803(8).

Advisory Commission Comments [2001].

Amended Rule 803(6) in conjunction with new Rule 902(11) eliminates the need to call the custodian of records as a trial witness. Such a procedure has been in effect by statute for medical business records. See Tenn. Code Ann. §§ 24-9-101(8) & 68-11-401 et seq.

(7) [Reserved.]

Advisory Commission Comments.
It is doubtful that the absence of a business entry poses a hearsay problem. Consequently, although F.R.Evid. 803(7) contains a purported exception, the Commission found no need for an exception.

(8) Public Records and Reports. — Unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness, records, reports, statements, or data compilations in any form of public offices or agencies setting forth the activities of the office or agency or matters observed pursuant to a duty imposed by law as to which matters there was a duty to report, excluding, however, matters observed by police officers and other law enforcement personnel. [As amended by order entered January 25, 1991, effective July 1, 1991.]

Advisory Commission Comments.
The rule admits records of public officials acting under an official duty to report accurately. This is the traditional official records hearsay exception. Tenn. R. Civ. P. 44 [repealed]; Tenn. Code Ann. §§ 24-6-105 — 107.

Police reports are expressly excluded, just as they are under current law in some instances. See *McBee v. Williams*, 56 Tenn. App. 232, 405 S.W.2d 668 (1966), construing Tenn. Code Ann. § 55-10-114(b) to exclude accident reports. See also Tenn. Code Ann. § 55-12-108(b), excluding Department of Safety determinations of fault in automobile accidents.

[Deleted in 1993: As to other statutory modifications and decisional embellishments, see *Tennessee Law of Evidence* §§ 82-86.]

The Commission borrowed language from subsections (A) and (B) of F.R.Evid. 803(8), but it expressly rejected federal subsection (C) on factual findings from investigations. The term "activities" in proposed subsection (A) is limited to the internal operations of a public office, making this category of official records much like business records of a private organization. The introductory language cautions that sources of information must be trustworthy.

Advisory Commission Comments [1991].
This is a technical correction.

Advisory Commission Comments [1993].
Delete the third paragraph of the comment.

(9) Records of Vital Statistics. — Records or data compilations in any form of births, fetal deaths, deaths, marriages, or divorces, if the report was made to a public office pursuant to requirements of law. [As amended by orders entered January 25, 1991, effective July 1, 1991, and February 13, 1991, effective July 1, 1991.]

Advisory Commission Comments.
Vital statistics, a particular variety of official records, come in under this exception. Tennessee law is unchanged. Tenn. Code Ann. § 68-3-101 et seq.

Advisory Commission Comments [1991].
The amendment adds divorce records to the list of vital statistics.

(10) [Reserved.]

Advisory Commission Comments.
Although Tenn. Code Ann. § 24-6-107 permits a filing officer to certify complete absence of an alleged record in the files, there is no Tennessee authority for making this absence a hearsay exception. Moreover, since the Commission believes that the absence of an entry in a public record is not a hearsay statement, no hearsay exception is needed. F.R.Evid. 803(10) purports to state a hearsay exception.

(11) [Reserved.]

Advisory Commission Comments.
The Commission did not believe records of religious organizations were uniformly reliable enough to satisfy hearsay exception requirements.

(12) Marriage, Baptismal, and Similar Certificates. — Statements of fact contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament made by a member of the clergy, a public official, or another person authorized by the rules or practices of a religious organization or by law to perform the act certified and purporting to have been issued at the time of the act or within a reasonable time thereafter.

Advisory Commission Comments.
This exception is similar to those in Rules 803(8) and (9). Marriage and baptism necessarily involve religious or official participation, and the religious or public record is evidence of the fact of baptism or marriage.

(13) Family Records. — Statements of fact concerning personal or family history contained in family Bibles, genealogies, engravings on rings, inscriptions on family portraits, engravings on burial urns, crypts, tombstones, or the like. [As amended by order entered January 25, 1991, effective July 1, 1991.]

Advisory Commission Comments.
While not always trustworthy, family records of the kinds described here may be the only evidence available. In any event, once admitted through this hearsay exception, the facts can be rebutted.

Advisory Commission Comments [1991].
This is a technical amendment.

Law Reviews.
Discovery and Admissibility of Accident Reports (Donald F. Paine), 27 Tenn. B.J. 125.

Hospital Records as Evidence: New Rules and Old Statutes (Donald F. Paine), 26 Tenn. B.J. 25 (1990).

Physical Condition in the New Tennessee Rules of Evidence (Donald F. Paine), 26 Tenn. B.J. 25 (1990).

(14) Records of Documents Affecting an Interest in Property. — The record of a document purporting to establish or affect an interest in property as proof of the contents of the original recorded document and its execution and delivery by each person by whom it purports to have been executed if the record is a record of a public office and an applicable statute authorizes the recording of documents of that kind in that office.

Advisory Commission Comments.
This exception is a narrow one. It admits only three facts about a recorded deed, financing statement, or other property instrument: (1) the contents of a certified copy are identical to the filed original, (2) the original was executed, and (3) the original was delivered (if that step is necessary).

(15) [Reserved.]

Advisory Commission Comments.
Statements of "fact" in a warranty deed, trust deed, or security agreement are not trustworthy enough to justify admissibility as truth. Consequently, the Commission rejected the contrary view in F.R.Evid. 803(15).

(16) Statements in Ancient Documents Affecting an Interest in Property. — Statements in a document in existence thirty years or more purporting to establish or affect an interest in property, the authenticity of which is established.

Advisory Commission Comments.
If a document — be it a deed, security agreement, or other instrument — affects a property interest, and if it is thirty years old and authentic, the trier of fact may take as true statements within the document. Proposed Rule 901(b) makes thirty years of age one of the requisites for authentication, but the offering lawyer must also establish normal custody and lack of suspicion.

Tennessee decisions treat admissibility of ancient deeds, but the proposed exception updates the law to cover other property instruments. Otherwise, the rule is consistent with present Tennessee law. It departs markedly from F.R.Evid. 803(16) which provides a hearsay exception for any (not just property) documents at least twenty years old.

(17) Market Reports and Commercial Publications. — Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

Advisory Commission Comments.
Tennessee's Uniform Commercial Code admits commodity market quotations in Tenn. Code Ann. § 47-2-724. The proposed exception extends the exception to other publications generally relied upon by the public.

(18) [Reserved.]

Advisory Commission Comments.
Learned treatises can be used to impeach an expert but are not themselves admissible to prove the truth of their contents. No good reason exists to permit hearsay to be taken as true just because it is written in books. F.R. Evid. 803(18) is contra.

(19) Reputation Concerning Personal or Family History. — Reputation among members of a person's family by blood, adoption, or marriage or among associates or in the community concerning a person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history.

Advisory Commission Comments.
The rule admits reputation to prove pedigree, and that is the common law and Tennessee position. To introduce an individual's declaration to prove pedigree, see Rule 804(b)(4).

The proposal contains no requirement that the reputation have existed before the controversy developed.

(20) Reputation Concerning Ancient Boundaries. — Reputation in a community, arising before the controversy and existing thirty years, as to the boundaries of or customs affecting lands in the community.

Advisory Commission Comments.
The rule mirrors current Tennessee law.

(21) Reputation As to Character. — Reputation of a person's character among associates or in the community.

Advisory Commission Comments.
Character evidence primarily involves relevancy issues, but it requires a hearsay exception as well to gain admittance. This hearsay exception is standard.

The exception satisfies the hearsay exclusionary rule, but other evidence principles must be satisfied as well. See Proposed Rules 404, 405, and 408.

(22) Judgment of Previous Conviction. — Evidence of a final judgment adjudging a person guilty of a crime punishable by death or imprisonment in

excess of one year to prove any fact essential to sustain the judgment, but not including, when offered by the prosecution in a criminal case for purposes other than impeachment, judgments against persons other than the accused. The pendency of an appeal may be shown but does not affect admissibility.

Advisory Commission Comments.

The rule adopts the federal approach admitting felony conviction records to prove underlying facts necessary to the judgment. Tennessee has followed the common law view excluding such evidence. *Smith v. Phillips*, 43 Tenn. App. 364, 309 S.W.2d 382 (1956).

Civil judgments are routinely admitted to bar relitigation on res judicata principles. In limited circumstances, federal constitutional law collaterally estops subsequent prosecutions.

The Commission believed that a jury's finding beyond a reasonable doubt that a serious crime was committed should be admitted in a later civil or criminal trial to prove the underlying facts necessary to the judgment of conviction. Because facts proving minor crimes may not have been developed at trial, the rule would exclude judgments for lesser infractions from this hearsay exception.

(23) Judgment As to Personal or Family History or Boundaries. — Judgments as proof of matters of personal or family history or boundaries, which matters were essential to the judgment.

Advisory Commission Comments.

The rule makes civil and criminal judgments admissible to prove boundaries and personal or family history. Reliability is relatively high, and need is great.

(24) [Reserved.]

Advisory Commission Comments.

The proposed rules contain no residual exception such as that in Fed.R.Evid. 803(24).

(25) Children's Statements. — Provided that the circumstances indicate trustworthiness, statements about abuse or neglect made by a child alleged to be the victim of physical, sexual, or psychological abuse or neglect, offered in a civil action concerning issues of dependency and neglect pursuant to Tenn. Code Ann. § 37-1-102(b)(12), issues concerning severe child abuse pursuant to Tenn. Code Ann. § 37-1-102(b)(21), or issues concerning termination of parental rights pursuant to Tenn. Code Ann. § 37-1-147 and Tenn. Code Ann. § 36-1-113, and statements about abuse or neglect made by a child alleged to be the victim of physical, sexual, or psychological abuse offered in a civil trial relating to custody, shared parenting, or visitation. Declarants of age thirteen or older at the time of the hearing must testify unless unavailable as defined by Rule 804(a); otherwise this exception is inapplicable to their extrajudicial statements.

Advisory Commission Comments.

Rule 803(25) is a narrow exception. It applies only if the specified issues are material. Even then it is inapplicable if the minor declarant has reached age thirteen by the time of hearing and is available as a witness but does not testify.

Declarations under this hearsay exception are inadmissible if "circumstances indicate lack of trustworthiness." Courts should carefully consider the motivation of particular minor declarants and also the motivation of some adults to influence children. Also worthy of consideration is the presence or absence of evidence corroborating the hearsay statement. As with all hearsay offered at trial, balancing under Rule 403 is appropriate.

The exception is not limited to juvenile court hearings, although it replaces a portion of T. R. Juv. P. 28(c). This new exception applies, for example, in a circuit court trial concerning the itemized issues. The exception is limited by its

terms to civil actions as opposed to criminal prosecutions.

The bench and bar should keep in mind that other exceptions in Rule 803 and 804 may serve to admit children's hearsay declarations. Examples include excited utterances, declarations of mental state, declarations of physical condition, or former testimony. Also, some extrajudicial statements are relevant on a nonhearsay basis.

Certain juvenile proceedings other than adjudicatory hearings admit "reliable hearsay." See T. R. Juv. P. 15(b), 16(a), and 32(f).

Advisory Commission Comments [2003]. Rule 803(25) is amended to extend the children's statements exception to some issues in a divorce action tried in circuit or chancery courts. Note that a condition precedent to admissibility in any court, including juvenile, is that "the circumstances indicate trustworthiness" of the hearsay.

Another change incorporates revisions in statutory citations.

(26) Prior Inconsistent Statements of a Testifying Witness. — A statement otherwise admissible under Rule 613(b) if all of the following conditions are satisfied:

(A) The declarant must testify at the trial or hearing and be subject to cross-examination concerning the statement.

(B) The statement must be an audio or video recorded statement, a written statement signed by the witness, or a statement given under oath.

(C) The judge must conduct a hearing outside the presence of the jury to determine by a preponderance of the evidence that the prior statement was made under circumstances indicating trustworthiness. [As amended by order entered January 28, 1993, and effective July 1, 1993; by order entered January 31, 2003, and effective July 1, 2003; and by order entered January 8, 2009, and effective July 1, 2009.]

Advisory Commission Comments [2009]. Subsection (26) alters Tennessee law by permitting some prior inconsistent statements to be treated as substantive evidence. Many other jurisdictions have adopted this approach to address circumstances where witnesses suddenly claim a lack of memory in light of external threats of violence which cannot be directly attributed to a party, for example. This rule incorporates several safeguards to assure that the prior inconsistent statements are both reliable and authentic.

To be considered as substantive evidence the statement must first meet the traditional conditions of admissibility which include the procedural aspects of inconsistent statements as addressed in Rule 613. This reference also makes clear that only prior inconsistent statements, and not consistent statements, are within the ambit of this rule.

Assuming the inconsistent statement is otherwise admissible to impeach the testifying witness, the party may then seek to have the statement treated as substantive evidence by complying with the rule's other requirements. Other rules address authenticity of documents and recordings which clearly apply here. *See e.g.* Rule 1001. However, this rule contains additional express requirements regarding the form of the prior statement so that the jury is assured that the statement contains the actual 'words' of the witness on a prior occasion. For example the prior statement must be an audio or video recorded statement. A "police report" or insurance investigator's "transcription" of the recorded statement would not qualify since it is not literally the witness's own words contained on audio or video media.

If not recorded, the prior statement can be in written form (created by the witness or by another) but then must be signed by the witness. The commission intends that the "signed" requirement must be equated with an actual signature as opposed to some email document which happens to have the witness's name on the address. Finally, the rule permits a prior statement to be treated as substantive evidence if given under oath.

The rule requires that the party seeking to have the statement treated as substantive evidence request a hearing out of the presence of the jury to satisfy the judge "by a preponderance of the evidence that the prior statement was made under circumstances indicating trustworthiness." This is to prevent fraud such as where a parent tape records a child after training the child to say "bad things" about the other parent in anticipation of a custody dispute. Rules 703 (Bases of Opinion Testimony by Experts) and 803(6) (Records of Regularly Conducted Activity) contain similar judicial gatekeeping requirements.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Su-

preme Court in its order dated January 31, 2003, was ratified and approved by 2003 House Resolution 22 and Senate Resolution 10. The order promulgating the 2003 amendment of this rule provided that it take effect on July 1, 2003.

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 8, 2009, was ratified and approved by 2009 House Resolution 14 and Senate Resolution 17. The order promulgating the amendment of this rule provided that it take effect July 1, 2009.

Law Reviews. "Admissions against interest" (Donald F. Paine), 43 Tenn. B.J. 32 (2007).

Ancient Documents (Donald F. Paine), 41 No. 2 Tenn. B.J. 40 (2005).

Contrasting "Present Recollection Refreshed" with "Past Recollection Recorded" (Donald F. Paine), 35 Tenn. B.J. 27 (1999).

Evidence — State v. Barone: Limiting the Scope of the Hearsay Exception in Tennessee Rule 803(4), 25 U. Mem. L. Rev. 193.

Excited Utterance: Brad Cunningham's Comeuppance (Donald F. Paine), 41 No. 1 Tenn. B.J. 33 (2005).

Family Law — Alexander v. Inman: The Tennessee Court of Appeals Establishes Guidelines for Contingent Attorneys' Fees in Domestic Relation Cases, 26 U. Mem. L. Rev. 1575 (1996).

Hearsay and Informal Reasoning (Craig R. Callen), 47 Vand. L. Rev. 43 (1994).

Hearsay in 10 Easy Steps (Donald F. Paine), 33 Tenn. B.J. 3 (1997).

Is There a 911 Call Exception to the Hearsay Rule? (Donald F. Paine), 35 Tenn. B.J. 21 (1999).

Juvenile Court Hearsay (Donald F. Paine), 36 Tenn. B.J. 35 (2000).

Recent Changes in Tennessee Evidence Law (Donald F. Paine), 34 Tenn. B.J. 14 (1998).

Tennessee Rule of Evidence 803(4) — The Admissibility of Statements Made by Victims of Child Sexual Abuse to Physicians During Physical Examinations, 66 Tenn. L. Rev. 875 (1999).

The Minor Hearsay Exceptions (Donald F. Paine), 38 Tenn. B.J. 33 (2002).

The Ten Commandments of Direct Examination (Donald F. Paine), 36 Tenn. B.J. 20 (2000).

Witness for the Prosecution (Donald F. Paine), 36 Tenn. B.J. 31 (2000).

NOTES TO DECISIONS

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1. In General.

Even though the trial court erred by allowing an officer to testify under Tenn. R. Evid. 803(19) that he knew through a family member that defendant and his accomplice were cousins, the error was harmless because the cellmate testified that defendant confessed to the crimes and the victim's wife placed defendant at the scene of the crimes. State v. Taylor, 240 S.W.3d 789, 2007 Tenn. LEXIS 1083 (Tenn. Dec. 19, 2007).

Before a witness is allowed to testify about another person's reputation for familial relationships pursuant to Tenn. R. Evid. 803(19), the trial court must be satisfied that the witness is going to testify about a reputation and not merely a single interpretation of an alleged reputation. State v. Taylor, 240 S.W.3d 789, 2007 Tenn. LEXIS 1083 (Tenn. Dec. 19, 2007).

Health club member offered a recitation of the statement purportedly made by staff member of the health club to prove that the health club had prior knowledge of the criminal conduct of another member of the health club. Accordingly, the staff member's statement was inadmissible at trial because the purported statement was hearsay, as it was offered for the truth of the matter asserted, and the health club member failed to establish that the hearsay statement fit one of the exceptions to the hearsay rule. Boswell v. YMCA, — S.W.3d —, 2019 Tenn. App. LEXIS 160 (Tenn. Ct. App. Mar. 29, 2019).

2. State of Mind Exception.

In murder trial where white defendant was accused of killing black victim, the trial court correctly admitted testimony about defendant's statement evidencing his dislike for blacks under the state of mind exception to the hearsay rule. State v. Middlebrooks, 840 S.W.2d 317, 1992 Tenn. LEXIS 563 (Tenn. 1992), cert. dismissed, Tennessee v. Middlebrooks, 510 U.S. 124, 114 S. Ct. 651, 126 L. Ed. 2d 555, 1993 U.S. LEXIS 7942 (1993), cert. denied, Tennessee v.

Middlebrooks, 510 U.S. 1064, 114 S. Ct. 740, 126 L. Ed. 2d 702, 1994 U.S. LEXIS 402 (1994), superseded by statute as stated in, State v. Banks, 271 S.W.3d 90, 2008 Tenn. LEXIS 963 (Tenn. 2008).

In quiet title proceeding, a statement to the deceased that defendant was going to build a garage on the property and after he built the garage the property would be his, and that the deceased made no verbal response, but simply turned and walked away, was inadmissible under the state-of-mind exception in Tenn. R. Evid. 803(3). Hulsey v. Bush, 839 S.W.2d 411, 1992 Tenn. App. LEXIS 340 (Tenn. Ct. App. 1992).

In a murder trial, defendant's threat, while not directed specifically at the victim, went to the group of individuals gathered together that night drinking and gambling and the statement was relevant in showing appellant's intent at the time. State v. Ray, 880 S.W.2d 700, 1993 Tenn. Crim. App. LEXIS 253 (Tenn. Crim. App. 1993).

In a murder prosecution, testimony of coconspirator as to a statement made by the victim regarding the prior action of a codefendant was inadmissible hearsay since it did not relate to conduct of the declarant, but to the conduct of a third party. State v. Hutchison, 898 S.W.2d 161, 1994 Tenn. LEXIS 157 (Tenn. 1994), rehearing denied, 898 S.W.2d 161, 1995 Tenn. LEXIS 198 (1995), cert. denied, Hutchinson v. Tennessee, 516 U.S. 846, 116 S. Ct. 137, 133 L. Ed. 2d 84, 1995 U.S. LEXIS 5846 (1995), dismissed, Hutchison v. Bell, — F. Supp. 2d —, 2010 U.S. Dist. LEXIS 31736 (E.D. Tenn. Mar. 30, 2010).

In a murder prosecution, testimony regarding statements of the victim which could have qualified as threats against defendant should have been admitted; that the statements were made several months before the shooting went to the weight of the evidence rather than its admissibility. State v. Ruane, 912 S.W.2d 766, 1995 Tenn. Crim. App. LEXIS 584 (Tenn. Crim. App. 1995).

In a murder prosecution, testimony regarding the victim's statement that he believed defendant was going to kill him was admissible as an exception to the hearsay rule, but was not directly probative on the issue of whether defendant murdered the victim. State v. Bragan, 920 S.W.2d 227, 1995 Tenn. Crim. App. LEXIS 541 (Tenn. Crim. App. 1995), rehearing denied, — S.W.2d —, 1995 Tenn. Crim. App. LEXIS 717 (1995).

The state of mind exception to the hearsay rule contemplates that only the declarant's conduct, not a third party's conduct, is provable by this hearsay exception. State v. Leming, 3 S.W.3d 7, 1998 Tenn. Crim. App. LEXIS 1055 (Tenn. Crim. App. 1998).

Where defendant's opening statement suggested that the victim committed suicide, evidence regarding the victim's state of mind at a time near that of the murder was relevant. State v. Long, 45 S.W.3d 611, 2000 Tenn. Crim. App. LEXIS 409 (Tenn. Crim. App. 2000).

Uncommunicated threat made by a victim is admissible as an exception to the rule excluding hearsay statements as an indication of the victim's state of mind, and evidence showing the victim's status as an aggressor is not excluded by Tenn. R. Evid. 403, even if there is substantial evidence, including a stipulation, that the victim was in fact the aggressor; however, a trial court's failure to admit such a statement did not constitute reversible error, because the outcome of the trial was not affected, where the evidence showed that defendant used more force than necessary to show self-defense. State v. Saylor, 117 S.W.3d 239, 2003 Tenn. LEXIS 861 (Tenn. 2003), cert. denied, Saylor v. Tennessee, 540 U.S. 1208, 124 S. Ct. 1483, 158 L. Ed. 2d 133, 2004 U.S. LEXIS 1500 (2004).

Victim's mother's testimony that the victim owned four burial plots and intended a traditional burial was properly admitted under the state-of-mind exception to the hearsay rule, and the jury might have reasonably inferred that defendant intended cremation as a method to destroy evidence of the crime. State v. Wilson, 164 S.W.3d 355, 2003 Tenn. Crim. App. LEXIS 841 (Tenn. Crim. App. 2003), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 226 (Tenn. Mar. 8, 2004).

Witness should not have been allowed to testify that a victim said that he was talking with defendant because the identification was inadmissible hearsay; however, the witness was properly allowed to testify that the victim received a telephone call, the voice on the other end of the line was male, and the victim made arrangements to meet that male at an apartment complex for a rendezvous with a girl because those statements were admissible since they related to the victim's state of mind. State v. Robinson, 239 S.W.3d 211, 2006 Tenn. Crim. App. LEXIS 902 (Tenn. Crim. App. Nov. 17, 2006).

Defendant's conviction for the aggravated rape of a child was proper because, even if the victim's statement was not admissible under the excited utterance exception, the portion of the victim's hearsay statement in which she told her mother that "it hurt" would have also been admissible as an existing state of mind, emotion, sensation, or physical condition under Tenn. R. Evid. 803(3). State v. Ramos, 331 S.W.3d 408, 2010 Tenn. Crim. App. LEXIS 195 (Tenn. Crim. App. Mar. 3, 2010), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 754 (Tenn. Aug. 26, 2010).

On appeal from defendant's criminal convictions, given the proof of the on-again, off-again nature of the victim's relationship with defendant, the statements that she made shortly before her death about her fear of defendant

were relevant and admissible under the state of mind exception to show not only the victim's state of mind at the time she uttered the statements, but also her probable mental state and behavior at the time of her death, including whether she would have been likely to initiate contact with defendant or willingly accompany him in her vehicle, Tenn. R. Evid. 803(3). State v. Trusty, 326 S.W.3d 582, 2010 Tenn. Crim. App. LEXIS 339 (Tenn. Crim. App. Apr. 23, 2010), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 906 (Tenn. Sept. 27, 2010).

Trial court did not err in allowing a witness to testify about the victim's statements to him concerning her fear of defendant, as it went to the victim's statement of mind, that she feared defendant and not her daughter, whom defendant tried to claim committed the crime. State v. Hawkins, 519 S.W.3d 1, 2017 Tenn. LEXIS 272 (Tenn. May 1, 2017).

Trial court did not err in excluding hearsay testimony from a proposed witness that, a few weeks prior to the murder, the victim was "worried" because his car was vandalized because it was not offered to to prove the victim's then state of mind or subsequent conduct, but to prove the conduct of a third party, as defendant sought to introduce the testimony to prove that an unknown third person killed the victim or to impeach the reliability of the police investigation. State v. Thomas, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 270 (Tenn. Crim. App. Apr. 25, 2019).

Witness's testimony that the victim told her that the victim held yard sales to raise enough money to purchase a bus ticket in order to send defendant back to Mississippi was not an express declaration of the victim's mental state but was hearsay as it was circumstantial evidence of the victim's feelings toward defendant at the time the statement was made; however, the victim's statement was circumstantial evidence of the her mental state toward defendant at the time the statement was made, and therefore, was admissible as nonhearsay as it was admissible for the circumstantial implication that the victim intended to end her relationship with defendant, and was relevant to refute defendant's claims that he acted without premeditation. State v. Stewart, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 714 (Tenn. Crim. App. Nov. 5, 2020).

3. Expressed Fear of Defendant.

Statements made by a murder victim expressing fear of the defendant were not directly probative of whether the defendant committed murder. State v. Leming, 3 S.W.3d 7, 1998 Tenn. Crim. App. LEXIS 1055 (Tenn. Crim. App. 1998).

Although evidence that victim was fearful of the defendant appeared to be admissible under Tenn. R. Evid. 803(3) to show the victim's state of mind, the evidence was still not relevant because the victim's state of mind was not directly probative of whether the defendant burned the victim. State v. Burns, 29 S.W.3d 40, 1999 Tenn. Crim. App. LEXIS 977 (Tenn. Crim. App. 1999).

4. Admission by Party Opponent.

Brief of defendant which contained an appendix which included an opinion of the supreme court in a previous appeal of a post-divorce decree proceeding was not competent evidence, but it did constitute an admission of fact by a party to be considered against that party. Inman v. Inman, 840 S.W.2d 927, 1992 Tenn. App. LEXIS 575 (Tenn. Ct. App. 1992).

Defendant's admission to the officer that he used automobile to transport marijuana seeds was competent evidence, and while not conclusive, it did supply evidence which was both substantial and material of forfeiture proceedings. Hill v. Lawson, 851 S.W.2d 822, 1992 Tenn. App. LEXIS 959 (Tenn. Ct. App. 1992).

An adoption of another's statement may be either expressed or implied. State v. Little, 854 S.W.2d 643, 1992 Tenn. Crim. App. LEXIS 404 (Tenn. Crim. App. 1992).

An implied adoption occurs when a party learns about another's statement and takes some action that a court can view as adopting the content of that statement. State v. Little, 854 S.W.2d 643, 1992 Tenn. Crim. App. LEXIS 404 (Tenn. Crim. App. 1992).

By not only retaining certain records, but going to the additional effort of moving them from one home to another, the defendant adopted the information contained in those records as his own; thus, while the information contained in the records was in fact hearsay, the records were properly admitted under the adoptive admission exception to the hearsay rule. State v. Little, 854 S.W.2d 643, 1992 Tenn. Crim. App. LEXIS 404 (Tenn. Crim. App. 1992).

Tenn. R. Evid. 803(1.2)(E) does not require the trial court to determine that a conspiracy existed before allowing a co-conspirator's statements into evidence. State v. Gaylor, 862 S.W.2d 546, 1992 Tenn. Crim. App. LEXIS 748 (Tenn. Crim. App. 1992), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 234 (Tenn. June 7, 1993).

While some initial proof of a conspiracy is required before the introduction of a co-conspirator's declarations, the trial judge may permit the declaration conditioned on the fact that a conspiracy will later be established by additional evidence. State v. Gaylor, 862 S.W.2d 546, 1992 Tenn. Crim. App. LEXIS 748 (Tenn. Crim. App. 1992), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 234 (Tenn. June 7, 1993).

The appropriate standard of proof for preliminary facts required for the admission of evidence, e.g., proof of a conspiracy for purposes of Tenn. R. Evid. 803(1.2)(E), is proof by a preponderance of the evidence. State v.

Stamper, 863 S.W.2d 404, 1993 Tenn. LEXIS 361 (Tenn. 1993).

Because the preliminary facts established by a preponderance of the evidence the existence of a conspiracy, the decision of the court of criminal appeals to exclude the co-conspirator statements was erroneous and was reversed. State v. Stamper, 863 S.W.2d 404, 1993 Tenn. LEXIS 361 (Tenn. 1993).

Factual statements contained in pleadings filed in other cases are admissions of a party opponent, and thus they may be received into evidence when they are inconsistent with the pleader's contentions in the present case. Pizzillo v. Pizzillo, 884 S.W.2d 749, 1994 Tenn. App. LEXIS 302 (Tenn. Ct. App. 1994).

A police officer's prior inconsistent statement as to whether a stop sign had been down several days with knowledge of the city, did not constitute an admission against the city under Tenn. R. Evid. 803(1.2)(D), and the statement could not be used as substantive evidence of actual notice on behalf of the city. Dailey v. Bateman, 937 S.W.2d 927, 1996 Tenn. App. LEXIS 484 (Tenn. Ct. App. 1996).

An insured's testimony about hearsay statements of the insurer's agent was admissible under the party opponent exception. Bland v. Allstate Ins. Co., 944 S.W.2d 372, 1996 Tenn. App. LEXIS 560 (Tenn. Ct. App. 1996).

In a prosecution for rape and related offenses, testimony of a witness as to statements made to her in a telephone conversation she had with defendant shortly after the incident was admissible. State v. Binion, 947 S.W.2d 867, 1996 Tenn. Crim. App. LEXIS 476 (Tenn. Crim. App. 1996).

Where the trial court found that a conspiracy existed between the defendant and the declarant based on the defendant's presence during a drug transaction with a third party and exchange of money and drugs with the declarant, statements made by the declarant were admissible Tenn. R. Evid. 803. State v. Alley, 968 S.W.2d 314, 1997 Tenn. Crim. App. LEXIS 565 (Tenn. Crim. App. 1997).

In order for a statement to be admissible under Tenn. R. Evid. 803(1.2): (1) There must be independent evidence that a conspiracy existed; (2) The statement must have been made during the pendency of the conspiracy; and (3) The statement must have been made in furtherance of the conspiracy. State v. Heflin, 15 S.W.3d 519, 1999 Tenn. Crim. App. LEXIS 1060 (Tenn. Crim. App. 1999).

The court rejected the unique proposition that the state adopt a defendant's statement whenever that defendant pleads guilty to the commission of a crime. Thus, where there was no proof that party opponent ever made the statement the defendant alleged he did, and there was absolutely no proof that the state ever manifested a belief that the party opponent's statement was true, the statement was inadmissible. State v. Harris, 30 S.W.3d 345, 1999 Tenn. Crim. App. LEXIS 1072 (Tenn. Crim. App. 1999).

Although evidence in rape case was hearsay, it appeared to be reliable and its admissibility was buttressed by its similarity to evidence presently admissible under Tenn. R. Evid. 803(1.2)(A) as an admission by a party opponent. State v. Brown, 29 S.W.3d 427, 2000 Tenn. LEXIS 24 (Tenn. 2000), cert. denied, Tennessee v. Brown, 531 U.S. 916, 121 S. Ct. 275, 148 L. Ed. 2d 200, 2000 U.S. LEXIS 6506 (2000).

Where a witness recalled defendant's remark that she intended to cremate the victim and place the victim's ashes beside her bed as a reminder not to remarry, the statement was relevant to establish defendant's regrets about her relationship with the victim, and was admissible as a qualified admission by a party-opponent. State v. Wilson, 164 S.W.3d 355, 2003 Tenn. Crim. App. LEXIS 841 (Tenn. Crim. App. 2003), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 226 (Tenn. Mar. 8, 2004).

In a rape of a child case, the testimony of the victim's father regarding a statement made by the victim to the father regarding the incident was not admissible as an admission by a party opponent because the victim did not meet the definition of a "party." State v. Flood, 219 S.W.3d 307, 2007 Tenn. LEXIS 274 (Tenn. 2007).

During defendant's murder trial, the court did not err by admitting her videotaped statement to police as an admission by a party opponent under Tenn. R. Evid. 803(1.2)(A) where defendant acknowledged that she went to the antique store on the morning of the shooting and that she sold two vases to the victim for $125; on review, the supreme court of Tennessee held that the statement of a party need not be against that party's interest in order to be admissible as an admission by a party opponent. State v. Lewis, 235 S.W.3d 136, 2007 Tenn. LEXIS 649 (Tenn. Aug. 17, 2007).

In a proceeding terminating the father's parental rights, It appeared that the trial court might have relied upon the testimony of the father at his criminal trial for sexual battery in reaching its decision in the case; Tenn. R. Evid. 803(1.2) provided that statements made by a party and offered against that party were exceptions to the hearsay rule and admissible evidence. Clearly, the father's own testimony at his criminal trial would have been admissible against him at the hearing on the petition to terminate his parental rights and thus, the trial court did not err in considering that testimony. Dep't of Children's Serv. v. Hood, 338 S.W.3d 917, 2009 Tenn. App. LEXIS 894 (Tenn. Ct. App. Dec. 30, 2009), appeal denied, In re Cassandra H., — S.W.3d —, 2010 Tenn. LEXIS 244 (Tenn. Mar. 15, 2010), cert. denied, Hood v. Tenn. Dep't of Children's Servs.,, 562 U.S. 879,

131 S. Ct. 196, 178 L. Ed. 2d 118, 2010 U.S. LEXIS 6541 (U.S. 2010).

Defendant's question to a jailer, "Do you honestly think that there is anything wrong with raping a child?" was a statement rather than a question, and given that defendant was a party opponent, his statement was admissible pursuant to Tenn. R. Evid. 803(1.2)(A). Although the statement was highly prejudicial, its probative value was not outweighed by its prejudicial effect. State v. Brown, 375 S.W.3d 565, 2011 Tenn. Crim. App. LEXIS 897 (Tenn. Crim. App. Dec. 6, 2011).

Where defendant tried to elicit from a police officer statements that defendant had made to the officer that evening, the trial court properly sustained the prosecutor's objection on the grounds of hearsay. The statement was not an admission of a party opponent as defendant claimed and subject to admission under Tenn. R. Evid. 803(1.2) because the statement defendant was trying to elicit was his own statement and not that of a party opponent. State v. Parsons, 437 S.W.3d 457, 2011 Tenn. Crim. App. LEXIS 922 (Tenn. Crim. App. Dec. 15, 2011), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 383 (Tenn. May 23, 2012).

Habeas corpus petition under 28 U.S.C. § 2254(d) from a prisoner, who was convicted of first-degree murder, that alleged multiple Sixth Amendment ineffective assistance of counsel claims, including the counsel's failure to object to alleged prejudicial hearsay testimony given by a witness, was properly denied because the state appellate court's conclusion that the prisoner did not show prejudice was not unreasonable; although part of the testimony should have been excluded as hearsay, the harmful portion of the testimony was properly admitted because that portion qualified as a party-opponent admission under Tenn. R. Evid. 803(1.2), and the prisoner made no argument as to how counsel's failure to make a hearsay objection was so prejudicial that the prisoner was deprived of a fair trial. Robins v. Fortner, 698 F.3d 317, 2012 FED App. 361P, 2012 U.S. App. LEXIS 21568 (6th Cir. Oct. 17, 2012).

Trial court properly admitted evidence regarding defendant's video-recorded statement to the police as an admission by a party opponent because the state provided independent, direct evidence establishing the falsity of defendant's statements, enabling the jury to infer consciousness of guilt, and it could not be said to have any tendency for the jury to have rested its decision on an improper basis or to have confused the jury in any way. State v. Jones, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 338 (Tenn. Crim. App. June 5, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 459 (Tenn. Sept. 18, 2019).

Admissions made in one legal proceeding by a party's lawyer, through pleadings or in-court statements, can be admitted as evidence in a subsequent proceeding as a party-opponent admission; thus, the trial court erred in denying defendant's motion to admit evidence that the State previously pursued two theories of guilt that were inconsistent with its theory of guilt at his second trial. State v. Robinson, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 553 (Tenn. Crim. App. Aug. 13, 2020).

Co-defendant's statement to a detective which the detective testified to at the military tribunal -- that the child was okay when petitioner left the house" and that "co-defendant was the only person in the house during that time period" -- constituted hearsay within hearsay. The co-defendant's statement to the detective was admissible as substantive evidence as an admission by a party opponent because it was his own statement that could have been offered against him at trial. Metz v. State, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 7 (Tenn. Crim. App. Jan. 7, 2021).

5. Party's Own Statement.

Where a police officer's testimony was elicited for the sole purpose of showing the contradiction in the name the defendant had earlier given officers, it was not error for the trial court to bar defendant from questioning the officer concerning the remainder of a self-serving statement given by defendant. State v. Brooks, 909 S.W.2d 854, 1995 Tenn. Crim. App. LEXIS 701 (Tenn. Crim. App. 1995).

Statement by defendant to police officer that, "the charge of theft is not correct, it should have been unauthorized use of a vehicle since it was my parents' vehicle," was admissible as a hearsay exception under Tenn. R. Evid. 803. State v. Land, 34 S.W.3d 516, 2000 Tenn. Crim. App. LEXIS 369 (Tenn. Crim. App. 2000).

Tenn. R. Evid. 803 did not apply to admission of hearsay statements made by a codefendant at his own criminal trial; Rule 803 deals with a third party confession, not that of the defendant on trial. State v. Mickens, 123 S.W.3d 355, 2003 Tenn. Crim. App. LEXIS 107 (Tenn. Crim. App. 2003), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 805 (Tenn. Sept. 2, 2003).

Though hearsay statements were improperly admitted into evidence because they were not offered against the insured but were offered to bolster his case, the appellate court declined to grant a new trial based upon that error since the information was properly admitted through other witnesses and the trial court's error did not affect the outcome of the trial when the evidence was introduced through other avenues. Riad v. Erie Ins. Exch., 436 S.W.3d 256, 2013 Tenn. App. LEXIS 712 (Tenn. Ct. App. Oct. 31, 2013), appeal denied, Riad v. Erie Ins. Exch., — S.W.3d —, 2014 Tenn. LEXIS 196 (Tenn. Mar. 4, 2014), superseded by statute as stated in, Lindenberg v. Jackson Nat'l Life Ins. Co., — F. Supp. 2d —, 2014 U.S. Dist. LEXIS 184081 (W.D. Tenn. Dec. 9, 2014).

6. Coconspirator Exception.

Codefendant's statement to law enforcement agent about the codefendant having a nephew or cousin who would take delivery of and transport cocaine was admissible under the coconspirator exception to the hearsay rule. State v. Shropshire, 874 S.W.2d 634, 1993 Tenn. Crim. App. LEXIS 575 (Tenn. Crim. App. 1993), rehearing denied, — S.W.2d —, 1993 Tenn. Crim. App. LEXIS 657 (Tenn. Crim. App. Sept. 23, 1993).

In a prosecution for murder involving a conspiracy to collect insurance from the death of the victim, the court did not err in admitting statements of coconspirators that were made after the victim's death, since the conspiracy did not end with the death, but continued until the conspirators' ultimate goal of collecting the proceeds of the crime was achieved or abandoned. State v. Hutchison, 898 S.W.2d 161, 1994 Tenn. LEXIS 157 (Tenn. 1994), rehearing denied, 898 S.W.2d 161, 1995 Tenn. LEXIS 198 (1995), cert. denied, Hutchinson v. Tennessee, 516 U.S. 846, 116 S. Ct. 137, 133 L. Ed. 2d 84, 1995 U.S. LEXIS 5846 (1995), dismissed, Hutchison v. Bell, — F. Supp. 2d —, 2010 U.S. Dist. LEXIS 31736 (E.D. Tenn. Mar. 30, 2010).

A tape recording of a conversation between defendant's coconspirator and a witness made almost two years after the homicide while the coconspirator was in prison was not made during the course of the conspiracy and was inadmissible. State v. Walker, 910 S.W.2d 381, 1995 Tenn. LEXIS 547 (Tenn. 1995), rehearing denied, — S.W.2d —, 1995 Tenn. LEXIS 668 (Tenn. 1995), cert. denied, Walker v. Tennessee, 519 U.S. 826, 117 S. Ct. 88, 136 L. Ed. 2d 45, 1996 U.S. LEXIS 4880 (1996).

Where defendant was charged with conspiracy to commit robbery as well as a homicide which was incidental to the robbery, statements made by a coconspirator to a witness three or four days after the killing, relating to the circumstances of the robbery and the facts surrounding the shooting, were not admissible under this rule since the conspiracy ended with the consummation of the robbery. State v. Walker, 910 S.W.2d 381, 1995 Tenn. LEXIS 547 (Tenn. 1995), rehearing denied, — S.W.2d —, 1995 Tenn. LEXIS 668 (Tenn. 1995), cert. denied, Walker v. Tennessee, 519 U.S. 826, 117 S. Ct. 88, 136 L. Ed. 2d 45, 1996 U.S. LEXIS 4880 (1996).

There is no bright line test or precise definition for determining whether a statement has been made during the course of the conspiracy; therefore Tenn. R. Evid. 803(1.2)(E) requires that a court examine all of the factors and circumstances of the case. State v. Henry, 33 S.W.3d 797, 2000 Tenn. LEXIS 715 (Tenn. 2000).

Where videotaped conversation between codefendants occurred approximately seven hours after they were arrested and nine hours after the offenses were committed, codefendant's statements were made after the conspiracy had ended and, therefore, were not made during the course of the conspiracy as required for admissibility under Tenn. R. Evid. 803(1.2)(E). State v. Henry, 33 S.W.3d 797, 2000 Tenn. LEXIS 715 (Tenn. 2000).

Despite that prosecutor failed to establish a foundation for the admission of statements made by codefendant pursuant to the coconspirator exception in Tenn. R. Evid. 803(1.2)(E), such error was harmless. State v. Henry, 33 S.W.3d 797, 2000 Tenn. LEXIS 715 (Tenn. 2000).

If the conspiracy had not begun or had already concluded when the statement was made, the statement will not be admissible under the coconspirator exception. State v. Carruthers, 35 S.W.3d 516, 2000 Tenn. LEXIS 683 (Tenn. 2000), cert. denied, Carruthers v. Tennessee, 533 U.S. 953, 121 S. Ct. 2600, 150 L. Ed. 2d 757, 2001 U.S. LEXIS 5032 (2001).

Where a conspirator is apprehended and tells all to the police, the statement is only a narrative statement of past conduct between conspirators and would not likely be admissible under the coconspirator exception. State v. Carruthers, 35 S.W.3d 516, 2000 Tenn. LEXIS 683 (Tenn. 2000), cert. denied, Carruthers v. Tennessee, 533 U.S. 953, 121 S. Ct. 2600, 150 L. Ed. 2d 757, 2001 U.S. LEXIS 5032 (2001).

Statements made regarding the relationship between two construction companies were subject to the co-conspirator hearsay exception, and there was no abuse of discretion in the trial court's admission of the statements into evidence. Danny L. Davis Contrs., Inc. v. Hobbs, 157 S.W.3d 414, 2004 Tenn. App. LEXIS 492 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2005 Tenn. LEXIS 165 (Tenn. Feb. 28, 2005).

Trial court properly sentenced defendants to 21 and/or 25 years of incarceration after a jury convicted them of conspiracy to possess with the intent to sell heroin within 1000 feet of a drug-free school zone because the trial court made an explicit finding that a conspiracy existed—the first defendant packaged heroin for resale into small heat-sealed Ziploc baggies while the second defendant was present, and the second and third defendants resold the heroin to others—it would be extremely impractical and inefficient to hold a pretrial hearing due to the number of defendants and witnesses, the trial court could admit the coconspirators' statements before determining that a conspiracy existed. State v. Williams, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 317 (Tenn. Crim. App. May 4, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 521 (Tenn. Sept. 16, 2020).

7. Excited Utterance.

Witnesses' testimony came under the excited utterance exception to the hearsay rule where

witness testified that when he entered the store where the alleged murder occurred, the victim's husband said, "I've been robbed," and looked at him for a couple of seconds and said, "they shot my wife." State v. Smith, 857 S.W.2d 1, 1993 Tenn. LEXIS 149 (Tenn. 1993), rehearing denied, — S.W.2d —, 1993 Tenn. LEXIS 248 (Tenn. June 28, 1993), cert. denied, Smith v. Tennessee, 510 U.S. 996, 114 S. Ct. 561, 126 L. Ed. 2d 461, 1993 U.S. LEXIS 7408 (1993), cert. denied, Tennessee v. Bane, 510 U.S. 1040, 114 S. Ct. 682, 126 L. Ed. 2d 650, 1994 U.S. LEXIS 63 (1994).

Shooting victim's declaration to officer on the scene of the shooting as to the identity of his assailant qualified for the "excited utterance" exception to the hearsay rule. State v. Summerall, 926 S.W.2d 272, 1995 Tenn. Crim. App. LEXIS 1009 (Tenn. Crim. App. 1995).

Testimony of witnesses as to rape victim's statements was admissible under the "excited utterance" exception. State v. Binion, 947 S.W.2d 867, 1996 Tenn. Crim. App. LEXIS 476 (Tenn. Crim. App. 1996).

In a prosecution for rape of a three-year-old child, the victim's statements to her mother made a few minutes after she experienced pain related to the sexual offense were admissible as an excited utterance. State v. Gordon, 952 S.W.2d 817, 1997 Tenn. LEXIS 473 (Tenn. 1997).

In a prosecution for rape of a three-year-old child, the victim's statements to a child psychologist made for the purpose of medical diagnosis and treatment were admissible. State v. Gordon, 952 S.W.2d 817, 1997 Tenn. LEXIS 473 (Tenn. 1997).

Other relevant circumstances to consider in determining whether a statement was made under stress or excitement include: (1) The nature and seriousness of the event or condition; (2) The appearance, behavior, outlook and circumstances of the declarant, including such characteristics as age and physical or mental condition; and (3) The contents of the statement itself, which may indicate the presence or absence of stress. State v. Stout, 46 S.W.3d 689, 2001 Tenn. LEXIS 461 (Tenn. 2001), cert. denied, Stout v. Tennessee, 534 U.S. 998, 122 S. Ct. 471, 151 L. Ed. 2d 386, 2001 U.S. LEXIS 10056 (2001).

In applying the excited utterance exception, the ultimate test is spontaneity and logical relation to the main event and where an act or declaration springs out of the transaction while the parties are still laboring under the excitement and strain of the circumstances and at a time so near it as to preclude the idea of deliberation and fabrication. State v. Stout, 46 S.W.3d 689, 2001 Tenn. LEXIS 461 (Tenn. 2001), cert. denied, Stout v. Tennessee, 534 U.S. 998, 122 S. Ct. 471, 151 L. Ed. 2d 386, 2001 U.S. LEXIS 10056 (2001).

In order to qualify for the excited utterance exception, the "startling event or condition" must be sufficiently startling to suspend the normal, reflective thought processes of the declarant. State v. Stout, 46 S.W.3d 689, 2001 Tenn. LEXIS 461 (Tenn. 2001), cert. denied, Stout v. Tennessee, 534 U.S. 998, 122 S. Ct. 471, 151 L. Ed. 2d 386, 2001 U.S. LEXIS 10056 (2001).

In a car accident negligence case, a witness's statement was properly admitted as an excited utterance, where the witness was 19 years old at the time of the accident, and right before talking to the trooper, he had participated in pulling the victims from their truck just before it exploded. Davidson v. Lindsey, 104 S.W.3d 483, 2003 Tenn. LEXIS 410 (Tenn. 2003).

In determining whether statements alleged to be "excited utterances" can be classified as "testimonial," the Supreme Court of Tennessee favors an approach that considers both the testimonial hearsay analysis and the excited utterance analysis and that considers the totality of the circumstances in order to determine whether a particular excited utterance should be deemed testimonial. State v. Maclin, 183 S.W.3d 335, 2006 Tenn. LEXIS 6 (Tenn. 2006), cert. denied, Anderson v. Tennessee, 549 U.S. 828, 127 S. Ct. 47, 166 L. Ed. 2d 49, 2006 U.S. LEXIS 5944 (2006).

Where defendant was charged with burglary, the trial court allowed police testimony as to hearsay statements by juveniles near the scene that they saw defendant kicking in the door of the business; the statements were admissible under the excited utterance exception to the hearsay rule; they were made under the excitement of a startling event. State v. Maclin, 183 S.W.3d 335, 2006 Tenn. LEXIS 6 (Tenn. 2006), cert. denied, Anderson v. Tennessee, 549 U.S. 828, 127 S. Ct. 47, 166 L. Ed. 2d 49, 2006 U.S. LEXIS 5944 (2006).

If an excited utterance is determined to be "testimonial," then under the Sixth Amendment and the Tenn. Const. art. I, § 9 right to meet the witnesses face to face, the statement is inadmissible unless the witness was unavailable and the defendant had a prior opportunity for cross-examination; if the excited utterance is not testimonial, then the statement is admissible if it bears adequate indicia of reliability. State v. Maclin, 183 S.W.3d 335, 2006 Tenn. LEXIS 6 (Tenn. 2006), cert. denied, Anderson v. Tennessee, 549 U.S. 828, 127 S. Ct. 47, 166 L. Ed. 2d 49, 2006 U.S. LEXIS 5944 (2006).

Defendant's conviction for premeditated first-degree murder was appropriate because testimony of a witness that the victim told her that defendant was following her and that she did not want anything to do with him was admissible under the excited utterance exception under Tenn. R. Evid. 803(2); witness related a startling evidence, which was defendant's repeated, unsettling "drive by's." State v.

Gilley, 297 S.W.3d 739, 2008 Tenn. Crim. App. LEXIS 660 (Tenn. Crim. App. Aug. 13, 2008).

Pursuant to Tenn. R. Evid. 803(2), the recording and delivery of a written license tag number met the requirements of an excited utterance, given the quick succession of events following a robbery, the seriousness of robbery, and the writer's close proximity to the minivan containing the suspected robber when observing the tag number. State v. Franklin, 308 S.W.3d 799, 2010 Tenn. LEXIS 415 (Tenn. Apr. 29, 2010), cert. denied, Franklin v. Tennessee, 179 L. Ed. 2d 503, 131 S. Ct. 1598, 562 U.S. 1272, 2011 U.S. LEXIS 1989 (U.S. 2011).

Defendant's conviction for the aggravated rape of a child was proper because the victim's statement to her mother fell within the excited utterance exception found at Tenn. R. Evid. 803(2). Defendant's sexual touching of the victim qualified as a startling event and the victim's statement that defendant touched her and that it hurt unquestionably related to the startling event; the victim's mother also testified that she was met by her daughter coming down the stairs of the house almost immediately after the event occurred. State v. Ramos, 331 S.W.3d 408, 2010 Tenn. Crim. App. LEXIS 195 (Tenn. Crim. App. Mar. 3, 2010), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 754 (Tenn. Aug. 26, 2010).

Victim's statement was properly admitted at trial because the victim indicated that she had just escaped her apartment after her assailant heard a noise and left her bedroom to investigate; she was naked from the waist down, reflecting her hurry, and "scared to death." The victim's appearance and statements implied that she feared her attacker might still be on the premises and that her emergency was ongoing. State v. Parker, 350 S.W.3d 883, 2011 Tenn. LEXIS 881 (Tenn. Sept. 23, 2011).

Video did not fall under the excited utterance exception to the hearsay rule because it was not made until four months after the startling event. Bottorff v. Sears, — S.W.3d —, 2018 Tenn. App. LEXIS 430 (Tenn. Ct. App. July 25, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 764 (Tenn. Dec. 6, 2018), cert. denied, 204 L. Ed. 2d 1145, 139 S. Ct. 2759, — U.S. —, 2019 U.S. LEXIS 4286 (U.S. June 24, 2019).

Testimony of the victim's girlfriend about the victim's statements was admissible under the excited utterance exception to the hearsay rule because the startling event was that the victim had just been shot, the girlfriend's statement was directly related to that startling event, and the statement was made while still under the stress of the shooting. State v. Collins, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 295 (Tenn. Crim. App. Apr. 18, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 489 (Tenn. Aug. 8, 2018), cert. denied, Collins v. Tennessee, 139 S. Ct. 649, 202 L. Ed. 2d 498, -- U.S. --, 2018 U.S. LEXIS 7182 (U.S. Dec. 10, 2018).

Facts supported the admittance of the victim's statement and the 911 call made by her mother under the excited utterance exception; when the mother asked the victim if anything happened, the victim began to cry and said that defendant kissed her mouth, her neck, and her vagina, and the mother immediately called 911 and while on the phone, took the victim's pants off to make sure nothing was wrong. State v. Zarate, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 393 (Tenn. Crim. App. July 5, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 547 (Tenn. Dec. 5, 2019).

Trial court did not err by admitting the 911 calls because they fit within the excited utterance exception to the hearsay rule, as the trial court heard evidence that the shooting took place during a gathering of family members prior to a funeral, the voices of the callers conveyed the urgency for police assistance, and the callers were still under the stress or excitement of the event at the time the calls were made. State v. Hall, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 396 (Tenn. Crim. App. July 8, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 534 (Tenn. Dec. 4, 2019).

Recording of defendant's 911 call statements was not admissible under excited utterance exception to hearsay because, although the shooting of the victim was a startling event and defendant's statements related to the shooting, defendant failed to establish that the statements were made while under stress or excitement. While it appeared that defendant made the call shortly after the shooting, defendant did not sound emotional, distraught, or excited, but calm, and the statements were primarily self-serving. State v. Waggoner, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 595 (Tenn. Crim. App. Sept. 24, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 126 (Tenn. Feb. 19, 2020).

At defendant's first degree murder trial, in which his defense was based on a claim that his gun misfired, counsel was not constitutionally deficient in failing to admit a police officer's statements that he did not pull the trigger when he shot himself in the foot with defendant's gun because, even assuming that the hearsay statements could have been introduced as excited utterances,the state court's application ofStrickland's attorney-performance standard was not objectively unreasonable. Kendrick v. Parris, — F.3d —, 2021 FED App. 52P, 2021 U.S. App. LEXIS 6038 (6th Cir. Mar. 03, 2021).

8. Medical Diagnosis and Treatment.

Statements made by a child abuse victim to a physician during an examination that the abuser is a member of the victim's immediate household are reasonably pertinent to treatment and thus are admissible under Tenn. R. Evid. 803. State v. Rucker, 847 S.W.2d 512,

1992 Tenn. Crim. App. LEXIS 628 (Tenn. Crim. App. 1992); State v. Livingston, 907 S.W.2d 392, 1995 Tenn. LEXIS 502 (Tenn. 1995).

Out-of-court statement of victim of child sexual abuse was not admitted through the testimony of an examining psychologist under Tenn. R. Evid. 803. State v. Barone, 852 S.W.2d 216, 1993 Tenn. LEXIS 69, 38 A.L.R.5th 897 (Tenn. 1993), rehearing denied, — S.W.2d —, 1993 Tenn. LEXIS 175 (Tenn. 1993).

Testimony of a physician about statements of a child abuse victim concerning feelings about the abuse was not reasonably related to medical diagnosis and treatment. State v. Livingston, 907 S.W.2d 392, 1995 Tenn. LEXIS 502 (Tenn. 1995).

In a rape prosecution, a nurse practitioner's testimony as to statements made to a social worker by the victim were admissible under the medical diagnosis and treatment exception to the hearsay rule. State v. Hunter, 926 S.W.2d 744, 1995 Tenn. Crim. App. LEXIS 871 (Tenn. Crim. App. 1995).

Statements of a rape victim given to a nurse practitioner that were reasonably pertinent for medical diagnosis and treatment were admissible; however, portions thereof regarding events before the rape and the description of the assailant should have been redacted. State v. Williams, 920 S.W.2d 247, 1995 Tenn. Crim. App. LEXIS 817 (Tenn. Crim. App. 1995).

In order to determine the admissibility of a statement made by a child-declarant, the trial court shall conduct an evidentiary hearing outside the jury's presence. State v. McLeod, 937 S.W.2d 867, 1996 Tenn. LEXIS 647 (Tenn. 1996).

Statements of a child victim to a physician were admissible where the examination and the taking of her medical history were for the purpose of determining whether medical treatment was needed, and where the physical findings were consistent with the history of sexual abuse. State v. McLeod, 937 S.W.2d 867, 1996 Tenn. LEXIS 647 (Tenn. 1996).

Statements of a child victim to a physician were not admissible where the physician testified that the examination was for evaluation purposes and, because fondling was the alleged abuse, she did not expect to find any physical evidence. State v. McLeod, 937 S.W.2d 867, 1996 Tenn. LEXIS 647 (Tenn. 1996).

Six-year-old victim's statement to physicians identifying defendant, her stepfather, as the perpetrator of abuse was admissible as being pertinent to the diagnosis and treatment of an emotional or psychological injury. State v. Stinnett, 958 S.W.2d 329, 1997 Tenn. LEXIS 572 (Tenn. 1997).

Even where statements are made to someone who will not provide treatment, the statement is still admissible under Tenn. R. Evid. 803(4), provided that such statements are for the purpose of diagnosis and treatment of a medical or physical problem. State v. Spratt, 31 S.W.3d 587, 2000 Tenn. Crim. App. LEXIS 465 (Tenn. Crim. App. 2000).

Statements by rape victim to nontreating physician that she was struck on head with a beer bottle and was then raped vaginally, rather than orally or anally, were admissible under Tenn. R. Evid. 803(4); however, victim's statements indicating that she was attacked at work by a black man who had requested information were not admissible. State v. Spratt, 31 S.W.3d 587, 2000 Tenn. Crim. App. LEXIS 465 (Tenn. Crim. App. 2000).

The rationale underlying the exception for statements made for purposes of medical diagnosis and treatment is that the declarant's motive of obtaining improved health increases the statement's reliability and trustworthiness. State v. Spratt, 31 S.W.3d 587, 2000 Tenn. Crim. App. LEXIS 465 (Tenn. Crim. App. 2000).

In a criminal prosecution for aggravated rape, the victim's medical records containing her out-of-court statements to emergency room medical personnel that she had been raped were nontestimonial and properly admitted under Tenn. R. Evid. 803(4). State v. Cannon, 254 S.W.3d 287, 2008 Tenn. LEXIS 278 (Tenn. Apr. 29, 2008).

In a case in which defendant was convicted of aggravated sexual battery as a lesser-included offense of rape of a child, the trial court correctly ruled that Children's Advocacy Center reports were admissible pursuant to the business records exception and that hearsay statements contained within the reports constituted statements made for the purpose of medical diagnosis or treatment. State v. Howard, 504 S.W.3d 260, 2016 Tenn. LEXIS 725 (Tenn. Oct. 12, 2016).

It was no error to decline to admit defendant's mental health records because (1) defendant offered no expert to interpret the records or testify as to defendant's ability to form the requisite mens rea at the time of defendant's crimes, and, (2) without showing the records' relevance, defendant was not prevented from presenting a defense. State v. Boutrous, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 114 (Tenn. Crim. App. Feb. 16, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 343 (Tenn. June 6, 2018), dismissed, Boutrous v. Perry, — F. Supp. 2d —, 2019 U.S. Dist. LEXIS 14780 (M.D. Tenn. Jan. 30, 2019).

In a rape of a child case, the trial court erred by allowing a nurse to read the victim's mother's statement to the jury because the record did not establish that the victim made a statement to her mother for purposes of medical diagnosis and treatment; the victim made a trustworthy statement to the nurse; and the victim's mother's statement did not add any additional information that would have been necessary for the nurse to diagnose and treat the victim; however, the error was harmless

because defendant failed to demonstrate that the trial court's error affected the outcome of his trial as the evidence showed that he admitted that he had the victim fellate him, and that his semen was on the victim's underwear. State v. Rimmer, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 52 (Tenn. Crim. App. Jan. 24, 2019).

In a rape of a child case, the seven-year-old victim's statement to a nurse was nontestimonial and properly admitted under the hearsay exception for medical diagnosis and treatment because the victim spoke only with the nurse about the abuse; the nurse used the information given by the victim to examine her, test her for sexually transmitted diseases, and treat her; the victim was escorted to the sexual assault resource center by a police officer late at night and was old enough to understand she was in a medical setting and needed to be truthful; she used child-like terms to describe the abuse; and nothing indicated that she was motivated to lie to the nurse. State v. Rimmer, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 52 (Tenn. Crim. App. Jan. 24, 2019).

Although a trial court erred by admitting into evidence statements made by the minor sexual assault victim to the victim's parent through a medical report, as the parent relayed the statements to a medical provider for the victim, and also during the parent's testimony during trial, in that the statements should have been excluded as hearsay, both errors were harmless and did not affect the outcome of the trial because the same information was presented through other evidence. State v. Gleason, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 78 (Tenn. Crim. App. Feb. 10, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 350 (Tenn. Aug. 10, 2020).

Trial court did not abuse its discretion by admitting a physician's testimony about the victim's statements to her because the physician testified that she was examining the victim for the purpose of making a medical diagnosis of child sexual abuse and therefore the testimony was admissible. State v. Wallace, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 94 (Tenn. Crim. App. Feb. 14, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 322 (Tenn. June 5, 2020).

Trial court did not err by admitting testimony of a pediatric nurse and a licensed clinical social worker relaying statements the victims had made to them about the rapes because the both testified that the victims' statements were necessary for medical diagnosis and treatment, including psychological injuries and to ensure the victims' safety. State v. Johnson, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 312 (Tenn. Crim. App. Apr. 30, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 548 (Tenn. Sept. 16, 2020).

9. Public Records and Reports.

Procedure to supply records of standards and procedures for testing approved breath testing instruments to any interested party conformed with the provisions of Tenn. R. Evid. 803(8) as an exception to the hearsay evidence rule. State v. Sensing, 843 S.W.2d 412, 1992 Tenn. LEXIS 655 (Tenn. 1992).

The trial court was correct in admitting defendant's driving record into evidence as a public record as the driving record was required by statute to be made open to the public by the department of safety. State v. Baker, 842 S.W.2d 261, 1992 Tenn. Crim. App. LEXIS 641 (Tenn. Crim. App. 1992).

Alabama uniform traffic ticket and complaint was properly admitted into evidence as a public record in an enhanced driving while under the influence (DUI) prosecution, as the ticket did not lack trustworthiness and bore several indicia of reliability. State v. Rea, 865 S.W.2d 923, 1992 Tenn. Crim. App. LEXIS 947 (Tenn. Crim. App. 1992).

TBI certification and the subsequent maintenance records of breath testing instruments for determining levels of intoxication while driving are public records under Tenn. R. Evid. 803(8). State v. Korsakov, 34 S.W.3d 534, 2000 Tenn. Crim. App. LEXIS 553 (Tenn. Crim. App. 2000).

Trial court did not err in admitting a temporary license tag for the victim's car because the temporary license tag could be considered a public record, and it was self-authenticating. State v. Collins, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 295 (Tenn. Crim. App. Apr. 18, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 489 (Tenn. Aug. 8, 2018), cert. denied, Collins v. Tennessee, 139 S. Ct. 649, 202 L. Ed. 2d 498, -- U.S. --, 2018 U.S. LEXIS 7182 (U.S. Dec. 10, 2018).

10. Records of Regularly Conducted Activity.

Whatever his or her title, to qualify as a "custodian" under this rule, a witness must be able to testify as to the identity of the record, the mode of preparation, and whether the record was made in the regular course of business at or near the time of the recorded event. State v. Baker, 842 S.W.2d 261, 1992 Tenn. Crim. App. LEXIS 641 (Tenn. Crim. App. 1992).

The mere fact that documents are admissible as evidence pursuant to Tenn. R. Evid. 803 does not mean that every entry contained in the documents can be admitted into evidence. State v. Rucker, 847 S.W.2d 512, 1992 Tenn. Crim. App. LEXIS 628 (Tenn. Crim. App. 1992).

Medical history contained in hospital records was not admissible as evidence pursuant to the records of regularly conducted activity exception embodied in Tenn. R. Evid. 803, where such history consisted of double and triple hearsay as the victim related some of the history to her mother, the mother related what the victim supposedly told her and what she observed to the emergency room nurse and the social worker, and these two individuals placed

the mother's statement in the hospital records, and where, in addition, the declarant, the mother, was not under a duty to transmit the information to either the nurse or the social worker. State v. Rucker, 847 S.W.2d 512, 1992 Tenn. Crim. App. LEXIS 628 (Tenn. Crim. App. 1992).

In a rape prosecution, statements made to a social worker by the victim were admissible under the business records exception to the hearsay rule. State v. Hunter, 926 S.W.2d 744, 1995 Tenn. Crim. App. LEXIS 871 (Tenn. Crim. App. 1995).

The fact that a record is admissible under Tenn. R. Evid. 803(6) does not mean that every entry in the record is admissible. The portion of an autopsy report that contained a conclusory summary of information supplied by the police was inadmissible as evidence of victim's propensity for violent behavior. State v. Robinson, 971 S.W.2d 30, 1997 Tenn. Crim. App. LEXIS 580 (Tenn. Crim. App. 1997).

Items such as a customer list, a draft agreement, shipping records, maps and three pieces of correspondence were among the types of records that tire shredding company would be likely to maintain in the ordinary course of its business. Tire Shredders, Inc. v. Erm-North Cent., Inc., 15 S.W.3d 849, 1999 Tenn. App. LEXIS 588 (Tenn. Ct. App. 1999).

Medical records indicating defendant's blood alcohol level were properly admitted under the business records exception to the hearsay rule, where the medical reports were compiled by medical personnel with knowledge who were under a business duty to record the blood testing procedures and the results of the test, the practice of hospitals is to regularly compile such reports of hospital activities, and the defendant's blood tests were conducted in the course of regularly conducted hospital activities. Hospital records kept duly for medical purposes and not prepared for the purpose of litigation are typically deemed reliable. State v. Goldston, 29 S.W.3d 537, 1999 Tenn. Crim. App. LEXIS 989 (Tenn. Crim. App. 1999).

Even assuming that a business record under Tenn. R. Evid. 803(6) qualifies as an "original" document, the state was still required to establish the prerequisites to application of the business records exception to the hearsay rule. State v. Carroll, 36 S.W.3d 854, 1999 Tenn. Crim. App. LEXIS 1346 (Tenn. Crim. App. 1999).

State failed to satisfy its burden pursuant to Tenn. R. Evid. 803(6) where it failed to establish whether it was the regular practice of sporting goods store to compile handwritten inventories following a robbery or theft; therefore, regardless of whether inventories constituted the best evidence of the serial numbers of the stolen goods, they were inadmissible as hearsay. State v. Carroll, 36 S.W.3d 854, 1999 Tenn. Crim. App. LEXIS 1346 (Tenn. Crim. App. 1999).

Doctor's letter, which was used to bolster the defendant physician's position that he was not negligent in assessing the patient's MRI scan, was improperly admitted into evidence because it was clearly hearsay as it contained a statement made by the doctor other than while testifying at trial in which he stated that he would have interpreted the MRI scan the same as the defendant physician. Godbee v. Dimick, 213 S.W.3d 865, 2006 Tenn. App. LEXIS 601 (Tenn. Ct. App. 2006), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 66 (Tenn. 2006).

Employee's trial testimony clearly established both that she was one of the Tennessee bureau of investigation employees in charge of maintaining the sex offender records and that she had knowledge of the manner in which they were prepared and preserved. State v. Flatt, 227 S.W.3d 615, 2006 Tenn. Crim. App. LEXIS 798 (Tenn. Crim. App. Oct. 3, 2006), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 253 (Tenn. 2007).

Trial court did not err in allowing testimony under the business records exception by the chief compliance officer of a wire transfer company because the compilation of the eleven money transfers satisfied the exception even though it was made in preparation for litigation years after the transactions in question because such a summary was, by necessity, prepared in anticipation of litigation, that fact did not disqualify it as a business record under the exception, and it was the regular practice of that business activity to make the data record. Fusner v. Coop Constr. Co., LLC, 211 S.W.3d 686, 2007 Tenn. LEXIS 7 (Tenn. 2007).

Trial court did not err in allowing testimony under the business records exception by the chief compliance officer of a wire transfer company because, despite not being the local agent who processed the transactions at issue, the officer nevertheless testified in detail to all of the *State v. Baker*, 842 S.W.2d 261, 1992 Tenn. Crim. App. LEXIS 641, requirements and to the process by which a local agent keyed in data to the company's database at the time of each transfer. Fusner v. Coop Constr. Co., LLC, 211 S.W.3d 686, 2007 Tenn. LEXIS 7 (Tenn. 2007).

Defendant's convictions for animal cruelty were appropriate under Tenn. R. Evid. 803(6) because a doctor, who was accepted by the trial court as an expert witness in the area of veterinary medicine, testified that she recorded the conditions in which she found defendant's animals and prepared a report based on her notes; the witness further testified that she had a business duty to record the information and had kept and maintained the record in the regular course of her business. State v. Siliski, 238 S.W.3d 338, 2007 Tenn. Crim. App. LEXIS 390 (Tenn. Crim. App. May 15, 2007), appeal

denied, — S.W.3d —, 2007 Tenn. LEXIS 878 (Tenn. Sept. 17, 2007).

Trial court did not err by admitting into evidence bank records under Tenn. R. Evid. 803(6) because they were authenticated upon certification by the bank's custodian of records as required by Tenn. R. Evid. 902(11), as the custodian's certification stated that the documents were true and accurate copies of the bank's business records and that they were made at or near the time of the occurrence of the matters set forth by a person with knowledge of those matters. Simpkins v. Simpkins, 374 S.W.3d 413, 2012 Tenn. App. LEXIS 131 (Tenn. Ct. App. Feb. 27, 2012).

"General ledger" was admissible in a suit between a creditor and debtor, under Tenn. R. Evid. 901 and 803(6), even though the ledger included information on the debtor's businesses that were not involved in the suit, because (1) testimony of the person who maintained the ledger adequately authenticated the ledger, (2) minor discrepancies in the ledger's information did not make the ledger wholly untrustworthy, and (3) no genuine dispute existed that the ledger was what it claimed to be, as both parties relied on the ledger at trial. Delta Dev. Corp. v. F. Fani Gulf Int'l, 393 S.W.3d 185, 2012 Tenn. App. LEXIS 222 (Tenn. Ct. App. Apr. 3, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 594 (Tenn. Aug. 16, 2012).

Trial court did not err in a foreclosure proceeding by admitting into evidence exhibits offered by the bank and the testimony of the bank's loan verification consultant at a damages hearing because the bank's damages summary set out key information concerning the loan between the bank and the borrower and the consultant was a qualified witness who had the knowledge necessary to testify to the identity and mode of preparation of the records and to the fact that they were made in the regular course of the bank's business. Starkey v. Wells Fargo Bank, N.A., — S.W.3d —, 2019 Tenn. App. LEXIS 190 (Tenn. Ct. App. Apr. 23, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 408 (Tenn. Aug. 14, 2019).

Trial court properly admitted the documents by which a judgment creditor proved the debt because they attested to the indebtedness, the debtor's liability, and expressly provided that documents were obtained by the creditor from an original creditor in the regular course of business. Midland Funding, LLC v. Thuy Chau, — S.W.3d —, 2019 Tenn. App. LEXIS 298 (Tenn. Ct. App. June 14, 2019).

Trial court properly admitted defendant's cell phone and images it contained because the state provided an unbroken chain of custody, and the document was properly admitted as a business record where it was made at or near the time of the event recorded, was routinely kept in the course of "business," and did not contain opinion or hearsay. State v. Norton, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 149 (Tenn. Crim. App. Mar. 8, 2019).

Trial court did not err by refusing to introduce into evidence a letter sent to the husband from his personnel manager advising him to review his draw on his bonus because it was inadmissible hearsay as the author of the letter was not present for cross-examination, the author could not be observed by the trial court, and the letter was not attached to an oath and therefore the letter was not reliable. Because the letter lacked trustworthiness because of the manner in which it was provided, it was not admissible as a business record. Pearson v. Pearson, — S.W.3d —, 2019 Tenn. App. LEXIS 288 (Tenn. Ct. App. June 6, 2019).

Trial court did not err by admitting the child's medical records under the business record exception to the hearsay rule during the trial to terminate the mother's parental rights because accompanying the drug test record was an affidavit signed by the custodian of records demonstrating compliance with this rule. In re Gracie H. Y., — S.W.3d —, 2020 Tenn. App. LEXIS 110 (Tenn. Ct. App. Mar. 16, 2020), appeal dismissed, In re Gracie Y., — S.W.3d —, 2020 Tenn. LEXIS 462 (Tenn. June 19, 2020).

Affidavit of the bank's senior vice president and the special assets and credit analyst manager for the bank about the principal balance and the accrued interest owed by the homeowner on his line of credit with the bank met the requirements of a record of regularly conducted activity because she had been the primary bank officer involved in efforts to collect the debt; and she attached to her affidavit a detailed loan history with each transaction cataloged. Tenn. State Bank v. Mashek, — S.W.3d —, 2020 Tenn. App. LEXIS 228 (Tenn. Ct. App. May 21, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 496 (Tenn. Oct. 7, 2020).

Because the repair invoice qualified as a business record and was excepted from the hearsay rule, and as a business record, the invoice was nontestimonial, and therefore its admission did not violate the Confrontation Clause. State v. Miller, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 58 (Tenn. Crim. App. Feb. 3, 2020).

Defendant's petition for post-conviction relief was properly denied because counsel was not ineffective for failing to object to improper witness testimony as an agent's statement that it was impossible to collect fingerprints and DNA from the same source was not shown to be incorrect; and the 9-1-1 operator acted as the keeper of the records at trial, and her testimony was admitted to authenticate the veracity of the recording. Stitts v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 356 (Tenn. Crim. App. May 20, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 578 (Tenn. Sept. 21, 2020).

Drug screen report was improperly admitted where the Department of Children's Services failed to elicit testimony from a probation officer to lay a foundation showing that he possessed the necessary information to make him a qualified witness. Any error in admitting the report was harmless, however, given the alternative evidence that the mother failed to address her substance abuse issues. In re River L., — S.W.3d —, 2021 Tenn. App. LEXIS 83 (Tenn. Ct. App. Mar. 6, 2021).

A timeline depicting the mother's various arrests was improperly admitted where although a case worker identified the timelineand explained how and why it was prepared, the Department of Children's Services (DCS) failed to ask her whether creating such a timeline was a regularly conducted DCS practice and whether she created the document near the time of the recorded events. Therefore, DCS failed to establish the requirements forTenn. R. Evid. 803(6), and the timeline should not have been admitted into evidence. The admission was harmless error, however, because the mother admitted that she had been arrested multiple times during the case and that she had a pending drug charge at the time of trial. In re River L., — S.W.3d —, 2021 Tenn. App. LEXIS 83 (Tenn. Ct. App. Mar. 6, 2021).

11. Attorneys' Time Records.

Attorneys are qualified to testify as to time records if they have personal knowledge of the firm's billing practices and the manner in which the account records were prepared and maintained. Alexander v. Inman, 903 S.W.2d 686, 1995 Tenn. App. LEXIS 70 (Tenn. Ct. App. 1995).

Computer printouts of attorneys' time records were admissible under Tenn. R. Evid. 803. Alexander v. Inman, 903 S.W.2d 686, 1995 Tenn. App. LEXIS 70 (Tenn. Ct. App. 1995).

In a murder prosecution, it was proper to admit testimony of a witness that the victim received a telephone call from one codefendant on the day of the murder and, immediately after the call, said that he was going fishing "with the boys": the evidence showed the victim's state of mind, his intention to fish. State v. Hutchison, 898 S.W.2d 161, 1994 Tenn. LEXIS 157 (Tenn. 1994), rehearing denied, 898 S.W.2d 161, 1995 Tenn. LEXIS 198 (1995), cert. denied, Hutchinson v. Tennessee, 516 U.S. 846, 116 S. Ct. 137, 133 L. Ed. 2d 84, 1995 U.S. LEXIS 5846 (1995), dismissed, Hutchison v. Bell, — F. Supp. 2d —, 2010 U.S. Dist. LEXIS 31736 (E.D. Tenn. Mar. 30, 2010).

12. Hospital Records.

Hospital records of victim of assault and attempted rape were properly admitted statements made for purposes of medical diagnosis or treatment. State v. Edwards, 868 S.W.2d 682, 1993 Tenn. Crim. App. LEXIS 228 (Tenn. Crim. App. 1993).

Trial court erred in criticizing as hearsay certain medical records because those records were accompanied by an affidavit reflecting that they were prepared by the personnel of a hospital, staff physicians, or persons acting under the control of either, in the ordinary course of hospital business. Rhody v. Rhody, — S.W.3d —, 2020 Tenn. App. LEXIS 169 (Tenn. Ct. App. Apr. 16, 2020).

13. Depositions.

The last sentence of Tenn. R. Civ. P. 32.01(3) prohibits the use of the discovery deposition of an expert for anything other than contradicting or impeaching the testimony of the deponent as an expert witness, regardless of whether the deposition was taken in the present case or in a previous case; also the specific prohibition contained in that sentence is given precedence over the general exceptions to the hearsay rule contained in Tenn. R. Evid. 803 and Tenn. R. Evid. 804. Drennon v. GE, 897 S.W.2d 243, 1994 Tenn. LEXIS 387 (Tenn. Special Workers' Comp. App. Panel 1994).

14. Recorded Recollection.

Where a witness claimed little recollection of the facts at trial, even when shown his former sworn statement, and it was apparent that the written statement was made when the matter was fresh in the witness's memory and accurately reflected his memory at the time, the state was properly permitted to read portions of the statement into the record under the recorded recollection exception to the hearsay rule. State v. Mathis, 969 S.W.2d 418, 1997 Tenn. Crim. App. LEXIS 511 (Tenn. Crim. App. 1997).

Audio recording of statement of witness to traffic accident meets the requirements of Tenn. R. Evid. 803(5) as a past recollection recorded where witness had first hand knowledge of the accident, was unable to testify at trial about the accident due to intervening brain surgery but did testify that he remembered giving the interview several days after the accident when his memory was good. Mitchell v. Archibald, 971 S.W.2d 25, 1998 Tenn. App. LEXIS 63 (Tenn. Ct. App. 1998).

In defendant's murder case, although a court erred by making witnesses' recorded recollection statements into exhibits, the error was harmless, because the jury heard each read aloud, and the bulk of each statement was the same as the trial testimony of its maker. State v. Robertson, 130 S.W.3d 842, 2003 Tenn. Crim. App. LEXIS 358 (Tenn. Crim. App. 2003), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 1068 (Tenn. Oct. 27, 2003).

It was not error to admit a witness's prior written statement and preliminary hearing testimony when the witness said the witness could not remember the subject of such statement and testimony because, inter alia, this material was admissible under Tenn. R. Evid. 803(5), as

(1) the required foundation was laid, and (2) a possibility that the witness was feigning a memory loss did not defeat admissibility under this Rule. State v. Davis, 466 S.W.3d 49, 2015 Tenn. LEXIS 463 (Tenn. June 3, 2015).

Suspicion that a witness is exaggerating his or her memory loss at trial is not sufficient to abrogate the admissibility of a recorded recollection pursuant to Tenn. R. Evid. 803(5). State v. Davis, 466 S.W.3d 49, 2015 Tenn. LEXIS 463 (Tenn. June 3, 2015).

Because a decedent was not available to refresh her recollection or to testify, the videos of the decedent did not fall under the recorded recollection hearsay exception and were properly excluded; however, even if the proffered videos satisfied the exception, they should not have been received into evidence as an exhibit because the rule stated that the memorandum or record could not be received as an exhibit unless offered by an adverse party. Bottorff v. Sears, — S.W.3d —, 2018 Tenn. App. LEXIS 430 (Tenn. Ct. App. July 25, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 764 (Tenn. Dec. 6, 2018), cert. denied, 204 L. Ed. 2d 1145, 139 S. Ct. 2759, — U.S. —, 2019 U.S. LEXIS 4286 (U.S. June 24, 2019).

Trial court did not err by admitting defendant's brother prior statement because the brother testified at trial that the statement was written and signed by him and the trial court conducted a jury-out hearing during which it determined that the statement was trustworthy. The statement was also properly admitted as a recorded recollection because it was taken shortly after the events in question and the brother no longer remembered the statement, and the trial court allowed the statement to be read into evidence but did not admit it as an exhibit. State v. Rimmer, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 322 (Tenn. Crim. App. May 21, 2019).

15. Children.

Childrens' statements were admissible where the circumstances did not militate against the trustworthiness of the statements and there was evidence corroborating the statements. Department of Human Servs. v. Purcell, 955 S.W.2d 607, 1997 Tenn. App. LEXIS 140 (Tenn. Ct. App. 1997).

In a dependency and neglect proceeding in which the child was found to be a victim of severe child abuse by aggravated sexual battery, the trial court did not err in admitting the out of court statements of the child because those statements were sufficiently bolstered by indicia of reliability so as to render them admissible as the disclosures of the child to the forensic interviewer, a licensed clinical social worker, her pediatrician, the grandmother, and the mother corroborated and sustained the reliability of the statements; and the father had ample opportunity to question and examine the conveyors of the disclosures. In re Emmalee O., 464 S.W.3d 311, 2015 Tenn. App. LEXIS 34 (Tenn. Ct. App. Jan. 27, 2015), appeal denied, — S.W.3d —, 2015 Tenn. LEXIS 478 (Tenn. June 12, 2015), cert. denied, Overton v. Tenn. Dep't of Children's Servs., 193 L. Ed. 2d 230, 136 S. Ct. 330, — U.S. —, 2015 U.S. LEXIS 6517 (U.S. 2015).

Juvenile court abused its discretion in allowing the children's therapist to testify about what the children told her about attending school where the children's statements were that, since entering the foster home, they were actively involved in school with no behavior problems in school, and no grade problems in school., and as a result those statements were not about abuse or neglect. In re River L., — S.W.3d —, 2021 Tenn. App. LEXIS 83 (Tenn. Ct. App. Mar. 6, 2021).

Trial court properly found that a child was the victim of severe child abuse at the hands of his mother when he was seven years old, that the child was dependent and neglected in her care, and entered a no-contact order against her because the in the child's forensic and therapy interviews, he made unprompted, consistent, detailed disclosures of sexual abuse perpetrated by mother and did not name any other perpetrator. In re Azhianne G., — S.W.3d —, 2021 Tenn. App. LEXIS 106 (Tenn. Ct. App. Mar. 18, 2021).

16. Doctrine of Curative Admissibility.

Hearsay statements that do not fall within a recognized hearsay exception may, nonetheless, be admitted during redirect examination under the doctrine of curative admissibility. The doctrine of curative admissibility permits the state, on redirect, to question the witness to clarify or explain the matters brought out during, or to remove or correct unfavorable inferences left by, previous cross-examination; where a defendant has injected an issue into the case, the state may be allowed to admit otherwise inadmissible evidence in order to explain or counteract a negative inference raised by the issue defendant injects. State v. Land, 34 S.W.3d 516, 2000 Tenn. Crim. App. LEXIS 369 (Tenn. Crim. App. 2000).

17. Prior Identification.

A party seeking to admit evidence under the prior identification exception must establish four elements: (1) That the declarant made an identification of a person; (2) That the identification was made after perceiving the person; (3) That the declarant testified at the hearing or trial in which the prior identification was introduced; and (4) That the declarant was subject to cross examination about the statement. State v. Stout, 46 S.W.3d 689, 2001 Tenn. LEXIS 461 (Tenn. 2001), cert. denied, Stout v. Tennessee, 534 U.S. 998, 122 S. Ct. 471, 151 L. Ed. 2d 386, 2001 U.S. LEXIS 10056 (2001).

The fact that the prior identification was made is admissible under the prior identification exception as substantive evidence regardless of whether the witness has identified the defendant in court. State v. Stout, 46 S.W.3d 689, 2001 Tenn. LEXIS 461 (Tenn. 2001), cert. denied, Stout v. Tennessee, 534 U.S. 998, 122 S. Ct. 471, 151 L. Ed. 2d 386, 2001 U.S. LEXIS 10056 (2001).

Under the prior identification exception, the person who made the identification must have personally perceived the person identified. State v. Stout, 46 S.W.3d 689, 2001 Tenn. LEXIS 461 (Tenn. 2001), cert. denied, Stout v. Tennessee, 534 U.S. 998, 122 S. Ct. 471, 151 L. Ed. 2d 386, 2001 U.S. LEXIS 10056 (2001).

Eyewitness's out-of-court identification satisfied the hearsay exception criteria for admission and did not violate the Confrontation Clause because the eyewitness testified at trial and was subject to cross-examination concerning the statement. State v. Dotson, 450 S.W.3d 1, 2014 Tenn. LEXIS 694 (Tenn. Sept. 30, 2014), cert. denied, Dotson v. Tennessee, 191 L. Ed. 2d 565, 135 S. Ct. 1535, 575 U.S. 906, 2015 U.S. LEXIS 1830 (U.S. 2015).

18. Evidence From Other Crimes.

Upon retrial of defendant's conviction for felony murder, the state was permitted to introduce evidence of his conviction for aggravated burglary in connection with the crime, but only if the trial court determined that its probative value was not substantially outweighed by the risk of unfair prejudice to the defendant. State v. Scarbrough, 181 S.W.3d 650, 2005 Tenn. LEXIS 1044 (Tenn. 2005).

19. Unavailability.

In response to police questioning at the crime scene, the victim launched into a detailed narrative of the defendant's assault on her; where the deceased victim was unavailable to testify at trial, the admission of the police officer's testimony of her hearsay statements violated defendant's confrontation rights because defendant did not have an opportunity to cross-examine the victim. State v. Maclin, 183 S.W.3d 335, 2006 Tenn. LEXIS 6 (Tenn. 2006), cert. denied, Anderson v. Tennessee, 549 U.S. 828, 127 S. Ct. 47, 166 L. Ed. 2d 49, 2006 U.S. LEXIS 5944 (2006).

20. Ancient Documents.

Property survey, which was within the exception to the hearsay rule under Tenn. R. Evid. 803(16), was admissible and available to assist the trial court in its duty of determining ownership upon remand; nothing in the circumstances surrounding the survey and the owner's attempt to introduce it into evidence raised a reasonable suspicion that was not genuine, and the survey, if properly proffered into evidence upon remand for new trial, was admissible. Dunegan v. Griffith, 253 S.W.3d 164, 2007 Tenn. App. LEXIS 633 (Tenn. Ct. App. Oct. 8, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 175 (Tenn. Mar. 10, 2008).

21. Medical Reports.

Although T.C.A. § 50-6-235 was not the exclusive means of introducing medical testimony in workers' compensation cases, evidence still had to meet the requirements of Tenn. R. Evid. 803(6) and a physician's independent medical evaluation of an employee in preparation for trial did not meet the requirements. Arias v. Duro Std. Prods. Co., 303 S.W.3d 256, 2010 Tenn. LEXIS 57 (Tenn. Jan. 22, 2010).

22. Prior Inconsistent Statement.

Trial court erroneously admitted into evidence the victim's hearsay statements to three witnesses; the victim's statements to the three women were not admissible via Tenn. R. Evid. 803(26) because they were not "audio or video recorded" or "given under oath" and the trial court did not conduct a hearing out of the presence of the jury to determine whether the statements were "made under circumstances indicating trustworthiness." Tenn. R. Evid. 803(26)(B),(C). State v. Ackerman, 397 S.W.3d 617, 2012 Tenn. Crim. App. LEXIS 510 (Tenn. Crim. App. July 13, 2012), overruled, State v. Sanders, 452 S.W.3d 300, 2014 Tenn. LEXIS 912 (Tenn. Nov. 10, 2014).

Because the video recording of the forensic interview was hearsay and did not satisfy the requirements for admission as a prior inconsistent statement via Tenn. R. Evid. 803(26) or as a past recollection recorded via Tenn. R. Evid. 803(5), it should not have been admitted. State v. Ackerman, 397 S.W.3d 617, 2012 Tenn. Crim. App. LEXIS 510 (Tenn. Crim. App. July 13, 2012), overruled, State v. Sanders, 452 S.W.3d 300, 2014 Tenn. LEXIS 912 (Tenn. Nov. 10, 2014).

It was not error to admit a witness's prior written statement and preliminary hearing testimony when the witness said the witness could not remember the subject of such statement and testimony because, inter alia, this material was admissible under Tenn. R. Evid. 803(26), as the witness's memory loss caused the witness to be unavailable. State v. Davis, 466 S.W.3d 49, 2015 Tenn. LEXIS 463 (Tenn. June 3, 2015).

For the purposes of Tenn. R. Evid. 803(26), a prior statement about events that a witness claims at trial to be unable to remember is "inconsistent" with the witness's trial testimony. State v. Davis, 466 S.W.3d 49, 2015 Tenn. LEXIS 463 (Tenn. June 3, 2015).

Codefendant's hearsay statement to police was erroneously admitted, because it did not meet the requirements of Tenn. R. Evid. 613(b) and 803(26), in that it was not made under circumstances indicting trustworthiness and the codefendant admitted or was not asked about making all but a few brief portions of the

statement. State v. Foust, 482 S.W.3d 20, 2015 Tenn. Crim. App. LEXIS 735 (Tenn. Crim. App. Sept. 9, 2015).

Based upon the prosecutor's statement to the court about the state's preparing the witness for his trial testimony and the witness's deception relative to the content of his trial testimony, defendant did not show that the state was aware, when it called the witness, that the witness had disavowed his written statement; in the absence of such evidence, the appellate court could not conclude that the witness was called as a witness as a pretext to introducing his written statement and that the testimony of a chief and a captain should not have been allowed to impeach the witness's testimony. State v. Rayfield, 507 S.W.3d 682, 2015 Tenn. Crim. App. LEXIS 780 (Tenn. Crim. App. Sept. 28, 2015), appeal denied, — S.W.3d —, 2016 Tenn. LEXIS 146 (Tenn. Feb. 18, 2016).

Since the shooting victim testified at trial, the presentation of a prior audio statement made under circumstances indicating trustworthiness did not violate this rule. State v. Lindsey, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 495 (Tenn. Crim. App. Aug. 16, 2019).

Audio-recorded statement of a witness recorded by a police detective the day after a shooting was admissible when the witness testified at trial as to having no recollection of the shooting because the trial court determined that the statement was made pursuant to circumstances indicating trustworthiness as defendant did not appear to be under the influence of drugs, was apprehensive, and had asked for but was denied money; the statement was consistent with the other evidence, and defense counsel cross-examined defendant. State v. Moore, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 352 (Tenn. Crim. App. May 15, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 503 (Tenn. Sept. 16, 2020).

Evidence was insufficient to support defendant's rape conviction because there was no evidence of force or coercion, as the victim recanted her allegation at trial, defendant's confession included no details that could be construed as force or coercion, and the State was not permitted to use the victim's statements contained on a video recording as substantive evidence of defendant's guilt as it did not satisfy the requirements of this rule and it did not seek the admission of the video. State v. Wyse, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 687 (Tenn. Crim. App. Oct. 20, 2020).

Trial court did not abuse its discretion by admitting the entire written statement of an eye witness because it was admissible as a prior inconsistent statement, as it contained events he claimed he was unable to remember at trial, the eye witness testified and was subject to cross-examination, the statement was signed by the eye witness during his interview with the police the morning after the shooting after being advised of his Miranda rights, and he claimed that most of his statement was created by the officers. State v. Stevenson, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 798 (Tenn. Crim. App. Dec. 16, 2020).

Trial court did not err by permitting the State to impeach the co-defendant with her prior inconsistent statement to an investigator that defendant was wearing a red coat because there was no evidence in the record that the State was aware at trial that the co-defendant would repudiate her prior statement, the co-defendant's prior inconsistent statement spoke directly to the credibility of her recollection of defendant's clothing on the night of the crimes, and her credibility on this issue was of significant value, and trial court's instruction specifically instructed the jury that the red coat statement was only admissible as impeachment evidence, and it sought to limit any prejudicial impact. State v. Kea, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 72 (Tenn. Crim. App. Mar. 4, 2021).

Rule 804. Hearsay exceptions; declarant unavailable. —

(a) Definition of Unavailability. — "Unavailability of a witness" includes situations in which the declarant —

(1) Is exempted by ruling of the court on the grounds of privilege from testifying concerning the subject matter of the declarant's statement; or

(2) Persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or

(3) Demonstrates a lack of memory of the subject matter of the declarant's statement; or

(4) Is unable to be present or to testify at the hearing because of the declarant's death or then existing physical or mental illness or infirmity; or

(5) Is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance by process; or

(6) For depositions in civil actions only, is at a greater distance than 100 miles from the place of trial or hearing.

A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.

Advisory Commission Comments.

These grounds for unavailability are familiar to Tennessee practitioners. The fourth and fifth – death, illness, and impossibility of subpoena – are typically the reasons a declarant is unavailable to testify. The first two bases found acceptance by the Supreme Court in *Breeden v. Independent Fire Ins. Co.*, 530 S.W.2d 769 (Tenn. 1975).

Advisory Commission Comments [1994].

The third ground for unavailability is new. Memory lapse, if demonstrated to the trial judge under Rule 104(a), is enough to get the contents of recorded recollection read to the jury, and the same condition should be enough to get cross-examining sworn former testimony before the jury. The new provision also applies to declarations against interest and individual declarations of pedigree.

Advisory Commission Comments [1997].

This amendment conforms Tenn. R. Civ. P. 32 and Tenn. R. Evid. 804. If the former testimony is a deposition, an additional ground of unavailability is a distance of over 100 miles between the deponent and the courthouse.

Advisory Commission Comments [1998].

The amendment to Rule 804(a) is technical.

Advisory Commission Comments [2003].

Paragraph (a)(6) is amended to restrict the 100 mile unavailability ground to depositions in civil, not criminal, trials.

Compiler's Notes.

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 31, 2003, was ratified and approved by 2003 House Resolution 22 and Senate Resolution 10. The order promulgating the 2003 amendment of this rule provided that it take effect on July 1, 2003.

(b) Hearsay Exceptions. — The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former Testimony. — Testimony given as a witness at another hearing of the same or a different proceeding or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered had both an opportunity and a similar motive to develop the testimony by direct, cross, or redirect examination.

Advisory Commission Comments.

The rule makes admissible former testimony even though one of the present parties was not at the earlier hearing, but only if the former testimony is offered against the party common to both hearings. In summary, no mutuality of parties is required, such as requirement having been abolished in *State v. Causby*, 706 S.W.2d 628 (Tenn. 1986).

The rule covers depositions as well as trial and preliminary hearing transcripts. Amended T.R.C.P. 32.01 contains the same principle of admissibility for depositions.

By specifically requiring "both an opportunity and a similar motive," this proposed rule is designed to avoid the holdings of *Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179 (3d Cir. 1978), and *Clay v. Johns-Manville Sales Corp.*, 722 F.2d 1289 (6th Cir. 1983).

(2) Statement Under Belief of Impending Death. — In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent and concerning the cause or circumstances of what the declarant believed to be impending death.

Advisory Commission Comments.

The rule retains Tennessee's common law limitations. The trial must be for homicide of the declarant, and the declaration is limited to circumstances surrounding the declarant's death. Obviously with this restricted exception, the ground for declarant's unavailability invariably will be death.

Advisory Commission Comments [2009].
The revised language makes admissible a dying declaration even though the declarant is not the victim of the homicide being prosecuted. The exception would apply, for example, where there were multiple victims but the prosecutions were severed. The revision also admits dying declarations in civil cases where relevant and material.

Compiler's Notes.
The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 8, 2009, was ratified and approved by 2009 House Resolution 14 and Senate Resolution 17. The order promulgating the amendment of this rule provided that it take effect July 1, 2009.

(3) Statement Against Interest. — A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another, that a reasonable person in the declarant's position would not have made the statement unless believing it to be true.

Advisory Commission Comments.
This rule follows modern Tennessee law by admitting declarations against penal interest as well as those against pecuniary or proprietary interest. *Breeden v. Independent Fire Ins. Co.*, 530 S.W.2d 769 (Tenn. 1975); *Smith v. State*, 587 S.W.2d 659 (Tenn. 1979). The proposal eliminates the condition espoused by *Smith* that declarations against penal interest offered by the accused in a criminal prosecution must be corroborated.

(4) Statement of Personal and Family History. — A statement made before the controversy arose (A) concerning declarant's own birth, adoption, marriage, divorce, or legitimacy; relationship by blood, adoption, or marriage; ancestry; or other similar fact of personal or family history; even though the declarant had no means of acquiring personal knowledge of the matter asserted; or (B) concerning the foregoing matters, and death also, of another person if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

Advisory Commission Comments.
When pedigree evidence is an individual's extrajudicial declaration rather than the community consensus, the declarant must be unavailable and must have spoken or written "before the controversy arose." The rule reflects Tennessee common law.

(5) [Reserved.]

Advisory Commission Comments.
There is no residual exception even where declarants are unavailable. Occasionally, however, constitutional considerations require a tribunal permit the accused in a criminal case to introduce trustworthy hearsay not falling within a traditional exception. See *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973). See also F.R.Evid. 804(b)(5).

(6) Forfeiture by Wrongdoing. — A statement offered against a party that has engaged in wrongdoing that was intended to and did procure the unavailability of the declarant as a witness. [As amended by order entered December 20, 1994, effective July 1, 1994; by order effective July 1, 1997; by order effective July 1, 1998; by order entered January 26, 1999, effective July 1, 1999; by order entered January 31, 2003, effective July 1, 2003; and by order entered January 8, 2009, effective July 1, 2009.]

Advisory Commission Comments [1999]. Rule 804(b)(6) adds a new hearsay exception. It seems only fair to let a party offer any extrajudicial statements of declarants whose unavailability was procured by the opponent.

Law Reviews. Comparing the Tennessee and Federal Rules of Evidence (Donald F. Paine), 26 Tenn. B.J. 37 (1990).

Hearsay and Informal Reasoning (Craig R. Callen), 47 Vand. L. Rev. 43 (1994).

Hearsay in 10 Easy Steps (Donald F. Paine), 33 Tenn. B.J. 3 (1997).

Is This Deposition for Discovery or Proof? (Donald F. Paine), 36 Tenn. B.J. 20 (2000).

New Rules! (Donald F. Paine), 35 Tenn. B.J. 32 (1999).

NOTES TO DECISIONS

Analysis

1. Depositions.
2. Former Testimony.
3. Dying Declarations.
4. Failure to Show Declarant Unavailable.
5. Statement Against Interest.
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7. Forfeiture by Wrongdoing.
8. Declarant Unavailable.
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1. Depositions.

The last sentence of Tenn. R. Civ. P. 32.01(3) prohibits the use of the discovery deposition of an expert for anything other than contradicting or impeaching the testimony of the deponent as an expert witness, regardless of whether the deposition was taken in the present case or in a previous case; also the specific prohibition contained in that sentence is given precedence over the general exceptions to the hearsay rule contained in Tenn. R. Evid. 803 and Tenn. R. Evid. 804. Drennon v. GE, 897 S.W.2d 243, 1994 Tenn. LEXIS 387 (Tenn. Special Workers' Comp. App. Panel 1994).

In an action involving an alleged breach of a settlement agreement between and employer and employee, trial court did not err in determining that a nurse was unavailable because she had moved to San Diego and was unavailable on the date of trial; thus, admission of her deposition was appropriate, asTenn. R. Evid. 804(a)(6) provided that a deposed witness who was more than 100 miles from the courthouse at time of trial qualified as an unavailable declarant. DePasquale v. Chamberlain, 282 S.W.3d 47, 2008 Tenn. App. LEXIS 403 (Tenn. Ct. App. July 15, 2008), appeal denied, Depasquale v. Chamberlain, — S.W.3d —, 2009 Tenn. LEXIS 217 (Tenn. Feb. 2, 2009).

Where buyers of a termite-infested house sued sellers and the termite control company, trial court did not err in instructing the jury on the "missing witness" rule because the termite expert was not available at trial; trial court properly applied Tenn. R. Civ. P. 32.01(3) and Tenn. R. Evid. 804(a) in holding that defendants could not read portions of the termite expert's deposition into evidence. Elchlepp v. Hatfield, 294 S.W.3d 146, 2008 Tenn. App. LEXIS 437 (Tenn. Ct. App. July 30, 2008), appeal denied, — S.W.3d —, 2009 Tenn. LEXIS 83 (Tenn. Jan. 26, 2009).

2. Former Testimony.

The testimony of a codefendant given at the first trial of a criminal case was admissible at a retrial of the case where the codefendant was not available because he invoked his Fifth Amendment privilege and refused to testify. State v. Bilbrey, 912 S.W.2d 187, 1995 Tenn. Crim. App. LEXIS 549 (Tenn. Crim. App. 1995), appeal denied, — S.W.2d —, 1995 Tenn. LEXIS 758 (Tenn. Dec. 4, 1995).

In defendant's murder case, a court did not err in admitting the audiotaped prior testimony of one victim from an earlier hearing in juvenile court, where the victim intentionally absented himself from the proceedings and took steps to keep the state from discovering his whereabouts, the state made good faith efforts to locate the witness but was unable to do so, the former testimony was reliable, and defendant had a similar motive and opportunity in the juvenile court proceeding to develop the victim's testimony through cross-examination. State v. Summers, 159 S.W.3d 586, 2004 Tenn. Crim. App. LEXIS 788 (Tenn. Crim. App. 2004), appeal denied, — S.W.3d —, 2005 Tenn. LEXIS 26 (Tenn. Jan. 18, 2005).

During defendant's trial for vehicular assault and aggravated vehicular homicide, trial court did not err by admitting testimony of a deceased witness from the preliminary hearing, as it was admissible under the "former testimony" hearsay exception of Tenn. R. Evid. 804(b)(1); defendant's right to confrontation was not violated because defendant had an opportunity to cross-examine the witness during the preliminary hearing. State v. Bowman, 327 S.W.3d 69, 2009 Tenn. Crim. App. LEXIS 35 (Tenn. Crim. App. Jan. 14, 2009), appeal denied, — S.W.3d —, 2009 Tenn. LEXIS 395 (Tenn. June 15, 2009), cert. denied, Bowman v. Tennessee, 175 L. Ed. 2d 388, 130 S. Ct. 559, 2009 U.S. LEXIS 8080 (U.S. 2009).

It was not error to admit a witness's prior preliminary hearing testimony when the witness said the witness could not remember the subject of such testimony because, inter alia, the memory loss caused the witness to be

unavailable under Tenn. R. Evid. 804(a)(3). State v. Davis, 466 S.W.3d 49, 2015 Tenn. LEXIS 463 (Tenn. June 3, 2015).

When considering the admission of the prior testimony of a witness who claims a lack of memory, a trial judge who suspects that the witness may be feigning or exaggerating his or her inability to recollect the relevant matters should utilize the approach of ordering the witness to testify, and, if the witness still feigns lack of memory, the witness is unavailable under Tenn. R. Evid. 804(a)(2). State v. Davis, 466 S.W.3d 49, 2015 Tenn. LEXIS 463 (Tenn. June 3, 2015).

Trial court did not err when it found the victim unavailable because the state used multiple avenues to bring him to court and the victim admitted that he did not plan to comply, and his testimony about the events was virtually the same at the preliminary hearing as it was at the motion for new trial hearing, and therefore was properly admitted. State v. Sorrell, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 510 (Tenn. Crim. App. Aug. 22, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 579 (Tenn. Dec. 4, 2019).

3. Dying Declarations.

A dying declaration may be found only in very limited circumstances. State v. Hampton, 24 S.W.3d 823, 2000 Tenn. Crim. App. LEXIS 383 (Tenn. Crim. App. 2000).

The rationale for the dying declaration exception to the hearsay rule is that one facing death will be truthful for fear of eternal consequences; absent a belief by the victim that death is imminent, the underlying rationale for the exception is not present. State v. Hampton, 24 S.W.3d 823, 2000 Tenn. Crim. App. LEXIS 383 (Tenn. Crim. App. 2000).

Evidence based upon the conclusion that the defendant believed that he was in danger of dying was insufficient to meet the test as to whether the dying declaration should be admitted as an exception to the hearsay rule. State v. Hampton, 24 S.W.3d 823, 2000 Tenn. Crim. App. LEXIS 383 (Tenn. Crim. App. 2000).

Where the victim was shot during a robbery of his antiques store, and he told police he knew that defendant was involved in the offenses, the trial court did not err by admitting this statement at defendant's murder trial as a dying declaration under Tenn. R. Evid. 804; while the statement was testimonial, its admission did not violate defendant's confrontations rights. State v. Lewis, 235 S.W.3d 136, 2007 Tenn. LEXIS 649 (Tenn. Aug. 17, 2007).

Court did not err in admitting the victim's statement under the dying declaration exception because there was testimony regarding the victim's condition after defendant shot him four times, the victim was fading in and out of consciousness, was in shock, was bleeding heavily from multiple gunshot wounds, and the victim appeared to be in distress, looked concerned, scared, and worried, and was using an oxygen mask. State v. Taylor, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 160 (Tenn. Crim. App. Apr. 20, 2021).

4. Failure to Show Declarant Unavailable.

Defendant's argument that the letter purportedly written by an inmate was admissible as a declaration against penal interest was without merit where defendant made no showing that declarant was unavailable to testify, no explanation was given as to why the inmate was not present at the trial, and there was no showing that any attempt had been made to locate the inmate or that process had been issued to compel the inmate's attendance. State v. Cureton, 38 S.W.3d 64, 2000 Tenn. Crim. App. LEXIS 29 (Tenn. Crim. App. 2000), review or rehearing denied, — S.W.3d —, 2000 Tenn. LEXIS 631 (Tenn. Nov. 6, 2000).

5. Statement Against Interest.

Where defendant was tried on four aggravated robbery indictments, his co-defendant was unavailable for purposes of Tenn. R. Evid. 804(a) because he asserted his fifth amendment privilege; co-defendant's self-serving statement to police in which he admitted to one of the robberies but claimed he was unarmed was not admissible under Tenn. R .Evid. 804(b)(3), as the statement was not against his interest. State v. Dotson, 254 S.W.3d 378, 2008 Tenn. LEXIS 277 (Tenn. Apr. 28, 2008).

In defendant's murder trial for the killing of his wife, the trial court did not err in excluding from evidence three anonymous letters written to defendant and to the prosecutor that admitted to the murder of the victim; although defendant claimed that the letters were statements against interest and thus fell under the exception to the hearsay rule under subsection (b)(3), the anonymous nature of the statements raised concerns about the reliability of the information. Further, because the letter writer's identity was never discovered, the letter writer had not exposed himself to criminal liability. State v. Brock, 327 S.W.3d 645, 2009 Tenn. Crim. App. LEXIS 496 (Tenn. Crim. App. June 29, 2009), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 56 (Tenn. Jan. 25, 2010), cert. denied, Brock v. Tennessee, , 562 U.S. 850, 131 S. Ct. 101, 178 L. Ed. 2d 64, 2010 U.S. LEXIS 5883 (U.S. 2010).

Co-defendant's statement to a detective which the detective testified to at the military tribunal -- that the child was okay when petitioner left the house" and that "co-defendant was the only person in the house during that time period" -- was admissible as a statement against interest because the co-defendant was unavailable at trial and because his statement directly contradicted his defense theory that petitioner inflicted the fatal injuries, rendering

invalid a claim by the declarant against another. Metz v. State, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 7 (Tenn. Crim. App. Jan. 7, 2021).

6. Application to Sentencing Proceedings.

It was not an error for the trial court to allow the state to read into the sentencing record the former testimony of two witnesses, each of whom testified at defendant's first trial that he had offered to pay them to kill his wife, because Tenn. R. Evid. 804(b)(1) did not apply to the resentencing hearing. State v. Stephenson, 195 S.W.3d 574, 2006 Tenn. LEXIS 454 (Tenn. 2006).

7. Forfeiture by Wrongdoing.

To ensure that Tenn. Evid. Rule 804(b)(6) is properly applied, the trial court is required to conduct a hearing outside the presence of the jury to determine whether a declarant's statements are admissible. In such a hearing, in order for the statements to be admissible, the trial court must find that a preponderance of the evidence establishes: (1) That the defendant was involved in or responsible for procuring the unavailability of the declarant; and (2) That a defendant's actions were intended, at least in part, to procure the absence of the declarant. State v. Ivy, 188 S.W.3d 132, 2006 Tenn. LEXIS 137 (Tenn. 2006), cert. denied, Ivy v. Tennessee, 549 U.S. 914, 127 S. Ct. 258, 166 L. Ed. 2d 200, 2006 U.S. LEXIS 6153 (2006).

Trial court correctly determined that the murder victim's statements regarding defendant's previous violence toward the victim were admissible under Tenn. Evid. Rule 804(b)(6), and defendant's rights to confrontation were not violated where the preponderance of the evidence supports the finding that defendant killed the victim to prevent her from contacting the police about defendant's aggravated assault. Defendant killed the victim two days after she swore out a warrant against him. State v. Ivy, 188 S.W.3d 132, 2006 Tenn. LEXIS 137 (Tenn. 2006), cert. denied, Ivy v. Tennessee, 549 U.S. 914, 127 S. Ct. 258, 166 L. Ed. 2d 200, 2006 U.S. LEXIS 6153 (2006).

Forfeiture by wrongdoing hearsay exception under Tenn. R. Evid. 804(b)(6) requires a showing that a defendant's actions were intended to prevent a witness from testifying; in a case where the prosecution failed to prove that defendant's motive for the murder was to make the victim unavailable as a witness, the admission of the victim's hearsay statements violated Tenn. R. Evid. 804(b)(6). State v. Brooks, 249 S.W.3d 323, 2008 Tenn. LEXIS 177 (Tenn. Mar. 20, 2008).

Victim's application for an order of protection was properly admitted pursuant to the forfeiture by wrongdoing exception. State v. Hawkins, 519 S.W.3d 1, 2017 Tenn. LEXIS 272 (Tenn. May 1, 2017).

8. Declarant Unavailable.

On appeal from a finding in favor of defendants in plaintiffs lawsuit for damages arising out of an explosion, it was undisputed in the record that a neighbor was advancing in age and he testified himself that he was in bad health. Plaintiffs did not seek to elicit any details on the neighbor's bad health and the appellate court found that they failed to show that the trial court abused its discretion in deferring to the neighbor and finding that he was physically infirm and, therefore, unavailable to appear at trial under Tenn. R. Evid. 804(a)(4). Roach v. Dixie Gas Co., 371 S.W.3d 127, 2011 Tenn. App. LEXIS 612 (Tenn. Ct. App. Nov. 14, 2011).

Trial court did not abuse its discretion by determining that a witness was unavailable because the record established that the state made multiple good-faith efforts to locate the witness and secure his presence at trial, including contacting his relatives, coordinating efforts with law enforcement in Florida, publishing his photograph in a Florida newspaper, filing petitions to secure his presence at trial, and obtaining an arrest warrant from a Florida court. State v. Jones, 568 S.W.3d 101, 2019 Tenn. LEXIS 19 (Tenn. Jan. 30, 2019), cert. denied, Jones v. Tennessee, 205 L. Ed. 2d 144, 140 S. Ct. 262, — U.S. —, 2019 U.S. LEXIS 5344 (U.S. Oct. 7, 2019).

Witness was sworn and questioned by counsel for the state thoroughly regarding his memory of his testimony at the preliminary hearing, and he persistently insisted that he had no memory of the prior events; the trial court's failure to order the witness to testify prior to declaring him unavailable, if anything, was harmless. State v. Clayton, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 458 (Tenn. Crim. App. July 31, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 556 (Tenn. Dec. 10, 2019).

Admitting portions of a physician's deposition transcript pursuant to Tenn. R. Civ. P. 32.01(3) was not error where, as a practicing physician, he was exempt from subpoena to trial under T.C.A. § 24-9-101(a), and thus unavailable under Tenn. R. Evid. 804(a)(5). Spearman v. Shelby Cty. Bd. of Educ., — S.W.3d —, 2021 Tenn. App. LEXIS 17 (Tenn. Ct. App. Jan. 15, 2021).

9. Preservation for Review.

In a proceeding terminating the father's parental rights, the father's entire transcript from his sexual-battery criminal trial was admitted into evidence. Although, in his brief, the father disputed the unavailability of the witnesses on appeal under Tenn. R. Evid. 804(a), (b), it appeared that the father did not raise the issue at the trial level. Because it appeared that he did not object to the availability of the witnesses nor did he provide the appellate court

with a citation to where he did so, the appellate court was unable to review the issue on appeal. Dep't of Children's Serv. v. Hood, 338 S.W.3d 917, 2009 Tenn. App. LEXIS 894 (Tenn. Ct. App. Dec. 30, 2009), appeal denied, In re Cassandra H., — S.W.3d —, 2010 Tenn. LEXIS 244 (Tenn. Mar. 15, 2010), cert. denied, Hood v. Tenn. Dep't of Children's Servs.,, 562 U.S. 879, 131 S. Ct. 196, 178 L. Ed. 2d 118, 2010 U.S. LEXIS 6541 (U.S. 2010).

10. Evidence Inadmissible Despite Unavailability.

In a workers' compensation action, although an employee satisfied Tenn. R. Evid. 804(a)(4) by showing that a doctor was unable to testify at a hearing because of the declarant's then existing physical or mental illness or infirmity, a medical report remained inadmissible due to the employer's inability to depose the doctor because the employee failed to show that the report also satisfied one of the narrow exceptions provided in Rule 804(b). Carter v. Quality Outdoor Prods., 303 S.W.3d 265, 2010 Tenn. LEXIS 31 (Tenn. Jan. 22, 2010).

Trial court did not err by excluding a co-defendant's statement to law enforcement in which he implicated himself in the offense but never mentioned defendant's involvement because the statement did not exculpate defendant for the offense and there was no evidence that the co-defendant was asked about her in the interview. State v. Perry, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 105 (Tenn. Crim. App. Mar. 23, 2021).

11. Evidence Properly Included.

Trial court did not err by admitting previous testimony from witnesses, along with related exhibits, who were unavailable at the second trial, because the record reflected that defendant had an opportunity to, and in fact did, cross-examine each witness. State v. Rimmer, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 322 (Tenn. Crim. App. May 21, 2019).

Rule 805. Hearsay within hearsay. —

Hearsay within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules or otherwise by law.

Advisory Commission Comments. The rule provides that out-of-court statement containing several levels of hearsay and multiple declarants is nonetheless admissible if a hearsay exception applies to each declarant's statement. Also, while not covered here, a particular declarant's statement in the chain may be admissible as nonhearsay.

Often hospital records contain a nurse's notation that a patient said something to the nurse. In that instance a court must deal with two hearsay declarations. The nurse's notation is admissible as a business record to the extent of showing what words were spoken. The patient's statement may then be admissible under the admissions exception to the declarations of physical condition exception.

Law Reviews. Hearsay and Informal Reasoning (Craig R. Callen), 47 Vand. L. Rev. 43 (1994).

Witness for the Prosecution (Donald F. Paine), 36 Tenn. B.J. 31 (2000).

NOTES TO DECISIONS

1. Medical Report.

In a case in which defendant was convicted of aggravated sexual battery as a lesser-included offense of rape of a child, the trial court correctly ruled that Children's Advocacy Center reports were admissible pursuant to the business records exception and that hearsay statements contained within the reports constituted statements made for the purpose of medical diagnosis or treatment. State v. Howard, 504 S.W.3d 260, 2016 Tenn. LEXIS 725 (Tenn. Oct. 12, 2016).

Rule 806. Attacking and supporting credibility of declarant. —

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked and, if attacked, may be supported by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been

admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.

Advisory Commission Comments. The rule makes clear that hearsay declarants are subject to impeachment to the same extent as trial witnesses. if the method of impeachment is by prior inconsistent statement, such statement is not excluded for failure to provide the declarant an opportunity to explain. See Rule 613(b).

Law Reviews. Hearsay and Informal Reasoning (Craig R. Callen), 47 Vand. L. Rev. 43 (1994).

The Ten Commandments of Direct Examination (Donald F. Paine), 36 Tenn. B.J. 20 (2000).

NOTES TO DECISIONS

1. Impeachment of Witness.

Admission into evidence of a statement by defendant's accomplice that defendant had killed victim, when admitted to impeach a statement adduced during cross-examination of a state's witness to the effect that accomplice, not defendant, killed the victim, was clearly authorized by Tenn. R. Evid. 806. State v. Adams, 859 S.W.2d 359, 1992 Tenn. Crim. App. LEXIS 829 (Tenn. Crim. App. 1992).

Where a codefendant had properly asserted his fifth amendment privilege when called by the defendant to testify, he qualified as an unavailable witness; therefore, the admission of another statement by the codefendant, which was inconsistent with the one placed into evidence by the defendant, fit squarely within the category of admissible impeachment under Tenn. R. Evid. 806. State v. Zirkle, 910 S.W.2d 874, 1995 Tenn. Crim. App. LEXIS 103 (Tenn. Crim. App. 1995), rehearing denied, — S.W.2d —, 1995 Tenn. Crim. App. LEXIS 230 (Tenn. Crim. App. Mar. 21, 1995), appeal denied, — S.W.2d —, 1995 Tenn. LEXIS 481 (Tenn. Aug. 28, 1995), dismissed, Zirkle v. Carlton, — F. Supp. 2d —, 2013 U.S. Dist. LEXIS 123960 (E.D. Tenn. June 12, 2013).

During defendant's trial for vehicular assault and aggravated vehicular homicide where trial court admitted the testimony of a deceased witness from the preliminary hearing, trial court's exclusion of a deputy's report detailing the decedent's prior inconsistent statement was improper; statement could have been used to impeach the witness under Tenn. R. Evid. 806. State v. Bowman, 327 S.W.3d 69, 2009 Tenn. Crim. App. LEXIS 35 (Tenn. Crim. App. Jan. 14, 2009), appeal denied, — S.W.3d —, 2009 Tenn. LEXIS 395 (Tenn. June 15, 2009), cert. denied, Bowman v. Tennessee, 175 L. Ed. 2d 388, 130 S. Ct. 559, 2009 U.S. LEXIS 8080 (U.S. 2009).

ARTICLE IX. AUTHENTICATION

Rule 901. Requirement of authentication or identification. —

(a) General Provision. — The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to the court to support a finding by the trier of fact that the matter in question is what its proponent claims.

(b) Illustrations. — By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) Testimony of Witness With Knowledge. — Testimony that a matter is what it is claimed to be.

(2) Nonexpert Opinion on Handwriting. — Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) Comparison by Trier of Fact or Expert Witness. — Comparison by trier of fact or by expert witnesses with specimens which have been authenticated.

(4) Distinctive Characteristics and the Like. — Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) Voice Identification. — Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

(6) Telephone Conversations. — Telephone conversations, by evidence that a call was made to the number assigned at the time by a telephone company to a particular person or business if (A), in the case of a person, circumstances including self-identification show the person answering to be the one called or (B), in the case of the business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) Public Records or Reports. — Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office (or a purported public record, report, statement, or data compilation in any form) is from the public office where items of this nature are kept.

(8) Ancient Documents or Data Compilation. — Evidence that a document or data compilation in any form (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where, if authentic, it would likely be, and (C) has been in existence thirty years or more at the time it is offered.

(9) Process or System. — Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) Methods Provided by Statute or Rule. — Any method of authentication or identification provided by Act of Congress or the Tennessee Legislature or by other rules prescribed by the Tennessee Supreme Court.

Advisory Commission Comments. Section (a) makes the trial judge arbiter of authentication issues, as does the common law.

Subsection (b)(3) lets the trier of fact or an expert compare exemplars and questioned documents. The proposed draft corrects the mistake in *Franklin v. Franklin*, 90 Tenn. 44, 16 S.W. 557 (1891), where the Supreme Court construed Tenn. Code Ann. § 24-7-108 [Repealed] to disallow purported forger's exemplar. See *Amburn v. State*, 553 S.W.2d 922 (Tenn. Crim. App. 1977), criticizing *Franklin*.

Subsection (b)(4) simply makes common sense. Without drawing the boundaries of practical possibilities, the rule allows proof to the court of a myriad of distinctive characteristics that may convince the judge that a questioned document is authentic enough to let the jury consider it.

Subsection (b)(9) treats authentication of computer documents. All that the lawyer need do is introduce evidence satisfying the court that the computer system produces accurate information.

Law Reviews. Authentication Miscellany (Donald F. Paine), 43 Tenn. B.J. 26 (2007).

Some Comparisons Between the New Tennessee Rules of Evidence and the Federal Rules of Evidence Part I (Robert Banks, Jr.), 20 Mem. St. U.L. Rev. 283 (1990).

NOTES TO DECISIONS

Analysis

1. In General.
2. Public Records and Reports.
3. Hospital Bills.
4. Chain of Custody.
5. Audio Recordings.
6. Affidavits.
7. Evidence Not Authenticated.
8. Evidence Authenticated.
9. Illustrative Cases.

1. In General.

Once the foundation provided in Tenn. R. Evid. 901(a) is presented, the trier of fact then makes the ultimate decision of whether the item is actually what it purports to be. State v. Hinton, 42 S.W.3d 113, 2000 Tenn. Crim. App. LEXIS 544 (Tenn. Crim. App. 2000), review or rehearing denied, — S.W.3d —, 2001 Tenn. LEXIS 126 (Tenn. 2001).

Property survey, which was within the exception to the hearsay rule under Tenn. R. Evid.

803(16), was admissible and available to assist the trial court in its duty of determining ownership upon remand; nothing in the circumstances surrounding the survey and the owner's attempt to introduce it into evidence raised a reasonable suspicion that was not genuine, and the survey, if properly proffered into evidence upon remand for new trial, was admissible. Dunegan v. Griffith, 253 S.W.3d 164, 2007 Tenn. App. LEXIS 633 (Tenn. Ct. App. Oct. 8, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 175 (Tenn. Mar. 10, 2008).

2. Public Records and Reports.

Alabama uniform traffic ticket and complaint was properly admitted into evidence as a public record in an enhanced driving while under the influence (DUI) prosecution, as the ticket did not lack trustworthiness and bore several indicia of reliability. State v. Rea, 865 S.W.2d 923, 1992 Tenn. Crim. App. LEXIS 947 (Tenn. Crim. App. 1992).

3. Hospital Bills.

Medical malpractice plaintiff's hospital bills were not inadmissible for lack of authentication where her treating physicians testified about the type of treatment she received, and both the source of the bills and the procedures they covered were verified. Russell v. Crutchfield, 988 S.W.2d 168, 1998 Tenn. App. LEXIS 294 (Tenn. Ct. App. 1998), appeal denied, — S.W.3d —, 1999 Tenn. LEXIS 77 (Tenn. Feb. 16, 1999).

Minor student's medical bills were properly admitted where the testifying physician had been qualified as an expert with respect to the student's medical bills, and both that physician and the student's treating physician had testified that the medical services provided after the student was hit in the head with a shot put were necessary. Spearman v. Shelby Cty. Bd. of Educ., — S.W.3d —, 2021 Tenn. App. LEXIS 17 (Tenn. Ct. App. Jan. 15, 2021).

4. Chain of Custody.

The purpose of requiring a witness to be able to identify the evidence or establish an unbroken chain of custody is to demonstrate that there has been no tampering, loss, substitution or mistake with respect to the evidence. Absent sufficient proof of the chain of custody, evidence should not be admitted unless both identity and integrity can be demonstrated by other appropriate means. State v. Scott, 33 S.W.3d 746, 2000 Tenn. LEXIS 682 (Tenn. 2000).

Trial court erred in establishing a proper chain of custody for hair samples taken from the victim, where the hairs were not identified by a witness with knowledge that the mounted samples were the same hairs as the ones originally taken from the victim, and there was no evidence whatsoever to show how the hairs came to be mounted on the slides. State v. Scott, 33 S.W.3d 746, 2000 Tenn. LEXIS 682 (Tenn. 2000).

In a criminal prosecution for aggravated rape, trial court erred by admitting evidence of victim's pantyhose because the state failed to establish a proper chain of custody as required by Tenn. R. Evid. 901; although the testimony of the detective, nurse, and doctor was sufficient to show that the pantyhose came from the nurse's treatment room, there was no specific testimony regarding the removal of the pantyhose from the victim. State v. Cannon, 254 S.W.3d 287, 2008 Tenn. LEXIS 278 (Tenn. Apr. 29, 2008).

Trial court properly admitted defendant's cell phone and images it contained because the State provided an unbroken chain of custody, and the document was properly admitted as a business record where it was made at or near the time of the event recorded, was routinely kept in the course of "business," and did not contain opinion or hearsay. State v. Norton, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 149 (Tenn. Crim. App. Mar. 8, 2019).

Trial court did not err by admitting blood evidence because the testimony sufficiently established the identity and integrity of the evidence. According to an officer and the video evidence, defendant's blood was collected and sealed so that any tampering would be evident, a special agent's testimony established that it was received by TBI inside the sealed kit, the tubes were labeled with defendant's name and birth date, and she did not note any irregularities when she received it. State v. Parton, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 395 (Tenn. Crim. App. July 8, 2019).

Trial court did not err by admitting into evidence the onesie worn by the victim because the identity and integrity of the evidence was reasonably established, as the video from an officer's body camera showed her wearing a white onesie as she was being carried down the steps, although the victim's clothes had been removed before the officer's arrival, the officer's testimony that the onesie appeared to have been cut off of the victim did not reasonably call into question the identity or integrity of the onesie as the one that was worn by the victim at the time she was shot. State v. Sims, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 588 (Tenn. Crim. App. Aug. 28, 2020).

Defendant's challenge to the chain of custody failed because the State provided an unbroken chain of custody between law enforcement gaining possession of the methamphetamine and its analysis. State v. Reed, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 645 (Tenn. Crim. App. Sept. 30, 2020).

Because a jacket and cap, which were similar to the ones worn by the third defendant in a video surveillance at the ATMs, were found and collected as evidence at the first defendant's house, were placed into a lieutenant's control until checked into a new evidence room, and a former officer described the uniqueness of the

hat specifically, and he said that both items of clothing appeared to be the same as the ones he gathered at the first defendant's house, that was sufficient to identify the items for chain of custody purposes, and the trial court did not abuse its discretion by admitting that evidence. State v. Robinson, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 96 (Tenn. Crim. App. Mar. 17, 2021).

Trial court did not abuse its discretion when it determined that there was adequate evidence establishing the identity or chain of custody of the cell phones because the officers who gathered the phones identified them and stated they put them into evidence bags; an agent put a sticker on the phone identifying it; a lieutenant offered photographs of the evidence bags and cell phones, which showed that the appropriate phone was in the appropriate bag at the time he examined the phones; each phone contained information, and or evidence, evincing to whom it belonged; and the phones used respectively the known phone numbers of defendant and the victim. State v. Robinson, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 96 (Tenn. Crim. App. Mar. 17, 2021).

Chain of custody was established because a lieutenant described how the evidence that was collected was kept in a box labeled with the case number, which he stored in his office; his office itself was kept locked when he was not present and was in a locked section of a building accessible only with a pass card; and, when the sheriff's department created an evidence room, he placed the box in the care and control of the evidence custodian up until trial. There was no evidence that the evidence was tampered with or stored incorrectly. State v. Robinson, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 96 (Tenn. Crim. App. Mar. 17, 2021).

5. Audio Recordings.

The evidence was sufficient for the trial court to determine that the jury could find that tape was of the 9-1-1 call made by victim after the shootings; the jury was then free to determine whether the tape was, in fact, of the 9-1-1 call involved in the case. State v. Hinton, 42 S.W.3d 113, 2000 Tenn. Crim. App. LEXIS 544 (Tenn. Crim. App. 2000), review or rehearing denied, — S.W.3d —, 2001 Tenn. LEXIS 126 (Tenn. 2001).

Defendant's conviction for the aggravated rape of a child was proper because the trial court did not improperly admit a transcript of a telephone call between defendant and the victim's father under Tenn. R. Evid. 901(b)(1); the father testified that he made the phone call and that the call was recorded. Further, he recognized the recording introduced at trial and identified the voices on the recording. State v. Ramos, 331 S.W.3d 408, 2010 Tenn. Crim. App. LEXIS 195 (Tenn. Crim. App. Mar. 3, 2010), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 754 (Tenn. Aug. 26, 2010).

A witness, who was responsible for monitoring inmate phone calls for the sheriff's office, did not testify as an expert in voice recognition, but identified defendant as an individual on recorded phone calls based on the procedures in place at the jail and other information mentioned during the calls unique to defendant's case. Accordingly, the trial court did not abuse its discretion in the admission of recordings of defendant's jail phone calls because the jail phone calls were properly authenticated. Harris v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 683 (Tenn. Crim. App. Oct. 16, 2020).

6. Affidavits.

In a criminal trial, the court did not abuse its discretion in determining that the affidavit of a state's witness had been sufficiently authenticated; identification by a witness was a valid alternative to establishing chain of custody for authenticating the affidavit. State v. Mickens, 123 S.W.3d 355, 2003 Tenn. Crim. App. LEXIS 107 (Tenn. Crim. App. 2003), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 805 (Tenn. Sept. 2, 2003).

7. Evidence Not Authenticated.

In a wrongful death action, the trial court erred in granting defendant's motion for summary judgment as defendant could not rely on the documents that accompanied her motion for summary judgment to satisfy her initial burden of proof because, inter alia, the unverified documents constituted inadmissible hearsay; and the presentation of the documents wholly failed to meet the requirement that the documents be authenticated as a condition precedent to admissibility. Smith ex rel. Agee v. Palmer, — S.W.3d —, 2019 Tenn. App. LEXIS 53 (Tenn. Ct. App. Jan. 30, 2019).

Trial court did not abuse its discretion by excluding an uncertified copy of plaintiff's criminal verdict form because defendant did not present a knowledgeable witness to testify about the authenticity of the document and it lacked sufficient indicia of reliability. Holt v. Kirk, — S.W.3d —, 2019 Tenn. App. LEXIS 205 (Tenn. Ct. App. Apr. 30, 2019).

Trial court did not abuse its discretion in refusing to admit an unauthenticated document into evidence because, while the sergeant testified that he recognized the towing slip, he was unable to identify the document defendant claim was the back of the towing slip and therefore it was not authenticated. State v. Rimmer, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 322 (Tenn. Crim. App. May 21, 2019).

Trial court did not abuse its discretion in a termination of parental rights case by sustaining an objection to the admission of laboratory reports from hair follicle drug screens performed on the parent because the parent could point to no evidence establishing that the reports were what the parent claimed them to be, only evidence that both of the parents were

familiar with the results of the reports. In re Adalee H., — S.W.3d —, 2020 Tenn. App. LEXIS 356 (Tenn. Ct. App. Aug. 7, 2020).

8. Evidence Authenticated.

"General ledger" was admissible in a suit between a creditor and debtor, under Tenn. R. Evid. 901 and 803(6), even though the ledger included information on the debtor's businesses that were not involved in the suit, because: (1) Testimony of the person who maintained the ledger adequately authenticated the ledger, (2) Minor discrepancies in the ledger's information did not make the ledger wholly untrustworthy, and (3) No genuine dispute existed that the ledger was what it claimed to be, as both parties relied on the ledger at trial. Delta Dev. Corp. v. F. Fani Gulf Int'l, 393 S.W.3d 185, 2012 Tenn. App. LEXIS 222 (Tenn. Ct. App. Apr. 3, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 594 (Tenn. Aug. 16, 2012).

Trial court did not abuse its discretion in admitting the testimony of the victim's girlfriend regarding text messages and phone calls that were made to the victim's cell phone just before his death because the testimony sufficiently established the girlfriend had ample knowledge of the victim's phone to identify the text messages and phone calls; the unavailability of the phone or the messages did not render testimony about the text messages and calls inadmissible under the best evidence rule. State v. Collins, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 295 (Tenn. Crim. App. Apr. 18, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 489 (Tenn. Aug. 8, 2018), cert. denied, Collins v. Tennessee, 139 S. Ct. 649, 202 L. Ed. 2d 498, -- U.S. --, 2018 U.S. LEXIS 7182 (U.S. Dec. 10, 2018).

Recording of the 911 call was authenticated by the male victim, a witness with knowledge of both the contents of the recording and the sounds of his own voice. State v. Richardson, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 670 (Tenn. Crim. App. Aug. 30, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 66 (Tenn. Jan. 18, 2019).

Notebook recovered from defendant's vehicle was properly authenticated because a trooper testified that the notebook was what it purported to be, i.e., that it was the same notebook that he seized from defendant's truck; the trooper testified that he discovered a reddish-brown notebook during his search of defendant's truck, and he identified the notebook admitted into evidence as the same notebook he found in defendant's truck. State v. Barnett, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 142 (Tenn. Crim. App. Mar. 6, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 352 (Tenn. July 18, 2019).

Although the complainant could not say with certainty that defendant was the person who responded to a Facebook message she had, her testimony that she accessed the messages in the prosecutor's office and watched as the prosecutor printed the messages as sufficient to authenticate them. State v. Thomas, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 169 (Tenn. Crim. App. Mar. 15, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 392 (Tenn. Aug. 14, 2019).

Witness's testimony sufficient authenticated the photographs because she identified them as the ones she took and stated that they accurately portrayed what she found in the bag after she retrieved it from the wrecked truck. State v. Dye, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 652 (Tenn. Crim. App. Oct. 15, 2019).

Video of defendant making statements that were relevant to the sentencing considerations which were to be made by the trial court was properly authenticated; the trial court had seen defendant and heard her testimony and the trial court's findings related to what defendant said in the video. Information as to the video having been distributed via any social media, who might have distributed the video, and who might have previously seen it were not necessary for the ultimate use of the video as evidence. State v. Stone, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 33 (Tenn. Crim. App. Jan. 24, 2020).

Detective's testimony was sufficient to authenticate a YouTube video and photograph, as the detective testified that he knew what defendant looked like and, after performing an internet search, he found a YouTube video featuring defendant, who was wearing a distinctive watch that appeared to be the same as the watch the perpetrator was wearing in the security video of the robbery. The detective testified that the police downloaded a copy of the YouTube video and made a still photograph from the video. State v. Spivey, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 74 (Tenn. Crim. App. Feb. 7, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 403 (Tenn. June 3, 2020).

Surveillance video from an apartment complex was adequately authenticated; the detective testified that he had training on how to obtain an accurate time/date stamp from a video, and he followed his training in obtaining the surveillance video in this case, plus a courtesy officer at the complex confirmed the detective's authentication of the video and both the detective and the officer identified defendant as the suspect on the video. State v. Ervin, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 88 (Tenn. Crim. App. Feb. 12, 2020).

Cell phone and text messages were properly authenticated by a deputy as the phone he found inside defendant's car and the messages he viewed on that phone. State v. Austin, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 695 (Tenn. Crim. App. Oct. 27, 2020).

9. Illustrative Cases.

Trial court did not abuse its discretion in considering the indemnity agreement admissible for purposes of summary judgment; to authenticate the agreement, appellee relied on the declaration of its employee, who testified on personal knowledge that appellants executed the agreement, and this declaration was sufficient for the trial court to infer that the agreement was authentic and that it was in fact signed by appellants. Lexon Ins. Co. v. Windhaven Shores, Inc., 601 S.W.3d 332, 2019 Tenn. App. LEXIS 420 (Tenn. Ct. App. Aug. 27, 2019).

Police investigator properly authenticated a surveillance video of a crime scene because the investigator was familiar with the location of the offenses, the vehicles involved, the description of the perpetrator and the perpetrator's clothing, and the basic facts of the case. In consequence, the investigator was able to ascertain whether the actions depicted in the video aligned with the information the investigator had gleaned about the offense from the investigator's investigation and could, as a result, authenticate the video recording. State v. Glass, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 402 (Tenn. Crim. App. June 9, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 553 (Tenn. Oct. 7, 2020).

Rule 902. Self-authentication. —

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required as to the following:

(1) Domestic Public Documents Under Seal. — A document bearing a seal purporting to be that of the State of Tennessee, the United States (or of any other state, district, commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands), or of a political subdivision, department, office, or agency thereof, and a signature purporting to be an attestation or execution.

(2) Domestic Public Documents Not Under Seal. — A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

(3) Foreign Public Documents. — A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make execution or attestation, accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person or (B) of any foreign official whose certificate of genuineness or signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may for good cause shown order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified Copies of Public Records. — A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office (including data compilations in any form), certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) of this

rule or complying with any Act of Congress or the Tennessee Legislature or rule prescribed by the Tennessee Supreme Court.

(5) Official Publications. — Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and Periodicals. — Printed material purporting to be newspapers and periodicals.

(7) Trade Inscriptions and the Like. — Inscriptions, sign, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control or origin.

(8) Acknowledged Documents. — Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

(9) Commercial Paper and Related Documents. — Commercial paper, including all signatures, and related documents to the extent provided by general commercial law.

(10) Presumptions Under Acts of Congress or the Legislature. — Any signature, document, or other matter declared by Act of Congress or the Tennessee Legislature to be presumptively or prima facie authentic.

(11) Certified Records of Regularly Conducted Activity. — The original or a duplicate of a domestic record of regularly conducted activity that would be admissible under Rule 803(6) if accompanied by an affidavit of its custodian or other qualified person certifying that the record:

(A) was made at or near the time of the occurrence of the matters set forth by, or from information transmitted by, a person with knowledge of and a business duty to record or transmit those matters;

(B) was kept in the course of the regularly conducted activity; and

(C) was made by the regularly conducted activity as a regular practice.

A party intending to offer a record into evidence under this paragraph must provide written notice of that intention to all adverse parties, and must make the record and declaration available for inspection sufficiently in advance of their offer into evidence to provide an adverse party with a fair opportunity to challenge them. [As amended by order entered January 23, 2001, effective July 1, 2001; and by order entered January 31, 2003, effective July 1, 2003.]

Advisory Commission Comments. This rule lists documents that do not require authenticating evidence as a foundation to admissibility.

Part (9) refers to Tennessee's version of the Uniform Commercial Code, Tenn. Code Ann. § 47-1-101 et seq. See in particular Tenn. Code Ann. § 47-3-308, concerning signatures on commercial paper.

Advisory Commission Comments [2001]. Read in conjunction with Rule 803(6), new Rule 902(11) allows affidavits by custodians to establish the foundation for business records. The custodian need not attend trial as a witness.

Advisory Commission Comments [2003]. The business duty element of a foundation for the business records hearsay exception is inserted in Rule 902(11)(A) to conform to Rule 803(6).

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 31, 2003, was ratified and approved by 2003 House Resolution 22 and Senate Resolution 10. The order promulgating the 2003 amendment of this rule provided that it take effect on July 1, 2003.

Law Reviews. Authentication Miscellany (Donald F. Paine), 43 Tenn. B.J. 26 (2007).

Attorney General Opinions. Tape recordings of court proceedings, OAG 99-140 (7/27/99).

NOTES TO DECISIONS

Analysis

1. Copies.
2. Letters.
3. Evidence Self-Authenticated.
4. Certification.
5. Certified Records of Regularly Conducted Activity.
6. Review.
7. Affidavits.

1. Copies.

Copies of Tennessee bureau of investigation certification and maintenance records of breath testing instruments for determining levels of intoxication while driving were not self-authenticating under Tenn. R. Evid. 902(4) because the copies themselves contained no certification of their correctness. State v. Korsakov, 34 S.W.3d 534, 2000 Tenn. Crim. App. LEXIS 553 (Tenn. Crim. App. 2000).

2. Letters.

Doctor's letter, which was used to bolster the defendant physician's position that he was not negligent in assessing the patient's MRI scan, was improperly admitted into evidence because it was clearly hearsay as it contained a statement made by the doctor other than while testifying at trial in which he stated that he would have interpreted the MRI scan the same as the defendant physician. Godbee v. Dimick, 213 S.W.3d 865, 2006 Tenn. App. LEXIS 601 (Tenn. Ct. App. 2006), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 66 (Tenn. 2006).

3. Evidence Self-Authenticated.

Trial court did not err in admitting a temporary license tag for the victim's car because the temporary license tag could be considered a public record, and it was self-authenticating. State v. Collins, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 295 (Tenn. Crim. App. Apr. 18, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 489 (Tenn. Aug. 8, 2018), cert. denied, Collins v. Tennessee, 139 S. Ct. 649, 202 L. Ed. 2d 498, -- U.S. --, 2018 U.S. LEXIS 7182 (U.S. Dec. 10, 2018).

Assuming the trial court erred by admitting the victim's medical record, the error would have been harmless in light of the evidence of the defendant's guilt; a paramedic did not testify that the victim did not have a torn frenulum and instead testified that he had not included a torn frenulum in his notes, and the injury to the victim's frenulum, while certainly painful to the victim, was minor in comparison to the magnitude and multitude of the other injuries inflicted upon the victim. State v. Harris, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 708 (Tenn. Crim. App. Nov. 5, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 236 (Tenn. Mar. 26, 2020).

4. Certification.

Trial court did not err by admitting into evidence bank records under Tenn. R. Evid. 803(6) because they were authenticated upon certification by the bank's custodian of records as required by Tenn. R. Evid. 902(11), as the custodian's certification stated that the documents were true and accurate copies of the bank's business records and that they were made at or near the time of the occurrence of the matters set forth by a person with knowledge of those matters. Simpkins v. Simpkins, 374 S.W.3d 413, 2012 Tenn. App. LEXIS 131 (Tenn. Ct. App. Feb. 27, 2012).

5. Certified Records of Regularly Conducted Activity.

Trial court properly admitted the documents by which a judgment creditor proved the debt because they attested to the indebtedness, the debtor's liability, and expressly provided that documents were obtained by the creditor from an original creditor in the regular course of business. Midland Funding, LLC v. Thuy Chau, — S.W.3d —, 2019 Tenn. App. LEXIS 298 (Tenn. Ct. App. June 14, 2019).

Trial court did not err by admitting the child's medical records under the business record exception to the hearsay rule during the trial to terminate the mother's parental rights because accompanying the drug test record was an affidavit signed by the custodian of records demonstrating compliance with this rule. In re Gracie H. Y., — S.W.3d —, 2020 Tenn. App. LEXIS 110 (Tenn. Ct. App. Mar. 16, 2020), appeal dismissed, In re Gracie Y., — S.W.3d —, 2020 Tenn. LEXIS 462 (Tenn. June 19, 2020).

6. Review.

Because defendant did not object to a document or the procedure for its admission on grounds that either violated the terms of evidence, defendant waived review of the issue. State v. Harris, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 708 (Tenn. Crim. App. Nov. 5, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 236 (Tenn. Mar. 26, 2020).

7. Affidavits.

Because the primary purpose of the affidavit was to authenticate the repair invoice as a business record, it was not evidentiary, and because the primary purpose of the affidavit was not evidentiary, the Confrontation Clause had no application to its admission. State v. Miller, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 58 (Tenn. Crim. App. Feb. 3, 2020).

Trial court did not abuse its discretion by admitting the repair invoice as evidence because the State provided adequate notice by emailing defense counsel a copy of the invoice and affidavit and The defendant acknowledged receipt of the emailed invoice and affidavit and

conceded that he could have inferred that the State intended to offer the invoice as evidence. State v. Miller, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 58 (Tenn. Crim. App. Feb. 3, 2020).

Rule 903. Subscribing witnesses' testimony. —

The testimony of a subscribing witness is not necessary to authenticate a writing unless required by statute. [As amended by order entered December 14, 2009, effective July 1, 2010.]

Advisory Commission Comments. In will contests, Tenn. Code Ann. § 32-4-105 requires calling subscribing witnesses to a will.

Advisory Commission Comments [2010]. The title of the rule is changed to reflect reality. A Tennessee statute does necessitate testimony of all living witnesses in a will contest "if to be found." T.C.A. § 32-4-105.

Compiler's Notes. The amendment of the heading and the Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 14, 2009, was ratified and approved by 2010 Senate Resolution 181 and 2010 House Resolution 236. The order promulgating the amendment of this rule provided that it take effect July 1, 2010.

ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1001. Definitions. —

For purposes of this article the following definitions are applicable:

(1) Writings and Recordings. — "Writings" and "recordings" consist of letters, words, numbers, sounds, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(2) Photographs. — "Photographs" include still photographs, x-ray films, video tapes, and motion pictures.

(3) Original. — An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print. If data are stored in a computer or similar device, any printout or other output readable by sight and shown to reflect the data accurately is an "original."

(4) Duplicate. — A "duplicate" is a copy produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.

Advisory Commission Comments. Tennessee's existing best evidence rule, also known as the original document rule, undergoes expansion in proposed Rules 1001 and 1003. As a practical matter, the most significant provision is the definition of "duplicate" in Rule 1001(4), which encompasses the copies familiar to all lawyers with copying machines. Support for admissibility can be found in *Bolton v. State*, 617 S.W.2d 909 (Tenn. Crim. App. 1981). The copy usually would be admissible on an equal plane with an "original" under Rule 1003.

Advisory Commission Comments [1999]. The Commission believes that the language in subsection (1) defining "writings and recordings" is sufficiently broad to cover electronic imaging, a process by which documents are read into a computer by a scanner for electronic storage. That is a "form of data compilation." Moreover, the General Assembly reenacted the Uniform Photographic Copies of Business and Public Records as Evidence Act, Tenn. Code Ann. § 24-7-119, effective April 29, 1998.

Law Reviews. A Meta-Analysis of the Tennessee Rules of Evidence (Neil P. Cohen), 57 Tenn. L. Rev. 1 (1989).

Some Comparisons Between the New Tennessee Rules of Evidence and the Federal Rules of Evidence Part I (Robert Banks, Jr.), 20 Mem. St. U.L. Rev. 283 (1990).

NOTES TO DECISIONS

1. Duplicate.

In a criminal trial, the court did not abuse its discretion in determining that the affidavit of a state's witness had been sufficiently authenticated. The fact that only a photocopy of the affidavit was available did not render the affidavit inadmissible. State v. Mickens, 123 S.W.3d 355, 2003 Tenn. Crim. App. LEXIS 107 (Tenn. Crim. App. 2003), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 805 (Tenn. Sept. 2, 2003).

Rule 1002. Requirement of original. —

To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress or the Tennessee Legislature.

Advisory Commission Comments. This rule states the traditional preference for an "original," but Rules 1001(4) and 1003 should be consulted. Usually the court will admit machine copies.

NOTES TO DECISIONS

Analysis

1. Construction with Other Statutes and Rules.
2. Photographs.
3. Video Recording.

1. Construction with Other Statutes and Rules.

Even assuming that a business record under Tenn. R. Evid. 803(6) qualifies as an "original" document, the state is still required to establish the prerequisites to application of the business records exception to the hearsay rule. State v. Carroll, 36 S.W.3d 854, 1999 Tenn. Crim. App. LEXIS 1346 (Tenn. Crim. App. 1999).

Regardless of whether written inventories constituted the best evidence of the serial numbers of the stolen goods, they were inadmissible as hearsay under Tenn. R. Evid. 803(6). State v. Carroll, 36 S.W.3d 854, 1999 Tenn. Crim. App. LEXIS 1346 (Tenn. Crim. App. 1999).

Trial court did not abuse its discretion in admitting the testimony of the victim's girlfriend regarding text messages and phone calls that were made to the victim's cell phone just before his death because the testimony sufficiently established the girlfriend had ample knowledge of the victim's phone to identify the text messages and phone calls; the unavailability of the phone or the messages did not render testimony about the text messages and calls inadmissible under the best evidence rule. State v. Collins, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 295 (Tenn. Crim. App. Apr. 18, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 489 (Tenn. Aug. 8, 2018), cert. denied, Collins v. Tennessee, 139 S. Ct. 649, 202 L. Ed. 2d 498, -- U.S. --, 2018 U.S. LEXIS 7182 (U.S. Dec. 10, 2018).

2. Photographs.

Photographs admitted into evidence and forensically examined by a special agent were indeed originals, and thus, the best evidence available. Therefore, the trial court properly admitted a thumb drive and the photographs from it. State v. Smith, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 645 (Tenn. Crim. App. Aug. 22, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 59 (Tenn. Jan. 17, 2019).

3. Video Recording.

Because the State of Tennessee introduced the recording itself into evidence after a police detective testified about the contents of a surveillance video, the investigator's testimony did not offend the best evidence rule. State v. Taylor, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 147 (Tenn. Crim. App. Feb. 26, 2020).

Rule 1003. Admissibility of duplicates. —

A duplicate is admissible to the same extent as an original unless a genuine question is raised as to the authenticity of the original.

Advisory Commission Comments. This rule is the key to an understanding of the best evidence rule as the Commission contemplates it. Normally business people and lawyers accept machine copies as authentic. There is no reason why courts should not take the same approach in most instances. See Rule 1001(4) for the definition of "duplicate."

NOTES TO DECISIONS

1. Photocopy.

In a criminal trial, the court did not abuse its discretion in determining that the affidavit of a state's witness had been sufficiently authenticated. The fact that only a photocopy of the affidavit was available did not render the affidavit inadmissible. State v. Mickens, 123 S.W.3d 355, 2003 Tenn. Crim. App. LEXIS 107 (Tenn. Crim. App. 2003), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 805 (Tenn. Sept. 2, 2003).

Because there was no genuine question raised by defendant as to the authenticity of the original photocopy of the front and back of the check defendant presented to the bank, and a bank employee identified the photocopy as the fraudulent check passed by defendant, the photocopy was properly admitted by the trial court. State v. Bumpas, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 95 (Tenn. Crim. App. Jan. 17, 2018), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 187 (Tenn. Apr. 16, 2020).

Borrower failed to show that a trial court abused its discretion in a foreclosure proceeding by accepting a copy of the note into evidence at a damages hearing as any genuine issue as to the authenticity of the photocopy of the note was resolved when the trial court ruled upon the bank's motion for summary judgment. The trial court concluded that the borrower showed no evidence that contradicted the bank's status as holder of the note and deed of trust and granted the bank summary judgment on all of the borrower's claims. Starkey v. Wells Fargo Bank, N.A., — S.W.3d —, 2019 Tenn. App. LEXIS 190 (Tenn. Ct. App. Apr. 23, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 408 (Tenn. Aug. 14, 2019).

Rule 1004. Admissibility of other evidence of contents. —

The original is not required, and other evidence of a writing, recording, or photograph is admissible if —

(1) Originals Lost or Destroyed. — All originals are lost or destroyed, unless the proponent lost or destroyed them in bad faith; or

(2) Original Not Obtainable. — No original can be obtained by any available judicial process or procedure; or

(3) Original in Possession of Opponent. — At a time when an original was under the control of the party against whom offered, that party was put on notice by the pleadings or otherwise that the contents would be a subject of proof at the hearing but does not produce the original at the hearing; or

(4) Collateral Matters. — The writing, recording, or photograph is not closely related to a controlling issue.

Advisory Commission Comments. In the rare situation where neither an "original" nor a "duplicate" is offered, this rule enumerates the common law excuses for failure to present the best evidence.

Rule 1005. Public records. —

The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations in any form, if otherwise admissible may be proved by copy certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy which compiles with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.

Advisory Commission Comments. Copies of public records are the best evidence if certified or otherwise authenticated under the rule.

Attorney General Opinions. Tape recordings of court proceedings, OAG 99-140 (7/27/99).

Rule 1006. Summaries. —

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary or calculation. The originals or duplicates shall be made available for examination or copying, or both, by other parties at reasonable times and places. The court may order that they be produced in court.

Advisory Commission Comments. Summaries of the contents of voluminous documents have long been admissible in Tennessee. *State ex rel. Stewart v. Follis*, 140 Tenn. 513, 521, 205 S.W. 444 (1918).

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), No. 3-16-1.

Law Reviews. For an article, "Can the Legal System Use Experts on Meaning?" see 66 Tenn. L. Rev. 1167 (1999).

NOTES TO DECISIONS

1. In General.

Trial court did not err in allowing testimony under the business records exception by the chief compliance officer of a wire transfer company because the compilation of the 11 money transfers satisfied the exception even though it was made in preparation for litigation years after the transactions in question because such a summary was, by necessity, prepared in anticipation of litigation, that fact did not disqualify it as a business record under the exception, and it was the regular practice of that business activity to make the data record. Fusner v. Coop Constr. Co., LLC, 211 S.W.3d 686, 2007 Tenn. LEXIS 7 (Tenn. 2007).

In the absence of proof that a document was entered as an exhibit and given to the jury, it was not clear that the heightened protections applicable to summaries was applicable. Hatfield v. Allenbrooke Nursing & Rehab. Ctr., LLC, — S.W.3d —, 2018 Tenn. App. LEXIS 450 (Tenn. Ct. App. Aug. 6, 2018), appeal denied, Hatfield v. Allenbrooke Nursing & Rehab. Ctr., LLC, — S.W.3d —, 2019 Tenn. LEXIS 74 (Tenn. Jan. 17, 2019).

Trial court did not err in a foreclosure proceeding by admitting into evidence exhibits offered by the bank and the testimony of the bank's loan verification consultant at a damages hearing because the bank's damages summary set out key information concerning the loan between the bank and the borrower and the consultant was a qualified witness who had the knowledge necessary to testify to the identity and mode of preparation of the records and to the fact that they were made in the regular course of the bank's business. Starkey v. Wells Fargo Bank, N.A., — S.W.3d —, 2019 Tenn. App. LEXIS 190 (Tenn. Ct. App. Apr. 23, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 408 (Tenn. Aug. 14, 2019).

Rule 1007. Testimony or written admission of party. —

Contents of writings, recordings, or photographs may be proved by the testimony, deposition, or written admission of the party against whom offered, without accounting for nonproduction of the original.

Advisory Commission Comments. This rule dispenses with the original document requirement in the circumstances described. Note that the proposed rule requires an unsworn statement of the contents of a document to be in writing.

Rule 1008. Functions of court and jury. —

When the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question of whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. When an issue is raised as to (a) whether the asserted writing, recording, or photograph ever existed, or (b) whether another writing, recording, or photograph produced at the trial is the original, or (c) whether other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.

Advisory Commission Comments. Division of responsibility between judge and jury is similar to the traditional provisions of Rule 104.

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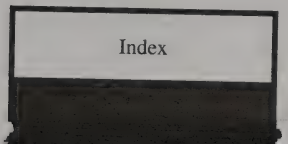
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[EFFECTIVE JANUARY 1, 1971]

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RULE 1

SCOPE OF RULES

Subject to exceptions as are stated in particular rules, the Rules of Civil Procedure shall govern procedure in the circuit or chancery courts in all civil actions, whether at law or in equity, and in all other courts while exercising the

civil jurisdiction of the circuit or chancery courts. These rules shall be construed to secure the just, speedy, and inexpensive determination of every action.

The Rules of Civil Procedure shall not apply to general sessions courts except as follows:

(1) The rules shall apply to general sessions courts exercising civil jurisdiction of the circuit or chancery courts;

(2) The rules shall apply after appeal or transfer of a general sessions civil lawsuit to circuit court; and

(3) Rule of Civil Procedure 69 governing execution on judgments shall apply to civil judgments obtained in general sessions courts. [As amended by order entered January 6, 2005, effective July 1, 2005.]

Advisory Commission Comments. This rule makes it clear that these Rules establish identical procedures for circuit and chancery courts and for those other courts of record which have been established by special or private acts of the General Assembly and which have jurisdiction similar to that of the circuit or chancery court, or of both. The Rules are not applicable to general sessions courts in the exercise of jurisdiction conferred by general statutes, but if a particular general sessions court exercises, under authority of a special or private act of the General Assembly, special jurisdiction similar to that of the circuit or chancery court, then these Rules do apply to that court in the exercise of that special jurisdiction.

Advisory Commission Comments [2005]. The amendment makes Rule 69 applicable to execution on judgments obtained in a general sessions court.

Advisory Commission Comments [2009]. A modified Rule 60 procedure to obtain relief from a general sessions court judgment is available by statute, T.C.A. § 16-15-727.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 6, 2005, was ratified and adopted by 2005 House Resolution 12 and Senate Resolution 7. The order promulgating the amendment of this rule provided that it take effect July 1, 2005.

The amendment of the Advisory Commission Comments to Rule 1, which added the 2009 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated January 8, 2009, was ratified and approved by 2009 House Resolution 15 and Senate Resolution 16. The order promulgating the amendment of the Advisory Commission Comments provided that it take effect July 1, 2009.

Cross-References. Depositions in general sessions courts, T.C.A. § 24-9-102.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-1, 1-2.

Tennessee Jurisprudence. 1 Tenn. Juris., Abatement, Survival and Revival, §§ 3, 35; 1 Tenn. Juris., Accounts and Accounting, § 13; 1 Tenn. Juris., Actions, §§ 16, 17; 1 Tenn. Juris., Amendments, §§ 6, 8; 5 Tenn. Juris. Bastardy, § 12; 8 Tenn. Juris., Courts, §§ 18, 19; 9 Tenn. Juris., Demurrers and Motions to Dismiss, § 2; 11 Tenn. Juris., Equity, §§ 2, 46, 47, 55; 11 Tenn. Juris., Estoppel, § 56; 15 Tenn. Juris., Instructions, § 4; 16 Tenn. Juris., Judgments and Decrees; § 84; 17 Tenn. Juris., Limitations of Actions, § 45; 22 Tenn. Juris., Setoff, Recoupment and Counterclaim, § 1.

Law Reviews. A Meta-Analysis of the Tennessee Rules of Evidence (Neil P. Cohen), 57 Tenn. L. Rev. 1 (1989).

Champerty as We Know It (R.D. Cox), 13 Mem. St. U.L. Rev. 139 (1983).

Laches at Law in Tennessee, 28 U. Mem. L. Rev. 117.

Some Comparisons Between the New Tennessee Rules of Evidence and the Federal Rules of Evidence Part I (Robert Banks, Jr.), 20 Mem. St. U.L. Rev. 283 (1990).

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1. Law of the State.
2. Construction with Other Statutes.
3. Applicability to Circuit Courts.
4. Appeals to Circuit Courts.
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6. Juvenile Proceedings.
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8. Ouster Proceedings.
9. Bail Bond Forfeitures.
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1. Law of the State.

Rules of Civil Procedure along with the Rules of Criminal Procedure and the Rules of Appellate Procedure, are "law" of this state, in full force and effect, until such time as they are superseded by legislative enactment or inconsistent rules promulgated by this court and adopted by the general assembly. Tennessee Dep't of Human Services v. Vaughn, 595 S.W.2d 62, 1980 Tenn. LEXIS 417 (Tenn. 1980).

2. Construction with Other Statutes.

The Tennessee Rules of Civil Procedure have generally been followed in construing other statutes. In re Johnson, 25 B.R. 889, 1982 Bankr. LEXIS 5272 (Bankr. E.D. Tenn. 1982).

Given that plaintiff's filing of both the summons against decedent and the administrator occurred in general sessions court, prior to the transfer of the action to the trial court, Tenn. R. Civ. P. 15.03 was inapplicable. Mott v. Luethke, — S.W.3d —, 2021 Tenn. App. LEXIS 98 (Tenn. Ct. App. Mar. 16, 2021).

3. Applicability to Circuit Courts.

The Tennessee Rules of Civil Procedure do not apply to the court of appeals. Irvin v. Clarksville, 767 S.W.2d 649, 1988 Tenn. App. LEXIS 610 (Tenn. Ct. App. 1988).

Trial court, in finding a driver in violation of the implied consent law, was required, pursuant to Tenn. R. Civ. P. 52.01, to set forth specific findings of fact and conclusions of law with regard to its ruling; the trial court was exercising civil jurisdiction, pursuant to Tenn. R. Civ. P. 1, by adjudicating the violation of an administrative rule. Therefore, the Rules of Civil Procedure applied. State v. Freeman, 402 S.W.3d 643, 2012 Tenn. App. LEXIS 726 (Tenn. Ct. App. Oct. 16, 2012), appeal denied, — S.W.3d —, 2013 Tenn. LEXIS 272 (Tenn. Mar. 5, 2013).

Tennessee Rules of Civil Procedure applied in the circuit court proceedings, and thus the circuit court's order of dismissal itself was a judgment subject to a post-trial motion. Ken Smith Auto Parts v. Thomas, — S.W.3d —, 2019 Tenn. App. LEXIS 17 (Tenn. Ct. App. Jan. 15, 2019), aff'd, 599 S.W.3d 555, 2020 Tenn. LEXIS 147 (Tenn. Apr. 17, 2020).

Defendant filed his motion 29 days after entry of the circuit court's order of dismissal, and as the Tennessee Rules of Civil Procedure applied in the circuit court proceedings and defendant timely filed an appropriate post-trial motion, the circuit court retained jurisdiction to rule on defendant's motion. Ken Smith Auto Parts v. Thomas, — S.W.3d —, 2019 Tenn. App. LEXIS 17 (Tenn. Ct. App. Jan. 15, 2019), aff'd, 599 S.W.3d 555, 2020 Tenn. LEXIS 147 (Tenn. Apr. 17, 2020).

Tenn. R. Civ. P. 59, 60 are applicable to de novo appeals from general sessions court to circuit court; as in any other circuit court case, these rules reflect the circuit courts' jurisdiction to correct earlier orders, even after an erroneous remand to general sessions court, within the parameters set out in those rules. Ken Smith Auto Parts v. Thomas, 599 S.W.3d 555, 2020 Tenn. LEXIS 147 (Tenn. Apr. 17, 2020).

4. Appeals to Circuit Courts.

The Tennessee Rules of Civil Procedure apply to cases appealed to the circuit court from the general sessions court, but they do not require the filing of written pleadings, issuance of new process, or any other steps which have been completed prior to appeal. Vinson v. Mills, 530 S.W.2d 761, 1975 Tenn. LEXIS 568 (Tenn. 1975); Ware v. Meharry Medical College, 898 S.W.2d 181, 1995 Tenn. LEXIS 189 (Tenn. 1995).

The Rules of Appellate Procedure, not the Rules of Civil Procedure, are applicable to circuit courts in reviewing beer board cases. Cooper v. Alcohol Com. of Memphis, 745 S.W.2d 278, 1988 Tenn. LEXIS 7 (Tenn. 1988).

In a case appealed from the general sessions court to the circuit court and subjected to de novo review, the rule limiting plaintiff's recovery to the jurisdictional limits of the general sessions court is not viable in the light of the adoption of the Rules of Civil Procedure and the principles of judicial economy; abrogating Moran v. Weinberger, 149 Tenn. 537, 260 S.W. 966, 1923 Tenn. LEXIS 112 (1924). Ware v. Meharry Medical College, 898 S.W.2d 181, 1995 Tenn. LEXIS 189 (Tenn. 1995).

Circuit court properly dismissed defendant's appeal and affirmed the judgment of the general sessions court pursuant to T.C.A. § 27-5-107 because to preserve plaintiff's original cause of action after dismissal, plaintiff had to perfect an appeal to the circuit court as prescribed by T.C.A. § 27-5-108, but plaintiff did not appeal the judgment, and his cause of action proceeded to the circuit court only by virtue of defendant's appeal; while defendant's appeal was pending, plaintiff was free to amend his complaint pursuant to T.C.A. § 16-15-729, however, defendant could dismiss the appeal without the consent and over the objection of plaintiff, and the dismissal of defendant's appeal removed the case from the circuit court and was fatal to plaintiff's amended cause of action. Crowley v. Thomas, 343 S.W.3d 32, 2011 Tenn. LEXIS 599 (Tenn. June 17, 2011).

Court of appeals did not err in affirming an order dismissing an insured's underinsured motorist claim against an insurer because the insured failed to amend to increase the amount of damages beyond those specified in the warrant she filed in general sessions court after she perfected a de novo appeal to the circuit court, and the amount of the insured's damages was limited to the amount she requested in her

general sessions warrant; the amount of damages a party appealing to circuit court from general sessions court seeks to recover is limited to the amount sought in the warrant filed in general sessions court until an amendment to increase the amount of damages is filed in the circuit court. Brown v. Roland, 357 S.W.3d 614, 2012 Tenn. LEXIS 2 (Tenn. Jan. 18, 2012).

Tenn. R. Civ. P. 59 and 60 are applicable to de novo appeals from general sessions court to circuit court under Tenn. R. Civ. P. 1(2); as in any other circuit court case, Rules 59 and 60 reflect the circuit courts' jurisdiction to correct earlier orders, even after an erroneous remand to general sessions court, within the parameters set out in those rules. Ken Smith Auto Parts v. Thomas, — S.W.3d —, 2020 Tenn. App. LEXIS 172 (Tenn. Apr. 17, 2020).

5. Appeals to Chancery Courts.

The Rules of Appellate Procedure, not the Rules of Civil Procedure, apply to chancery courts in reviewing beer board cases. Cooper v. Alcohol Com. of Memphis, 745 S.W.2d 278, 1988 Tenn. LEXIS 7 (Tenn. 1988).

6. Juvenile Proceedings.

The state rules of civil procedure do not apply to paternity cases in juvenile court, which are quasi-criminal actions. Patrick v. Dickson, 526 S.W.2d 449, 1975 Tenn. LEXIS 596 (Tenn. 1975); Tennessee Dep't of Human Services v. Daniel, 659 S.W.2d 625, 1983 Tenn. App. LEXIS 616 (Tenn. Ct. App. 1983).

Jurisdiction to terminate parental or guardianship rights resides concurrently in the chancery, circuit, and juvenile courts under T.C.A. § 36-1-113(a); standing to intervene in a termination proceeding in juvenile court should be analyzed under Tenn. R. Civ. P. 24. Gonzalez v. Tenn. Dep't of Children's Servs., 136 S.W.3d 613, 2004 Tenn. LEXIS 566 (Tenn. 2004).

7. Statute of Limitations.

As to claim in paternity case that a plea of the statute of limitations can only be presented in the juvenile court, the language of (former) § 36-224(3) is superseded by the fact that the jury trial in the circuit court is subject to the Tennessee Rules of Civil Procedure pursuant to which defendant is entitled to raise the statute of limitations in that court. Tennessee Dep't of Human Services v. Patterson, 605 S.W.2d 541, 1980 Tenn. LEXIS 469 (Tenn. 1980) (denial of petition for rehearing).

8. Ouster Proceedings.

These rules apply to ouster proceedings under T.C.A. § 8-47-101 et seq. State ex rel. Leech v. Wright, 622 S.W.2d 807, 1981 Tenn. LEXIS 496 (Tenn. 1981).

If there is any conflict between any express provision of the ouster statutes, T.C.A. § 8-47-101 et seq., and the Rules of Civil Procedure, the ouster statute should prevail. State ex rel. Leech v. Wright, 622 S.W.2d 807, 1981 Tenn. LEXIS 496 (Tenn. 1981).

9. Bail Bond Forfeitures.

The Tennessee Rules of Civil Procedure apply to bail bond forfeitures just as they would in any other civil action before a circuit court. Indemnity Ins. Co. v. Blackwell, 653 S.W.2d 262, 1983 Tenn. App. LEXIS 546 (Tenn. Ct. App. 1983).

10. Nonjudicial Bodies.

The technicalities of the Rules of Civil Procedure do not necessarily apply before nonjudicial bodies unless the rules of that body so require. Goodwin v. Metropolitan Bd. of Health, 656 S.W.2d 383, 1983 Tenn. App. LEXIS 710 (Tenn. Ct. App. 1983).

11. Summary Judgments.

In the absence of a contrary statute or court rule, Tenn. R. Civ. P. 1 makes it clear that summary judgments are available in all civil cases filed in the circuit or chancery courts. Owen v. Stanley, 739 S.W.2d 782, 1987 Tenn. App. LEXIS 3211 (Tenn. Ct. App. 1987), overruled, Matlock v. Simpson, 902 S.W.2d 384, 1995 Tenn. LEXIS 44 (Tenn. 1995).

Summary judgments may be used in any civil case filed in the circuit or chancery court unless contrary to another statute or court rule. Biogen Distributors, Inc. v. Tanner, 842 S.W.2d 253, 1992 Tenn. App. LEXIS 751 (Tenn. Ct. App. 1992).

12. Pro Se Litigants.

Pro se litigants are entitled to the same liberality of construction with regard to their pleadings that Tenn. R. Civ. P. 1, 8.05, and 8.06 afford any other litigant. Irvin v. Clarksville, 767 S.W.2d 649, 1988 Tenn. App. LEXIS 610 (Tenn. Ct. App. 1988).

13. Administrative Law Judge.

Administrative law judge (ALJ) did not lacked the authority to grant a motion for summary judgment in favor of the Tennessee Board of Education, because the regulations promulgated by the Tennessee Department of State provided that administrative agencies could use the Tennessee Rules of Civil Procedure for guidance in determining the procedure to follow in situations not specifically addressed by the Department of State Rules, and the Uniform Administrative Procedures Act directed the ALJ to permit the parties to submit motions at appropriate stages in the proceedings and the Department of State Rules allowed parties in a contested case to seek relief in the form of a motion. Yokley v. State Bd. of Educ., 305 S.W.3d 523, 2009 Tenn. App. LEXIS 337 (Tenn. Ct. App. May 19, 2009), appeal denied, — S.W.3d —, 2009 Tenn. LEXIS 755 (Tenn. Nov. 23, 2009).

RULE 2

ONE FORM OF ACTION

All actions in law or equity shall be known as "civil actions."

Advisory Commission Comments. Prior to the adoption of these Rules, Tennessee practice spoke of "civil actions at law" (Tenn. Code Ann. § 20-201) [repealed] and of "suits" in chancery (Tenn. Code Ann. § 21-102) [repealed]. Rule 2 simplifies the terminology of applying a single term to all civil actions.

Advisory Commission Comments [2013]. The 2013 Advisory Commission Comment to Tenn. R. Civ. P. 3 provides guidance for determining whether a statutorily authorized "petition" is considered a "complaint" or a "motion" for purposes of the Rules of Civil Procedure.

Compiler's Notes. The amendment of Rule 2, which added the 2013 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 18, 2012, was ratified and approved by House Resolution 36 and Senate Resolution 12. The order promulgating the addition of the 2013 Advisory Commission Comments provided that it take effect July 1, 2013.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 102, 498, 504, 509.

Tennessee Jurisprudence. 1 Tenn. Juris., Actions, §§ 1-17; 1 Tenn. Juris., Amendments, § 8; 2 Tenn. Juris., Appeal and Error, § 16; 8 Tenn. Juris., Covenant, Action of, § 1; 9 Tenn. Juris., Demurrers and Motions to Dismiss, § 6; 11 Tenn. Juris., Equity, §§ 2, 55; 11 Tenn. Juris., Estoppel, § 56; 15 Tenn. Juris., Instructions, § 4.

Law Reviews. Laches at Law in Tennessee, 28 U. Mem. L. Rev. 117.

Symposium: Tennessee Rules of Civil Procedure (Irving M. Strauch), 9 Mem. St. U.L. Rev. 367.

NOTES TO DECISIONS

1. Cause of Action.

A cause of action is the set of facts which give rise to the judicial proceeding. The cause of action is born when those facts occur. The action occurs when a complaint based on those facts is filed with the court. Mid-South Pavers, Inc. v. Arnco Constr., Inc., 771 S.W.2d 420, 1989 Tenn. App. LEXIS 12 (Tenn. Ct. App. 1989).

RULE 3

COMMENCEMENT OF ACTION

All civil actions are commenced by filing a complaint with the clerk of the court. An action is commenced within the meaning of any statute of limitations upon such filing of a complaint, whether process be issued or not issued and whether process be returned served or unserved. If process remains unissued for 90 days or is not served within 90 days from issuance, regardless of the reason, the plaintiff cannot rely upon the original commencement to toll the running of a statute of limitations unless the plaintiff continues the action by obtaining issuance of new process within one year from issuance of the previous process or, if no process is issued, within one year of the filing of the complaint. [As amended July 1, 1979 and January 24, 1992, effective July 1, 1992, and by order adopted January 28, 1993, effective July 1, 1993; and by order filed February 1, 1995, effective July 1, 1995; and by order effective July 1, 1997; and by order effective July 1, 1998; and by order entered January 6, 2005, effective July 1, 2005.]

Advisory Commission Comments. Prior to the adoption of these Rules, a civil action at law could be continued and prosecuted, for purposes of applying statutes of limitation, after return of process unserved, by issuance of alias process from term to term or by recommencing suit within one year after failure to execute process. Rule 3 did not adopt the previous procedure regarding term-to-term issuance of alias process. Instead, the third sentence of Rule 3 contains a provision for obtaining issuance of new process within one

year from issuance of the previous process. The Rule, of course, applies to all civil actions, whether legal or equitable in nature.

Advisory Commission Comments [1995]. Because the former rule created confusion between the one-year recommencement period and the one-year saving statute, the recommencement provision is eliminated. The earlier six-month reissuance period is extended from six months to a full year.

Advisory Commission Comments [1997]. Some clerks by local court rule may want to require lawyers to file a summons – not to toll the running of a statute of limitations, but rather to assist the clerks' workloads. Other clerks may want to handle the chore themselves. Either position is appropriate under revised Rule 3. "Commencement" for statute of limitations purpose would occur on the day the complaint is filed, regardless of the method chosen for preparation of a summons.

Deletion of the requirement of filing a summons in addition to a complaint returns the requirement for commencement to pre-1992 status. While there appeared to be reasons making the additional summons filing mandatory, other reasons militate against it. For one thing, the recent waiver of service provisions of Rule 4.07 may lull a lawyer into believing no summons need be filed under that procedure. For another, there is a hazard that a federal diversity case in Tennessee would not be commenced by simply filing the complaint required by Federal Rule 3. *See Ragan v. Merchants Transfer & Warehouse Company*, 337 U.S. 530 (1949), reaffirmed on this ground by *Walker v. Armco Steel Corporation*, 446 U.S. 740 (1980).

Note that Rule 4.01, both then and now, requires the clerk to issue a summons "forthwith" once a complaint is filed (unless there is a waiver under Rule 4.07). Moreover, the amended rule does not prevent a lawyer from filing a summons with the clerk. In any event, good practice mandates following up to ensure that a summons is promptly issued and served.

Advisory Commission Comments [1998]. The amendment to the third sentence removes the former eventuality of failure to return process within 30 days.

Advisory Commission Comments [2002]. A complaint filed by a pro se litigant incarcerated in a correctional facility is governed by the prisoner-filing provision in Rule 5.06.

Advisory Commission Comments [2005]. This amendment to the final sentence mirrors an amendment to Rule 4.03 increasing time for service of a summons from 30 to 90 days

Advisory Commission Comments [2013]. Rule 2 provides that "[a]ll actions in law or equity shall be known as 'civil actions.' " The initial Advisory Commission Comment to Rule 2 explains that, "[p]rior to adoption of these Rules, Tennessee practice spoke of 'civil actions at law' (Tenn. Code Ann. § 20-2010 [repealed] and of 'suits' in chancery (Tenn. Code Ann. § 21-102 [repealed]). Rule 2 simplifies the terminology of applying a single term to all civil actions." Consistent with that explanation, Rule 3 goes on to provide (in pertinent part) that "[a]ll civil actions are commenced by filing a *complaint* with the clerk of the court." (Emphasis added.)

Although Rules 2 and 3 simplified the terminology previously applied to "civil actions at law" and "suits" in chancery, those rules — as well as Rule 7 — are silent as to their application as to "petitions" authorized by statute. *See, e.g.,* Tenn. Code Ann. §§ 4-5-322 (2011) (petition for judicial review under Administrative Procedures Act); 4-21-307 (2011) (petition for judicial review of order of Human Rights Commission); 27-8-106 (2000) (petition for writ of certiorari); 29-3-103 (2000) ("bill or petition" to abate a public nuisance); 29-16-104 (2000) (petition to take land by eminent domain); 29-27-106 (2000) ("bill or petition" for partition); 30-1-117 ("verified petition" to apply for letter of administration or letters testamentary to administer the estate of a decedent); 34-3-102 (2007) (petition for appointment of a conservator); 36-3-602 (2010) (petition for order of protection); 36-5-405 (2010) (petition to set, enforce, modify or terminate support); 36-6-108 (2010) (petition to alter visitation/parental relocation); 36-6-306 (2010) (petition for grandparent visitation); and 36-6-405 (2010) (petition to modify permanent parenting plan). Depending on the nature of a statutorily authorized "petition," the petition might be considered a "complaint" for the purposes of these Rules, or it might be considered a motion relating to a pending civil action. In determining whether or not a statutorily authorized petition is a "complaint" for purposes of these Rules, the court must give effect to the substance of the pleading, rather than its form. *See, e. g., Brundage v. Cumberland Cnty.*, 357 S.W.3d 361, 371 (Tenn. 2011); *Abshure v. Methodist Heathcare-Memphis Hosp.*, 325 S.W.3d 98, 104 (Tenn. 2010); *Ferguson v. Brown*, 291 S.W.3d 381, 386-87 (Tenn. Ct. App. 2008). As the Supreme Court has stated, "a trial court is not bound by the title of the pleading, but has the discretion to treat the pleading according to the relief sought." *Norton v. Everhart*, 895 S.W.2d 317, 319 (Tenn. 1995).

Compiler's Notes. The amendment of Rule 3, as promulgated and adopted by the Supreme Court in its order dated January 6, 2005, was ratified and approved by 2005 House Resolution 12 and Senate Resolution 7. The order promulgating the amendment of this rule provided that it take effect July 1, 2005.

In its order filed on December 14, 2009, the Supreme Court of Tennessee submitted a proposed amendment to the Advisory Commission Comments of Rule 3, which, if approved by resolution of both houses of the General Assem-

bly, would take effect July 1, 2010. On February 1, 2010, the Supreme Court filed an order, effective December 14, 2009, withdrawing the proposed amendment to this rule in the December 14 order.

The amendment of Rule 3, which added the 2013 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 18, 2012, was ratified and approved by House Resolution 36 and Senate Resolution 12. The order promulgating the addition of the 2013 Advisory Commission Comments provided that it take effect July 1, 2013.

In its order filed August 27, 2015, the Supreme Court provided: "The Advisory Commission on the Rules of Practice and Procedure annually presents recommendations to the Court to amend the Tennessee Rules of Appellate, Civil, Criminal, and Juvenile Procedure and the Tennessee Rules of Evidence. With its meeting on August 14, 2015, the Advisory Commission completed its 2014-2015 term, and the Commission thereafter transmitted its recommendations to the Court."

"The court hereby publishes the Advisory Commission's recommended amendments set out in the two Appendices to this order. Appendix I sets out the proposed amendments tot he Rules of Appellate, Civil, and Criminal Procedure. Appendix II sets out a proposed comprehensive revision of the Rules of Juvenile Procedure, which, if adopted, will replace in its entirety the current version of the Rules of Juvenile Procedure."

"The court hereby solicits written comments on the proposed amendments from the bench, the bar, and the public. The deadline for submitting written comments is Wednesday, November 25, 2015. Written comments may either be submitted by email to appellatecourtclerk@tncourts.gov or by mail addressed to: James Hivner, Clerk, Re: 2016 Rules Package, 100 Supreme Court Building, 401 7th Avenue North, Nashville, TN 37219-1407 and should reference the docket number set out above [No. ADM2015-01631].

The proposed amendment to Tennessee Rules of Civil Procedure, Rule 3, promulgated by the Supreme Court in its order dated August 27, 2015, would delete the second and third sentences, designate the first sentence as (a) and add (b), which would read: "Subject to the provisions of Rule 4.01(3) and (4), the filing of a complaint tolls any applicable statutes of limitation and repose." The original Advisory Commission Comments, and those for 1995, 1997, 1998 and 2005 would be deleted in their entirety. A new 2016 Advisory Commission Comments would be added, and would read: "Advisory Commission Comments [2016]. Prior to the 2016 amendment, Rule 3 stated in its entirety: All civil actions are commenced by filing a complaint with the clerk of the court. An action is commenced within the meaning of any statute of limitations upon such filing of a complaint, whether process be issued or not issued and whether process be returned served or unserved. If process remains unissued for 90 days or is not served within 90 days from issuance, regardless of the reason, the plaintiff cannot rely upon the original commencement to toll the running of a statute of limitations unless the plaintiff continues the action by obtaining issuance of new process within one year from issuance of the previous process or, if no process is issued, within one year of the filing of the complaint."

"The 2016 amendment retains in Rule 3 the first sentence set out in the foregoing quotation and designates that sentence as new subdivision (a). Because the second and third sentences of the former rule (set out above) pertained to the issuance and service of process, the Commission concludes that those matters should be addressed in Rule 4, instead of Rule 3, and the 2016 amendment therefore deletes the second and third sentences from Rule 3. In light of that amendment to Rule 3, Rule 4.01 is simultaneously amended to address the matters previously addressed by the two sentences deleted from Rule 3. Relatedly, Rule 3 also is amended to add new subdivision (b), which states: "Subject to the provisions of Rule 4.01(3) and (4), the filing of a complaint tolls any applicable statutes of limitation and repose."

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), § 102, 135, 504.

Pritchard on Wills and Administration of Estates (7th ed., Robinson and Mobley), §§ 1100 et seq.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-3-1, 1-3-2.

Tennessee Jurisprudence. 1 Tenn. Juris., Abatement, Survival and Revival, § 3; 1 Tenn. Juris., Actions, § 16, 17; 1 Tenn. Juris., Amendments, § 8; 3 Tenn. Juris., Appearances, § 6; 3 Tenn. Juris., Attachment and Garnishment, § 86; 9 Tenn. Juris., Demurrers and Motions to Dismiss, § 6; 11 Tenn. Juris., Equity, § 48; 18 Tenn. Juris., Limitations of Actions, v 44; 20 Tenn. Juris., New Trials, § 18; 26 Tenn. Juris., Workers' Compensation, § 48; 26 Tenn. Juris., Working Contracts, § 16.

Law Reviews. Civil Procedure — Carr v. Borchers: Tennessee's Nonresident Motorist Statute Revisited, 22 Mem. St. U.L. Rev. 357 (1992).

Laches at Law in Tennessee, 28 U. Mem. L. Rev. 211.

Service of Process Upon Foreign Defendants Under the Hague Convention (Michael L. Silhol), 28 No. 5 Tenn. B.J. 20 (1992).

Tennessee and Federal Rules of Civil Procedure (Donald F. Paine), 27 No. 5 Tenn. B.J. 25 (1991).

The Tolling of Statutes of Limitations in Tennessee, 14 Mem. St. U.L. Rev. 375 (1984).

NOTES TO DECISIONS

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1. Superseded Rule.
2. Commencement of Action.
3. Recommencement.
4. Statute of Limitations.
5. Failure to Issue Process.
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7. Reissue of Process.
8. Tort Actions Against Personal Representative.
9. Savings Statute.
10. Savings Statute Inapplicable.
11. Issuance of Summons.
12. Pro Se Litigants.
13. Procedure.
15. Unintentional Delay In Service.
16. Construction With Other Statutes.

1. Superseded Rule.

The Tennessee Rules of Civil Procedure are "laws" and are subject to being superseded in the same manner as statutes. Thus, the specific provisions in T.C.A. § 56-7-1206(e) prevail over the conflicting general provisions in Tenn. R. Civ. P. 3. Lady v. Kregger, 747 S.W.2d 342, 1987 Tenn. App. LEXIS 3052 (Tenn. Ct. App. 1987).

Where defendant was not, in fact, an uninsured motorist and plaintiff at no stage of the proceedings ever enjoyed a presumption that defendant was uninsured, T.C.A. § 56-7-1206 did not prevent the application of Tenn. R. Civ. P. 3. Carr v. Borchers, 815 S.W.2d 528, 1991 Tenn. App. LEXIS 243 (Tenn. Ct. App. 1991), appeal denied, — S.W.2d —, 1991 Tenn. LEXIS 314 (Tenn. Aug. 5, 1991).

In a personal injury action arising from an automobile accident, plaintiff had the burden of establishing that the other motorist was uninsured, and no presumption of uninsured status arose by the mere fact that service was returned not found; further, where the record showed that plaintiff did not intend to rely upon uninsured motorist coverage, the trial court correctly held that plaintiff's suit was barred by the statute of limitations by virtue of his failure to comply with Tenn. R. Civ. P. 3. Ballard v. Ardehani, 901 S.W.2d 369, 1995 Tenn. App. LEXIS 18 (Tenn. Ct. App. 1995).

2. Commencement of Action.

Because injured plaintiff failed to comply with Tenn. R. Civ. P. 3, requiring plaintiff to serve defendant doctor within 30 days of filing a medical malpractice case, plaintiff could rely on the original commencement date for purposes of a statute of limitations only so long as plaintiff continued the action; because plaintiff nonsuited, then refiled, without ever obtaining service on the first complaint, and without serving a copy of the notice of voluntary dismissal and complaint on the doctor, as required by Tenn. R. Civ. P. 41.01, plaintiff could not rely on the filing date of the original complaint to satisfy the applicable one year statute of limitations, and plaintiff's second suit was barred. Frye v. Blue Ridge Neuroscience Ctr., 70 S.W.3d 710, 2002 Tenn. LEXIS 123 (Tenn. 2002).

District court properly determined that the Class Action Fairness Act (CAFA), Pub. L. No. 109-2, 119 Stat. 4 (2005), applied to a breach of contract action that was filed against an insurance company by an automobile owner whose vehicle was damaged in an accident with the company's insured; the amended complaint, which was filed after CAFA's effective date, did not relate back to the owner's original individual complaint under Tenn. R. Civ. P. 15.03 because the company was neither afforded adequate notice of the generic identity of the proposed class, nor provided adequate notice of claims of all plaintiffs who might someday fall within the putative class by virtue of the original complaint that was filed pursuant to Tenn. R. Civ. P. 3. Smith v. Nationwide Prop. & Cas. Ins. Co., 505 F.3d 401, 2007 FED App. 400P, 2007 U.S. App. LEXIS 22974 (6th Cir. Oct. 1, 2007).

The 1998 version of T.C.A. § 6-51-115(b)(2) controlled the allocation of local option revenue derived from the annexed territory because it was in effect when the quo warranto litigation challenging the ordinances was concluded, and the determinative date was the date on which the annexation ordinance became operative, which was January 2002; the mere filing of a quo warranto action held the effective date of the annexation in abeyance until the filed action was dismissed, and as long as the quo warranto actions were pending, the annexations did not become effective or operative. Town of Huntsville v. Scott County, 269 S.W.3d 57, 2008 Tenn. App. LEXIS 114 (Tenn. Ct. App. Feb. 28, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 665 (Tenn. Aug. 25, 2008).

Requirement in T.C.A. § 29-26-122(a) that a plaintiff conduct a due diligence inquiry prior to filing a complaint for medical negligence was not in conflict with Tenn. R. Civ. P. 3. Jackson v. HCA Health Servs. of Tenn., Inc., 383 S.W.3d 497, 2012 Tenn. App. LEXIS 250 (Tenn. Ct. App. Apr. 18, 2012), appeal denied, Jackson v. HCA Health Servs. of Tenn., — S.W.3d —, 2012 Tenn. LEXIS 585 (Tenn. Aug. 16, 2012).

Patient who filed his initial health care liability action before the enactment of the pre-suit notice requirements, voluntarily dismissed his original action, gave pre-suit notice and refiled his suit more than one year later filed his suit after the one-year period under the saving statute since T.C.A. § 29-21-121 did not alter the traditional definition of commencement of a suit with the filing of the complaint; however, the patient was entitled to the 120-day exten-

sion of the savings statute under T.C.A. § 29-26-121 because he gave pre-suit notice before filing the second complaint. Rajvongs v. Wright, 432 S.W.3d 808, 2013 Tenn. LEXIS 1000 (Tenn. Dec. 12, 2013).

Pre-suit notice requirement of T.C.A. § 29-26-121 does not alter the traditional definition of the commencement of an action and a health care liability action is commenced by filing a complaint since the statutory language, "potential claim" in T.C.A. § 29-26-121 draws a distinction between a potential health care liability claim and the complaint that is filed to commence an action; providing notice at least sixty (60) days before the filing of a complaint, indicates that the complaint, not the notice, is the defining event for commencement of a civil action. Rajvongs v. Wright, 432 S.W.3d 808, 2013 Tenn. LEXIS 1000 (Tenn. Dec. 12, 2013).

Insured's service on his uninsured motorist carrier was not sufficient to properly commence the action because the procedure in T.C.A. § 56-7-1206(d), allowing a plaintiff to sue an uninsured motorist carrier directly, was not triggered; in order to trigger the statute allowing a suit to be commenced directly against an uninsured motorist carrier, the summons had to be returned with some indication that the defendant was "not to be found," but nothing indicated that service was either attempted or accomplished on anyone related to the alleged tortfeasor. Liput v. Grinder, 405 S.W.3d 664, 2013 Tenn. App. LEXIS 136 (Tenn. Ct. App. Feb. 27, 2013), appeal denied, — S.W.3d —, 2013 Tenn. LEXIS 615 (Tenn. July 11, 2013).

T.C.A. § 29-26-121 does not change the traditional definition of commencement under Tenn. R. Civ. P. 3; therefore, although the pre-suit notice requirements must be given, unless properly excused, a failure to satisfy them before the filing of a complaint does not prevent that filing from being considered a commencement within the meaning of § 29-26-121(c). Therefore, a refiled medical malpractice case should not have been dismissed based on an allegation that the pre-suit notice requirements were not met in the original filing because, despite non-suiting a first lawsuit, a second lawsuit was commenced within the one year time period provided for in T.C.A. § 28-1-105. Cartwright v. DMC-Memphis Inc., 468 S.W.3d 517, 2014 Tenn. App. LEXIS 796 (Tenn. Ct. App. Dec. 9, 2014), appeal denied, — S.W.3d —, 2015 Tenn. LEXIS 347 (Tenn. Apr. 14, 2015).

3. Recommencement.

Where the dismissal of plaintiff's action did not foreclose the merits, plaintiff could timely recommence the action by filing a new complaint within one year of the appellate court's affirmance of the dismissal. Adams v. Carter County Memorial Hospital, 548 S.W.2d 307, 1977 Tenn. LEXIS 544 (Tenn. 1977); Bates v. Harp, 573 F.2d 930, 1978 U.S. App. LEXIS 11905 (6th Cir. Tenn. 1978).

Execution of a certificate by counsel is not equivalent to the filing of new complaint and process and such a "certificate" is not the equivalent of a recommencement of the action within one year as contemplated by Tenn. R. Civ. P. 3. Vanhooser v. Ling, 872 S.W.2d 913, 1993 Tenn. App. LEXIS 674 (Tenn. Ct. App. 1993); Ballard v. Ardehani, 901 S.W.2d 369, 1995 Tenn. App. LEXIS 18 (Tenn. Ct. App. 1995).

A corporate complaint signed by its nonlawyer president was invalid since it did not meet the requirement of Tenn. R. Civ. P. 11, that it be signed by an attorney of record or the party, and the defect in the filing was not cured by the subsequent filing of a notice of appearance by the corporation's attorney. Old Hickory Eng'g & Mach. Co. v. Henry, 937 S.W.2d 782, 1996 Tenn. LEXIS 515 (Tenn. 1996).

Plaintiff's *Bivens* claims were time-barred because plaintiff did not effect service on defendants within 90 days of refiling of the complaint in the appropriate forum court as required by Tenn. R. Civ. P. 3. Dolan v. United States, 514 F.3d 587, 2008 FED App. 48P, 2008 U.S. App. LEXIS 1790 (6th Cir. Jan. 28, 2008), cert. denied, 171 L. Ed. 2d 888, 128 S. Ct. 2971, 554 U.S. 919, 2008 U.S. LEXIS 5183 (U.S. 2008).

4. Statute of Limitations.

When the summons is not returned at the end of 30 days following its issuance, the plaintiff must obtain issuance of new process within six months, or recommence the action within one year, of the end of the 30-day period in order to preserve the original commencement of the action as a bar to the running of a statute of limitations. Adams v. Carter County Memorial Hospital, 548 S.W.2d 307, 1977 Tenn. LEXIS 544 (Tenn. 1977); Bates v. Harp, 573 F.2d 930, 1978 U.S. App. LEXIS 11905 (6th Cir. Tenn. 1978).

Service of process may be valid for jurisdictional purposes under Tenn. R. Civ. P. 4 but still be insufficient to toll the statute of limitations under Tenn. R. Civ. P. 3, which is directed toward commencement of actions and circumstances under which the statute may be prevented from running. First Tenn. State Bank, N.A. v. Dougherty, 963 S.W.2d 507, 1997 Tenn. App. LEXIS 519 (Tenn. Ct. App. 1997).

Because notification of a suit was not a valid substitute for service of process as required by Tenn. R. Civ. P. 4.03, a party so notified could not be deemed served for the purpose of tolling the statute of limitations under Tenn. R. Civ. P. 3 and the savings statute, T.C.A. § 28-1-105(a), when there was no actual service of process. Sims v. Adesa Corp., 294 S.W.3d 581, 2008 Tenn. App. LEXIS 170 (Tenn. Ct. App. Mar. 25, 2008).

It was error to dismiss an action as barred by a one year statute of limitations when proof of service of process was returned 412 days after

issuance of a summons because Tenn. R. Civ. P. 3 and 4.03 did not condition the effectiveness of the action's original commencement to toll the statute of limitations on the prompt return of proof of service. Fair v. Cochran, 418 S.W.3d 542, 2013 Tenn. LEXIS 727 (Tenn. Sept. 12, 2013).

Circuit court properly denied a motion filed by an injured driver and his wife (the plaintiffs) to enlarge the time frame for obtaining new service of process of the defendant driver, and dismissed their automobile negligence suit because they failed to timely serve the defendant with process, acknowledged that their counsel's failure to investigate the lack of personal service sooner was negligent, and failed to follow up with the process server or the trial court clerk to determine whether they needed to effectuate alias service despite having almost 10 months to do so. Webster v. Isaacs, — S.W.3d —, 2019 Tenn. App. LEXIS 404 (Tenn. Ct. App. Aug. 21, 2019).

5. Failure to Issue Process.

The framers of Tenn. R. Civ. P. 3 adopted the prior chancery court practice of commencement by filing, rather than the prior law court practice of commencement by issuance of summons; therefore, failure to issue process does not by itself preclude the commencement of a cause of action under Tenn. R. Civ. P. 3. Lee v. Crenshaw, 562 F.2d 380, 1977 U.S. App. LEXIS 11621 (6th Cir. Tenn. 1977).

6. Insufficient Service of Process.

Will not toll the statute of limitations and, even though company's subsequent service by letter rogatory on Yugoslavian company was proper, it did not occur within one year of filing the complaint. Proctor & Gamble Cellulose Co. v. Viskoza-Loznica, 33 F. Supp. 2d 644 (W.D. Tenn. 1998).

Finding against the deceased patient's spouse in a medical malpractice action was appropriate because none of the employees who accepted service were agents authorized by appointment to receive service of process on behalf of either the corporation or the individual physician. Because the spouse never effectively served the physician or the corporation with process and because the corporation and physician did not waive that defense, the one-year statute of limitations for malpractice actions had run. Hall v. Haynes, 319 S.W.3d 564, 2010 Tenn. LEXIS 684 (Tenn. Aug. 26, 2010).

7. Reissue of Process.

Where a plaintiff knows the identity of the uninsured motorist but is unable to obtain service because his whereabouts are unknown, T.C.A. § 56-7-1206(d) is the procedure required to perfect a direct action against the uninsured motorist carrier, as suspension of the requirement of Tenn. R. Civ. P. 3 to reissue process, in this instance, is consistent with the legislative intent to provide an efficient procedure. Little v. State Farm Mut. Ins. Co., 784 S.W.2d 928, 1989 Tenn. App. LEXIS 823 (Tenn. Ct. App. 1989), appeal denied, Little v. Barnett, 1990 Tenn. LEXIS 90 (Tenn. Feb. 26, 1990).

8. Tort Actions Against Personal Representative.

Where suit was not filed in a personal injury action until after the death of the defendant, at which time the statute of limitations had not yet run, and subsequently the trial court ordered the substitution of the personal representative as defendant, the court held that the action was commenced within the meaning of Tenn. R. Civ. P. 3 at the time that order was entered, but that the running of the statute of limitations was tolled, up to six months, between the death of the original defendant and the appointment of the personal representative as provided by § 28-1-110. Carpenter v. Johnson, 514 S.W.2d 868, 1974 Tenn. LEXIS 460 (Tenn. 1974).

Plaintiff injured party's tort action filed against a deceased driver did not commence for purposes of Tenn. R. Civ. P. 3 because plaintiff failed to name the personal representative for the deceased driver's estate as the defendant until after the expiration of the statute of limitations, and because the complaint did not commence an action within the meaning of Rule 3, it did not commence an action that plaintiff's later motion to amend to add the personal representative as the defendant could "relate back to" within the meaning of Tenn. R. Civ. P. 15.03. Vaughn v. Morton, 371 S.W.3d 116, 2012 Tenn. App. LEXIS 201 (Tenn. Ct. App. Mar. 28, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 435 (Tenn. June 19, 2012).

Trial court did not err in granting an uninsured motorist carrier summary judgment because an insured's claim against it was barred since the insured failed to ever serve any personal representative for a driver's estate; pursuant to T.C.A. § 28-1-110, the one-year statute of limitations contained in T.C.A. § 28-3-104(a)(1) was tolled for the maximum allowance of six months from the date of the driver's death, but the insured did not obtain issuance of new process within one year of the original issuance as required by Tenn. R. Civ. P. 3 to maintain his claim. Liput v. Grinder, 405 S.W.3d 664, 2013 Tenn. App. LEXIS 136 (Tenn. Ct. App. Feb. 27, 2013), appeal denied, — S.W.3d —, 2013 Tenn. LEXIS 615 (Tenn. July 11, 2013).

9. Savings Statute.

The availability of the saving statute, T.C.A. § 28-1-105, is a function of notice to the defendant and diligence by the plaintiff. Advey v. Celotex Corp., 962 F.2d 1177, 1992 U.S. App. LEXIS 8452 (6th Cir. Tenn. 1992), rehearing

denied, — F.2d —, 1992 U.S. App. LEXIS 14459 (6th Cir. June 16, 1992).

10. Savings Statute Inapplicable.

Where the plaintiff did not issue new process, after the original process was not served or returned within 30 days from issuance, within the six months period and did not recommence the action within one year from issuance of the initial unserved process, as prescribed by Tenn. R. Civ. P. 3, the action was not "commenced within the time limited by a rule or statute of limitations," and the savings statute, T.C.A. § 28-1-105 was inapplicable. Little v. Franceschini, 688 S.W.2d 91, 1985 Tenn. App. LEXIS 2629 (Tenn. Ct. App. 1985); Federal Deposit Ins. Corp. v. Cureton, 842 F.2d 887, 1988 U.S. App. LEXIS 3483 (6th Cir. 1988).

In a personal injury action, where plaintiffs did not obtain the issuance of new process within six months of the issuance of previous process or recommence their action within one year of the issuance of the initial process pursuant to Tenn. R. Civ. P. 3, they could not rely on the date of filing of their original complaint to toll the running of the statute of limitations pursuant to T.C.A. § 28-1-105. Gregory v. McCulley, 912 S.W.2d 175, 1995 Tenn. App. LEXIS 524 (Tenn. Ct. App. 1995).

Where plaintiff's second pro se medical malpractice complaint was filed within one year of the date of the voluntary dismissal of her first complaint, this was timely under the saving statute, T.C.A. § 28-1-105(a); however, where the second complaint was not served on the defendants within one year of filing and plaintiff could not rely on the saving statute, the complaint was properly dismissed as untimely. Slone v. Mitchell, 205 S.W.3d 469, 2005 Tenn. App. LEXIS 819 (Tenn. Ct. App. 2005), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 586 (Tenn. June 26, 2006).

11. Issuance of Summons.

A summons need not necessarily be issued simultaneously with the filing of a complaint in order for the complaint to toll the statute of limitations. Hine v. Commercial Carriers, Inc., 802 S.W.2d 218, 1990 Tenn. LEXIS 485 (Tenn. 1990).

The drafters of Tenn. R. Civ. P. 3 and Tenn. R. Civ. P. 4 undoubtedly contemplated that a summons would be issued relatively close to the time the complaint is filed as process cannot be returned, served or unserved, unless it is first issued. Hine v. Commercial Carriers, Inc., 802 S.W.2d 218, 1990 Tenn. LEXIS 485 (Tenn. 1990).

If the drafters of the rule intended a complaint and summons to commence an action for statute of limitation purposes, the rule could have easily been drafted to so indicate. Hine v. Commercial Carriers, Inc., 802 S.W.2d 218, 1990 Tenn. LEXIS 485 (Tenn. 1990).

The term "forthwith," contained in Tenn. R. Civ. P. 4, prevents the adoption of a blanket rule that would render ineffective the commencement of a lawsuit simply because a summons is not issued at the moment the complaint is filed. Hine v. Commercial Carriers, Inc., 802 S.W.2d 218, 1990 Tenn. LEXIS 485 (Tenn. 1990).

Proceedings in the chancery court for review of an administrative decision may be initiated without the issuance of a summons. JACO v. Department of Health, Bureau of Medicaid, 950 S.W.2d 350, 1997 Tenn. LEXIS 408 (Tenn. 1997), overruled in part, Schering-Plough Healthcare Prods. v. State Bd. of Equalization, 999 S.W.2d 773, 1999 Tenn. LEXIS 407 (Tenn. 1999).

12. Pro Se Litigants.

Pro se litigants must comply with the requirements of Tenn. R. Civ. P. 3 and 4 regarding the filing of the complaint and the issuance of process. Hodges v. Tennessee AG, 43 S.W.3d 918, 2000 Tenn. App. LEXIS 785 (Tenn. Ct. App. 2000).

13. Procedure.

In light of the nature of modification proceedings, the commencement of proceedings under that section should be treated as the filing of an independent action. Stricklin v. Stricklin, 490 S.W.3d 8, 2015 Tenn. App. LEXIS 754 (Tenn. Ct. App. Sept. 21, 2015).

Although the petition referred to the statute should be treated as a complaint for the purposes of the Tennessee Rules of Civil Procedure, the father did not argue that he was denied any procedural rights or that he was denied service of process, and his issues in this regard were waived. Stricklin v. Stricklin, 490 S.W.3d 8, 2015 Tenn. App. LEXIS 754 (Tenn. Ct. App. Sept. 21, 2015).

Trial court's judgment was vacated and the appellate court ordered that the matter be dismissed because the record did not reflect that a complaint or petition was ever filed; indeed, the first entry in the record was the September 19, 2017, order upon which the appeal was based; and, although the order was ostensibly based on a claim for damages asserted by the employee against the employer, there was no pleading where the employee ever asserted such a claim. Thus, inasmuch as the employee never asserted any claim by way of a filed pleading, there was no basis to enter a judgment against the employer. In re Jury Venire for the Week of July 24, 2017, — S.W.3d —, 2018 Tenn. App. LEXIS 244 (Tenn. Ct. App. May 3, 2018).

15. Unintentional Delay In Service.

Fact that appellant's delay in serving the summons might have been unintentional did not prevent a finding that he failed to timely comply with the service requirements of the Tennessee Rules of Civil Procedure; he could

not simply ignore the clear parameters set forth by the rules for serving process because his delay in serving appellee was unintentional. Meersman v. Regions Morgan Keegan Trust, — S.W.3d —, 2018 Tenn. App. LEXIS 594 (Tenn. Ct. App. Oct. 9, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 123 (Tenn. Feb. 20, 2019).

16. Construction With Other Statutes.

Trial court properly dismissed a company's lawsuit against a contractor's owners for violation of the licensing statute because the statute of limitations had run due to the company's failure to properly serve the owners, and any actions allegedly taken by the owners, regardless of alleged bad faith, had no bearing on the company's own ability to toll the running of the statute of limitations. Cored, LLC v. Hatcher, — S.W.3d —, 2020 Tenn. App. LEXIS 444 (Tenn. Ct. App. Oct. 6, 2020).

RULE 3A

ENFORCEMENT OF FOREIGN JUDGMENTS

3A.01. Enrollment of Foreign Judgments. Enrollment of a foreign judgment pursuant to the Uniform Enforcement of Foreign Judgments Act, T.C.A. § 26-6-104, does not require filing of a complaint, but shall be by

(1) Filing with the clerk of the Circuit Court or the Clerk & Master of the Chancery Court, a copy of a foreign judgment authenticated in accordance with the Acts of Congress or the statutes of this state;

(2) Filing an Affidavit executed by the judgment creditor or the judgment creditor's lawyer, setting forth the name and last known post office address of the judgment debtor and the judgment creditor;

(3) Filing a Notice of Filing that provides a description of the judgment creditor, judgment debtor, name and last known post office address of the judgment debtor and the judgment creditor and notice that the judgment creditor is enrolling a foreign judgment in Tennessee; and

(4) Paying the appropriate filing fee to the Clerk for opening a miscellaneous file.

NOTES TO DECISIONS

1. Foreign Decrees.

When a Texas franchiser sought to enroll a default judgment obtained in a lawsuit in Texas, the Texas summons and complaint were properly served on a franchisee and personal guarantors in Tennessee as the process server's affidavit supporting the franchiser's motion for substitute service complied with the requirements of the Texas Rules of Civil Procedure, the Texas court's order instructing the process server where and how to serve the summons was appropriate, and the method of service was a reasonably effective means of providing notice. Mr. Appliance, LLC v. Appliance Servs. of Tenn., LLC, — S.W.3d —, 2020 Tenn. App. LEXIS 540 (Tenn. Ct. App. Nov. 30, 2020).

3A.02. Notice of Filing. The following form of Notice of Filing, when completed, provides sufficient information to comply with the notice required under 3A.01(3) above;

IN RE PROCEEDING TO ENFORCE JUDGMENT AGAINST [INSERT NAME OF JUDGMENT DEBTOR]

NOTICE OF FILING

Judgment creditor [insert name of judgment creditor] hereby gives notice that he/she/it is enrolling a foreign judgment in Tennessee pursuant to the Uniform Enforcement of Foreign Judgments Act.

The following documents are attached in support of this notice:

(a) A copy of a foreign judgment authenticated in accordance with the Acts of Congress or the statutes of this state.

(b) An Affidavit executed by the judgment creditor or the judgment creditor's attorney, setting forth the name and last known post office address of the judgment debtor and the judgment creditor.

COST BOND

I hereby acknowledge and bind myself for the prosecution of this action and payment of all costs in this court which may at any time be adjudged against the plaintiff in the event said plaintiff shall not pay the same.

Witness my hand this _____ day of _____, 20____ .

_____

Surety

_____

Address

3A.03. Clerk's Duties. On receipt of the copy of the foreign judgment, the Notice of Filing, and the affidavit, the clerk shall:

(1) Promptly open a case number file, and

(2) Issue a summons to be delivered for service to any person authorized to serve process for service upon the judgment debtor, including providing a copy of the Notice of Filing to be served upon the judgment debtor, a copy of the foreign judgment authenticated in accordance with the Acts of Congress or the statutes of this state, and a copy of the Affidavit filed by the judgment creditor or the judgment creditor's lawyer.

3A.04. Enrollment and Execution. If the judgment debtor does not file a response or answer within thirty (30) days after service, the Clerk shall

(1) Enroll the judgment; and

(2) Upon the filing of a request for execution, issue the execution, by garnishment, attachment, or as otherwise requested, without requiring further order from the Court. [As added by order filed December 18, 2012, effective July 1, 2013.]

Advisory Commission Comments [2013]. Tennessee trial courts have not followed a uniform procedure in enrolling and enforcing foreign judgments. Some trial courts have considered that a complaint or motion for default is necessary under the Rules of Civil Procedure to enroll or enforce by execution a domesticated foreign judgment, despite the adoption of the Uniform Enforcement of Foreign Judgments Act, Tenn. Code Ann. §§ 26-6-104 – 108 (2000 & Supp. 2011). The Act's purpose to streamline the procedure for enrolling and enforcing for-

eign judgments is hampered by court's uncertainty whether enrolling a foreign judgment should be treated as commencing a civil action, requiring commencement by a complaint and, upon lack of response by the judgment debtor after service, requiring entry of a default upon proper motion.

Rule 3A has been adopted to insure that trial courts follow the same process throughout the state. It makes clear that where a foreign judgment is enrolled pursuant to the Act and is undisputed, no complaint is necessary to enroll the judgment or issue execution upon it. Similarly, no motion for default or entry of default judgment is necessary before execution may issue. *See also* Advisory Commission Comment [2013] to Tenn. R. App. 55.

If a judgment debtor does dispute the Notice of Filing Foreign Judgment, Tennessee's Uniform Enforcement of Foreign Judgments Act entitles the debtor to a trial on the merits concerning the underlying validity of the judgment, and the Tennessee Rules of Civil Procedure govern the trial on the merits on that answer and response.

Compiler's Notes. The addition of Rule 3A, as promulgated and adopted by the Supreme Court in its order dated December 18, 2012, was ratified and approved by House Resolution 36 and Senate Resolution 12. The order promulgating the addition of Rule 3A provided that it take effect July 1, 2013.

STATE OF TENNESSEE

In the _____ Court of _____ County

_____, Plaintiff(s),

vs.

_____, Defendant(s)

No. _____

SUMMONS for ENFORCEMENT OF FOREIGN JUDGEMENT

TO: _____
Defendant Address

_____
Defendant Address

You are hereby notified that a judgement creditor has filed in the _____ Court of _____ County, Tennessee in the above styled case a judgment entered against you in another state. If you object to entry of this judgment or the foreign judgment is on appeal, you must file a response or answer objecting to the enrollment of this judgment in the office of the _____ Court Clerk of _____ County, Tennessee on or before thirty (30) days after service of this summons upon you. If you fail to do so, the Clerk may issue execution on the foreign judgment against you.

WITNESSED and Issued this ____ day of _____, 20____

_____, _____ Court Clerk

By _____, Deputy Clerk

ATTORNEY FOR PLAINTIFF: _____
PLAINTIFF'S ATTORNEY'S ADDRESS: _____
PLAINTIFF'S ADDRESS: _____

Received this ____ day of _____, 20____
By: _____
Deputy Sheriff

State of Tennessee
County of _____

I, _____, Clerk of the _____ Court, in and for the State and County aforesaid, hereby certify that the within and foregoing is a true and correct copy of the original writ of summons issued in this case.

_____ Court Clerk

By _____, D.C.

OFFICER'S RETURN

I certify that I served this summons together with the foreign judgment, notice of filing of foreign judgment, and affidavit of the judgment creditor as follows:

☐ On _____ ____, 20____, I delivered a copy of the summons, enrolled foreign judgment, and creditor's affidavit to the defendant, _____
_____
_____

☐ Failed to serve this summons within 30 days after its issuance because:
_____
_____

_____, Sheriff

_____, Deputy Sheriff

CLERK'S RETURN

I hereby acknowledge and accept service of the within summons and receive copy of same, this ____ day of _____, 20____.

_____
Defendant

_____,_____ Court Clerk
By_____, D.C.

NOTICE TO DEFENDANT(S)

Tennessee law provides a ten thousand ($10,000.00) personal property exemption from execution or seizure to satisfy a judgment. If a judgment should be entered against you in this action and you wish to claim property as exempt, you must file a written list, under oath, of the items you wish to claim as exempt, with the clerk of court. The list may be filed at any time and may be changed by you thereafter as necessary; however, unless it is filed before the judgment becomes final, it will not be effective as to any execution or garnishment issued prior to the filing of the list. Certain items are automatically exempt by law and do not need to be listed; these include items of necessary wearing apparel (clothing) for yourself and your family and trunks or other receptacles necessary to contain such apparel, family portraits, the family Bible, and school books. Should any of these items be seized you would have the right to recover them. If you do not understand your exemption right or how to exercise it, you may wish to seek the counsel of a lawyer.

RULE 4

PROCESS

4.01. Summons; Issuance; By Whom Served. (1) Upon the filing of the complaint, the clerk of the court shall promptly issue the required summons and cause it, with necessary copies of the complaint and summons, to be delivered for service to any person authorized to serve process. This person shall serve the summons, and the return endorsed thereon shall be proof of the time and manner of service. A summons may be issued for service in any county against any defendant, and separate or additional summonses may be issued against any defendant upon request of plaintiff. Nothing in this rule shall affect existing laws with respect to venue.

(2) A summons and complaint may be served by any person who is not a party and is not less than 18 years of age. The process server must be identified by name and address on the return.

(3) If a plaintiff or counsel for plaintiff (including third-party plaintiffs) intentionally causes delay of prompt issuance of a summons or prompt service of a summons, the filing of the complaint (or third-party complaint) will not toll any applicable statutes of limitation or repose. [Added by order filed February 1, 1995, effective July 1, 1995; by order effective July 1, 1997; by order effective July 1, 1998; by order entered December 10, 2003, effective July 1, 2004 and by order filed December 29, 2015, effective July 1, 2016.]

Compiler's Notes. In its order filed on December 14, 2009, the Supreme Court of Tennessee submitted proposed amendments to Rule 4.01(3) and the Advisory Commission Comments, which, if approved by resolution of both houses of the General Assembly, would take effect July 1, 2010. On February 1, 2010, the Supreme Court filed an order, effective December 14, 2009, withdrawing the proposed amendments to this rule in the December 14 order.

The amendment of Rule 4 and its existing Advisory Commission Comments and the added [2016] Advisory Comment Notes, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 143 and Senate Resolution 81. The order promulgating the amendment of Rule 4 and its existing Advisory Commission Comments and the addition of [2016] Advisory Comment Notes provided that it take effect July 1, 2016.

Law Reviews. A Tale of Two Jurisdictions, 68 Vand. L. Rev. 501 (2015).

Federal Civil Procedure--Personal Jurisdiction--General Jurisdiction Over Foreign Corporations Based Upon Domestic Subsidiary Activity Within The Forum State, 82 Tenn. L. Rev. 461 (2015).

NOTES TO DECISIONS

Analysis

1. Dismissal.
2. Procedure.
3. Service Proper.

1. Dismissal.

Trial court did not err by finding that plaintiff's fraud and negligence claims were time-barred by operation of this rule, and therefore it properly granted defendant summary judgment, because plaintiff offered no argument or explanation for waiting seven months to properly serve defendant. Plaintiff knew that his second attempt to serve defendant by mail was as unsuccessful as his first attempt, yet he waited, without explanation, despite having actual knowledge of how to properly serve defendant. Fuller v. Allianz Life Ins. Co. of N. Am., — S.W.3d —, 2020 Tenn. App. LEXIS 69 (Tenn. Ct. App. Feb. 19, 2020).

Trial court erred in granting medical providers' motion to dismiss because they did not meet their burden of proving that the eighty-nine-day delay of service was intentional; a deceased patient's wife was not obligated to file an affidavit or present other proof that the delay was not intentional when the medical providers had not shown an intentional delay in the first place. Eskridge v. NHC Healthcare Farragut, LLC, — S.W.3d —, 2020 Tenn. App. LEXIS 350 (Tenn. Ct. App. Aug. 6, 2020).

2. Procedure.

Although the petition referred to the statute should be treated as a complaint for the purposes of the Tennessee Rules of Civil Procedure, the father did not argue that he was denied any procedural rights or that he was denied service of process, and his issues in this regard were waived. Stricklin v. Stricklin, 490 S.W.3d 8, 2015 Tenn. App. LEXIS 754 (Tenn. Ct. App. Sept. 21, 2015).

3. Service Proper.

Notarized affidavit of service indicating that a spouse was personally served by a process server at the spouse's address in India, which was filed in the trial court, created a rebuttable presumption that proper service was achieved in a divorce proceeding. Furthermore, the spouse's failure to recite any facts to support the spouse's argument that service of process was flawed, constituted a waiver of the issue. Singh v. Singh, — S.W.3d —, 2019 Tenn. App. LEXIS 334 (Tenn. Ct. App. July 3, 2019).

4.02. Summons; Form. The summons shall be issued in the name of the State of Tennessee, be dated and signed by the clerk, contain the name of the court and county, the title of the action, and the file number. The summons shall be directed to the defendant, shall state the time within which these rules require the defendant to appear and defend, and shall notify the defendant that in case of his or her failure to do so judgment by default will be rendered against that defendant for the relief demanded in the complaint. The summons shall state the name and address of the plaintiff's attorney, if any; otherwise, it shall state the plaintiff's address.

4.03. Summons; Return. (1) The person serving the summons shall promptly make proof of service to the court and shall identify the person served and shall describe the manner of service. If a summons is not served within 90 days after its issuance, it shall be returned stating the reasons for failure to serve. The plaintiff may obtain new summonses from time to time, as provided in Rule 3, if any prior summons has been returned unserved or if any prior summons has not been served within 90 days of issuance.

(2) When process is served by mail, the original summons, endorsed as below; an affidavit of the person making service setting forth the person's compliance with the requirements of this rule; and, the return receipt shall be sent to and filed by the clerk. The person making service shall endorse over his or her signature on the original summons the date of mailing a certified copy of the summons and a copy of the complaint to the defendant and the date of receipt of return receipt from the defendant. If the return receipt is signed by the defendant, or by person designated by Rule 4.04 or by statute, service on the defendant shall be complete. If not, service by mail may be attempted again or other methods authorized by these rules or by statute may be used.

(3) Failure to promptly file proof of service does not affect the validity of service. [As amended by order entered January 6, 2005, effective July 1, 2005 and by order filed December 29, 2015, effective July 1, 2016.]

Compiler's Notes. The amendment of Rule 4 and its existing Advisory Commission Comments and the added [2016] Advisory Comment Notes, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 143 and Senate Resolution 81. The order promulgating the amendment of Rule 4 and its existing Advisory Commission Comments and the addition of [2016] Advisory Comment Notes provided that it take effect July 1, 2016.

NOTES TO DECISIONS

Analysis

1. Service by Mail.
2. Intentional Delay.
3. Service Upon Corporate Agent.
4. Untimely Filing of Proof of Service.
5. Unintentional Delay.
6. Return of Service.

1. Service by Mail.

Finding against the deceased patient's spouse in a medical malpractice action was appropriate because none of the employees who accepted service were agents authorized by appointment to receive service of process on behalf of either the corporation or the individual physician. The spouse's attorney addressed to the physician a copy of the summons and the amended complaint by certified mail, return receipt requested, but according to the plain language of Tenn. R. Civ. P. 4.03(2), service was not "complete" unless the signatory of the return receipt was a person designated by Tenn. R. Civ. P. 4.04; an accounts payable clerk signed the return, but she did not have the express authority to accept service of process on the physician's behalf. Hall v. Haynes, 319 S.W.3d 564, 2010 Tenn. LEXIS 684 (Tenn. Aug. 26, 2010).

2. Intentional Delay.

Because a patient's attorney intentionally delayed service of process in order to obtain an expert opinion to support the patient's medical malpractice claim, filing of the complaint was ineffective to commence the action pursuant to Tenn. R. Civ. P. 4.01(3). Because the one-year statute of limitations had expired, the complain was dismissed as time-barred. Jones v. Vasu, 326 S.W.3d 577, 2010 Tenn. App. LEXIS 283 (Tenn. Ct. App. Apr. 22, 2010), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 967 (Tenn. Oct. 12, 2010).

3. Service Upon Corporate Agent.

Finding against the deceased patient's spouse in a medical malpractice action was appropriate pursuant to Tenn. R. Civ. P. 4.04(4) because none of the employees who accepted service were agents authorized by appointment to receive service of process on behalf of either the corporation or the individual physician. Neither a registered agent nor an accounts payable clerk offered any testimony that would

suggest that the registered agent appointed the clerk as his subagent to perform any of his duties as registered agent for the medical corporation. Hall v. Haynes, 319 S.W.3d 564, 2010 Tenn. LEXIS 684 (Tenn. Aug. 26, 2010).

4. Untimely Filing of Proof of Service.

It was error to dismiss an action as barred by a one year statute of limitations when proof of service of process was returned 412 days after issuance of a summons because Tenn. R. Civ. P. 3 and 4.03 did not condition the effectiveness of the action's original commencement to toll the statute of limitations on the prompt return of proof of service. Fair v. Cochran, 418 S.W.3d 542, 2013 Tenn. LEXIS 727 (Tenn. Sept. 12, 2013).

5. Unintentional Delay.

Fact that appellant's delay in serving the summons might have been unintentional did not prevent a finding that he failed to timely comply with the service requirements of the Tennessee Rules of Civil Procedure; he could not simply ignore the clear parameters set forth by the rules for serving process because his delay in serving appellee was unintentional. Meersman v. Regions Morgan Keegan Trust, — S.W.3d —, 2018 Tenn. App. LEXIS 594 (Tenn. Ct. App. Oct. 9, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 123 (Tenn. Feb. 20, 2019).

Appellants commenced the first complaint within the statute of limitations applicable to their personal injury claim, a dismissal was entered without prejudice and not upon any ground concluding appellants' right of action; therefore, the one-year statute of limitations under the savings statute commenced upon entry of the dismissal order and the second complaint was timely filed. The delay in filing the return of service did not bar application of the savings statute. Villalba v. McCown, — S.W.3d —, 2019 Tenn. App. LEXIS 424 (Tenn. Ct. App. Aug. 30, 2019).

6. Return of Service.

To effect return of service, appellants needed to, and did, file with the clerk of court the summons, a return receipt evidencing service, and an unsworn declaration from their attorney attesting to the effective service, which met the requirement of an affidavit given the declaration's language of being made under penalty of perjury. Villalba v. McCown, — S.W.3d —, 2019 Tenn. App. LEXIS 424 (Tenn. Ct. App. Aug. 30, 2019).

4.04. Service Upon Defendants within the State. The plaintiff shall furnish the person making the service with such copies of the summons and complaint as are necessary. Service shall be made as follows:

(1) Upon an individual other than an unmarried infant or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally, or if he or she evades or attempts to evade service, by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, whose name shall appear on the proof of service, or by delivering the copies to an agent authorized by appointment or by law to receive service on behalf of the individual served.

(2) Upon an unmarried infant or an incompetent person, by delivering a copy of the summons and complaint to the person's residence guardian or conservator if there is one known to the plaintiff; or if no guardian or conservator is known, by delivering the copies to the individual's parent having custody within this state; or if no such parent is within this state, then by delivering the copies to the person within this state having control of the individual. If none of the persons defined and enumerated above exist, the court shall appoint a practicing attorney as guardian ad litem to whom the copies shall be delivered. If any of the persons directed by this paragraph to be served is a plaintiff, then the person who is not a plaintiff who stands next in the order named above shall be served. In addition to the service provided in this paragraph, service shall also be made on an unmarried infant who is fourteen (14) years of age or more, and who is not otherwise incompetent.

(3) Upon a partnership or unincorporated association (including a limited liability company) which is named defendant under a common name, by

delivering a copy of the summons and of the complaint to a partner or managing agent of the partnership or to an officer or managing agent of the association, or to an agent authorized by appointment or by law to receive service on behalf of the partnership or association.

(4) Upon a domestic corporation, or a foreign corporation doing business in this state, by delivering a copy of the summons and of the complaint to an officer or managing agent thereof, or to the chief agent in the county wherein the action is brought, or by delivering the copies to any other agent authorized by appointment or by law to receive service on behalf of the corporation.

(5) Upon a nonresident individual who transacts business through an office or agency in this state, or a resident individual who transacts business through an office or agency in a county other than the county in which the resident individual resides, in any action growing out of or connected with the business of that office or agency, by delivering a copy of the summons and of the complaint to the person in charge of the office or agency.

(6) Upon the state of Tennessee or any agency thereof, by delivering a copy of the summons and of the complaint to the attorney general of the state or to any assistant attorney general.

(7) Upon a county, by delivering a copy of the summons and of the complaint to the chief executive officer of the county, or if absent from the county, to the county attorney if there is one designated; if not, by delivering the copies to the county court clerk.

(8) Upon a municipality, by delivering a copy of the summons and of the complaint to the chief executive officer thereof, or to the city attorney.

(9) Upon any other governmental or any quasi-government entity, by delivering a copy of the summons and of the complaint to any officer or managing agent thereof.

(10) Service by mail of a summons and complaint upon a defendant may be made by the plaintiff, the plaintiff's attorney or by any person authorized by statute. After the complaint is filed, the clerk shall, upon request, furnish the original summons, a certified copy thereof and a copy of the filed complaint to the plaintiff, the plaintiff's attorney or other authorized person for service by mail. Such person shall send, postage prepaid, a certified copy of the summons and a copy of the complaint by registered return receipt or certified return receipt mail to the defendant. If the defendant to be served is an individual or entity covered by subparagraph (2), (3), (4), (5), (6), (7), (8), or (9) of this rule, the return receipt mail shall be addressed to an individual specified in the applicable subparagraph. The original summons shall be used for return of service of process pursuant to Rule 4.03(2). Service by mail shall not be the basis for the entry of a judgment by default unless the record contains either: (a) a return receipt showing personal acceptance by the defendant or by persons designated by Rule 4.04 or statute; or (b) a return receipt stating that the addressee or the addressee's agent refused to accept delivery, which is deemed to be personal acceptance by the defendant pursuant to Rule 4.04(11). If the defendant is a domestic corporation, a foreign corporation authorized to conduct business in this state, or any entity required to register with the Tennessee Secretary of State and appoint a registered agent, a refusal to accept delivery shall be the basis for a default judgment only where the motion

for default is accompanied by evidence from the Tennessee Secretary of State showing that moving party made the certified mail service with the correct entity name and the correct name and address for the registered agent authorized by law to receive service of process. If service by mail is unsuccessful, it may be tried again or other methods authorized by these rules or by statute may be used.

(11) When service of a summons, process, or notice is provided for or permitted by registered or certified mail under the laws of Tennessee and the addressee or the addressee's agent refuses to accept delivery and it is so stated in the return receipt of the United States Postal Service, the written return receipt if returned and filed in the action shall be deemed an actual and valid service of the summons, process, or notice. Service by mail is complete upon mailing. [Added by order filed February 1, 1995, effective July 1, 1995; by order effective July 1, 1997; by order effective July 1, 1998; by order entered December 10, 2003, effective July 1, 2004 and by order filed December 29, 2015, effective July 1, 2016; amended by order dated January 8, 2019, effective October 1, 2019.]

Compiler's Notes. The amendment of Rule 4 and its existing Advisory Commission Comments and the added [2016] Advisory Comment Notes, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 143 and Senate Resolution 81. The order promulgating the amendment of Rule 4 and its existing Advisory Commission Comments and the addition of [2016] Advisory Comment Notes provided that it take effect July 1, 2016.

In its order filed August 30, 2016, the Supreme Court provided: "The Advisory Commission on the Rules of Practice & Procedure annually presents recommendations to the Court to amend the Tennessee Rules of Appellate, Civil, Criminal, and Juvenile Procedure, and the Tennessee Rules of Evidence. With its meeting on August 12, 2016, the Advisory Commission completed its 2015-2016 term, and the Commission thereafter transmitted its recommendations to the Court."

"The Court hereby solicits written comments from the bench, the bar, and the public concerning the Advisory Commission's recommended amendments set out in Appendix I (proposed amendments to the Rules of Evidence, the Rules of Appellate, Civil, and Criminal Procedure) and Appendix II (proposed amendments to the Rules of Juvenile Procedure) to this order. The deadline for submitting written comments is Wednesday, November 23, 2016. Written comments may either be submitted by email to appellatecourtclerk@tncourts.gov or by mail addressed to: James Hivner, Clerk, Re: 2017 Rules Package, 100 Supreme Court Building, 401 7th Avenue North, Nashville, TN 37219-1407 and should reference the docket number set out above [No. ADM2016-01777]."

The rule changes in its order filed August 30, 2016 do not appear to have been adopted by the court as of May 11, 2018.

The amendment of Rule 4, which amended Rules 4.04(10) and 4.05(5), and added a new 4.05(6), as promulgated and adopted by the Supreme Court in its order dated January 8, 2019, was ratified and approved by 2019 Special Session House Resolution 4 and 2019 Regular Session Senate Resolution 16. The order promulgating the amendment of Rule 4 by amendment of Rules 4.04(10) and 4.05(5), and the addition of new 4.05(6), provided that it take effect October 1, 2019.

Law Reviews. A Tale of Two Jurisdictions, 68 Vand. L. Rev. 501 (2015).

Federal Civil Procedure—Personal Jurisdiction—General Jurisdiction Over Foreign Corporations Based Upon Domestic Subsidiary Activity Within The Forum State, 82 Tenn. L. Rev. 461 (2015).

NOTES TO DECISIONS

Analysis

1. Service Upon Agent.
2. Service Upon Corporate Agent.
3. Service by Mail.
4. Service Insufficient.
5. Default Judgment.
6. Valid Service.

7. Delay In Filing Return.

1. Service Upon Agent.

Finding against the deceased patient's spouse in a medical malpractice action was appropriate pursuant to Tenn. R. Civ. P. 4.04(1) because none of the employees who accepted service were agents authorized by appointment to receive service of process on behalf of either the corporation or the individual physician. The authority to sign for and receive certified mail did not, on its own, confer the authority to accept service of process. Hall v. Haynes, 319 S.W.3d 564, 2010 Tenn. LEXIS 684 (Tenn. Aug. 26, 2010).

Circuit court properly granted summary judgment to a judgment debtor in the creditor's action to set aside the general sessions court's default judgment for lack of subject matter jurisdiction because it was undisputed that the creditor did not provide citation to the record in support of the facts that the creditor contended were in dispute, and the facts established that the creditor did not deliver a copy of the civil warrant "to an officer or managing agent" of the debtor," or to an agent authorized by appointment or by law to receive service on behalf of" the debtor. Endeavor Metals Grp. LLC v. McKevitz, — S.W.3d —, 2019 Tenn. App. LEXIS 268 (Tenn. Ct. App. May 29, 2019).

Default judgment in this case was not void for lack of service; an employee had implied authority to accept service of process on behalf of defendant, as it was undisputed that the employee accepted service of process on defendant's behalf in prior unrelated actions, defendant acquiesced to the employee's actions in those instances, and defendant conferred implied authority on the employee to act as his agent for service of process. Warren Bros. Sash & Door Co. v. Santoro Custom Builders, Inc., — S.W.3d —, 2020 Tenn. App. LEXIS 4 (Tenn. Ct. App. Jan. 8, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 365 (Tenn. June 3, 2020).

2. Service Upon Corporate Agent.

Corporate agent with the authority to sign for and receive the corporation's certified mail does not, without more, qualify as an agent authorized by appointment to receive service of process on behalf of a corporate defendant, Tenn. R. Civ. P. 4.04(4). Hall v. Haynes, 319 S.W.3d 564, 2010 Tenn. LEXIS 684 (Tenn. Aug. 26, 2010).

3. Service by Mail.

Finding against the deceased patient's spouse in a medical malpractice action was appropriate pursuant to Tenn. R. Civ. P. 4.04(1) because none of the employees who accepted service were agents authorized by appointment to receive service of process on behalf of either the corporation or the individual physician. The authority to sign for and receive certified mail did not, on its own, confer the authority to accept service of process, R. 4.04(10). Hall v. Haynes, 319 S.W.3d 564, 2010 Tenn. LEXIS 684 (Tenn. Aug. 26, 2010).

Person with the authority to sign for and receive certified mail does not, without more, qualify as an agent authorized by appointment to receive service of process on behalf of an individual defendant. Hall v. Haynes, 319 S.W.3d 564, 2010 Tenn. LEXIS 684 (Tenn. Aug. 26, 2010).

Finding against the deceased patient's spouse in a medical malpractice action was appropriate because none of the employees who accepted service were agents authorized by appointment to receive service of process on behalf of either the corporation or the individual physician. The spouse's attorney addressed to the physician a copy of the summons and the amended complaint by certified mail, return receipt requested, but according to the plain language of Tenn. R. Civ. P. 4.03(2), service was not "complete" unless the signatory of the return receipt was a person designated by Tenn. R. Civ. P. 4.04; an accounts payable clerk signed the return, but she did not have the express authority to accept service of process on the physician's behalf. Hall v. Haynes, 319 S.W.3d 564, 2010 Tenn. LEXIS 684 (Tenn. Aug. 26, 2010).

4. Service Insufficient.

Where service of process did not conform with the provisions of Tenn. R. Civ. P. 4, the trial court properly vacated its prior entry of a default judgment, because the service of process was void and a judgment based on a void judgment was void. Ramsay v. Custer, 387 S.W.3d 566, 2012 Tenn. App. LEXIS 526 (Tenn. Ct. App. July 31, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 865 (Tenn. Nov. 20, 2012).

Trustee's assistant did not have authority to accept service of process; she was not authorized to accept service simply on the basis of being an employee of the trustee, her role as liaison regarding the trusts did not suffice to prove she had authority to accept service of process, and her act of checking the box marked "agent" on the return receipt did not prove acquiescence on the part of the trustee. Meersman v. Regions Morgan Keegan Trust, — S.W.3d —, 2018 Tenn. App. LEXIS 594 (Tenn. Ct. App. Oct. 9, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 123 (Tenn. Feb. 20, 2019).

Because an attorney did not have express or implied authority to accept service of process as appellee's attorney or otherwise, she was not an authorized agent for appellee or its former employees, and the attempted service of process was ineffective. Meersman v. Regions Morgan Keegan Trust, — S.W.3d —, 2018 Tenn. App. LEXIS 594 (Tenn. Ct. App. Oct. 9, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 123 (Tenn. Feb. 20, 2019).

Plaintiff failed to achieve personal service upon defendant; plaintiff failed to deliver a copy of the summons and complaint to defendant and also failed to leave a copy of the summons and complaint at defendant's abode with some person of suitable age and discretion then residing therein, and plaintiff never attempted to serve defendant by mail. The rule does not provide for service by posting a copy of the summons and complaint upon the door of a defendant's abode. Ebulueme v. Onoh, — S.W.3d —, 2019 Tenn. App. LEXIS 260 (Tenn. Ct. App. May 24, 2019).

5. Default Judgment.

There was sufficient evidence to support the trial court's conclusion that appellant was served with process such that she was not entitled to relief from the default judgment; the process server announced himself and his intent to serve appellant, at which time she ran into the residence, and thereafter, the server delivered process to another resident of the property. Smartbank v. Stephens, — S.W.3d —, 2019 Tenn. App. LEXIS 512 (Tenn. Ct. App. Oct. 21, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 108 (Tenn. Feb. 20, 2020).

6. Valid Service.

Appellants demonstrated valid service of process of the first complaint pursuant to the version of the rule in effect at the time; because the return of service that had been sent to appellee was returned by the postal service as unclaimed and appellee acknowledged that the address to which the summons was sent was her correct address at the time, the return of service filed by appellants was sufficient evidence of actual and valid service of process of the first complaint. Villalba v. McCown, — S.W.3d —, 2019 Tenn. App. LEXIS 424 (Tenn. Ct. App. Aug. 30, 2019).

To effect return of service, appellants needed to, and did, file with the clerk of court the summons, a return receipt evidencing service, and an unsworn declaration from their attorney attesting to the effective service, which met the requirement of an affidavit given the declaration's language of being made under penalty of perjury. Villalba v. McCown, — S.W.3d —, 2019 Tenn. App. LEXIS 424 (Tenn. Ct. App. Aug. 30, 2019).

7. Delay In Filing Return.

Appellants commenced the first complaint within the statute of limitations applicable to their personal injury claim, a dismissal was entered without prejudice and not upon any ground concluding appellants' right of action; therefore, the one-year statute of limitations under the savings statute commenced upon entry of the dismissal order and the second complaint was timely filed. The delay in filing the return of service did not bar application of the savings statute. Villalba v. McCown, — S.W.3d —, 2019 Tenn. App. LEXIS 424 (Tenn. Ct. App. Aug. 30, 2019).

4.05. Service Upon Defendant Outside This State. (1) Whenever the law of this state authorizes service outside this state, the service, when reasonably calculated to give actual notice, may be made:

(a) by any form of service authorized for service within this state pursuant to Rule 4.04;

(b) in any manner prescribed by the law of the state in which service is effected for an action in any of the courts of general jurisdiction in that state;

(c) as directed by the court.

The provisions of this Rule 4.05 are inapplicable when service is effected in a place not within any judicial district of the United States.

(2) Service of process pursuant to this Rule 4.05 shall include a copy of the summons and of the complaint.

(3) Service by mail upon a corporation shall be addressed to an officer or managing agent thereof, or to the chief agent in the county wherein the action is brought, or by delivering the copies to any other agent authorized by appointment or by law to receive service on behalf of the corporation.

(4) Service by mail upon a partnership or unincorporated association (including a limited liability company) that is named defendant under a common name shall be addressed to a partner or managing agent of the partnership or to an officer or managing agent of the association, or to an agent authorized by appointment or by law to receive service on behalf of the partnership or association.

(5) When service of summons, process, or notice is provided for or permitted by registered or certified mail, under the laws of Tennessee, and the addressee, or the addressee's agent, refuses to accept delivery, and it is so stated in the return receipt of the United States Postal Service, the written return receipt, if returned and filed in the action, shall be deemed an actual and valid service of the summons, process, or notice. Service by mail is complete upon mailing.

(6) Service by mail shall not be the basis for the entry of a judgment by default unless the record contains either: (a) a return receipt showing personal acceptance by the defendant or by persons designated by Rule 4.05 or statute; or (b) a return receipt stating that the addressee or the addressee's agent refused to accept delivery, which is deemed to be personal acceptance by the defendant pursuant to Rule 4.05(5). If the defendant is a domestic corporation, a foreign corporation authorized to conduct business in this state, or any entity required to register with the Tennessee Secretary of State and appoint a registered agent, a refusal to accept delivery shall be the basis for a default judgment only where the motion for default is accompanied by evidence from the Tennessee Secretary of State showing that moving party made the certified mail service with the correct entity name and the correct name and address for the registered agent authorized by law to receive service of process. [Amended by order filed December 29, 2015, effective July 1, 2016; amended by order dated January 8, 2019, effective October 1, 2019.]

Compiler's Notes. The amendment of Rule 4 and its existing Advisory Commission Comments and the added [2016] Advisory Comment Notes, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 143 and Senate Resolution 81. The order promulgating the amendment of Rule 4 and its existing Advisory Commission Comments and the addition of [2016] Advisory Comment Notes provided that it take effect July 1, 2016.

In its order filed August 30, 2016, the Supreme Court provided: "The Advisory Commission on the Rules of Practice & Procedure annually presents recommendations to the Court to amend the Tennessee Rules of Appellate, Civil, Criminal, and Juvenile Procedure, and the Tennessee Rules of Evidence. With its meeting on August 12, 2016, the Advisory Commission completed its 2015-2016 term, and the Commission thereafter transmitted its recommendations to the Court."

"The Court hereby solicits written comments from the bench, the bar, and the public concerning the Advisory Commission's recommended amendments set out in Appendix I (proposed amendments to the Rules of Evidence, the Rules of Appellate, Civil, and Criminal Procedure) and Appendix II (proposed amendments to the Rules of Juvenile Procedure) to this order. The deadline for submitting written comments is Wednesday, November 23, 2016. Written comments may either be submitted by email to appellatecourtclerk@tncourts.gov or by mail addressed to: James Hivner, Clerk, Re: 2017 Rules Package, 100 Supreme Court Building, 401 7th Avenue North, Nashville, TN 37219-1407 and should reference the docket number set out above [No. ADM2016-01777]."

The rule changes in its order filed August 30, 2016 do not appear to have been adopted by the court as of May 11, 2018.

The amendment of Rule 4, which amended Rules 4.04(10) and 4.05(5), and added a new 4.05(6), as promulgated and adopted by the Supreme Court in its order dated January 8, 2019, was ratified and approved by 2019 Special Session House Resolution 4 and 2019 Regular Session Senate Resolution 16. The order promulgating the amendment of Rule 4 by amendment of Rules 4.04(10) and 4.05(5), and the addition of new 4.05(6), provided that it take effect October 1, 2019.

Law Reviews. A Tale of Two Jurisdictions, 68 Vand. L. Rev. 501 (2015).

Federal Civil Procedure—Personal Jurisdiction—General Jurisdiction Over Foreign Corporations Based Upon Domestic Subsidiary Activity Within The Forum State, 82 Tenn. L. Rev. 461 (2015).

4.06. [Reserved.]

4.07. Waiver of Service; Duty to Save Costs of Service; Request to Waive. — (1) A defendant who waives service of a summons does not thereby waive any objection to the venue or to the jurisdiction of the court over the person of the defendant.

(2) An individual, corporation, or association that is subject to service and that receives notice of an action in the manner provided in this paragraph has a duty to avoid unnecessary costs of serving the summons. To avoid costs, the plaintiff may notify such a defendant of the commencement of the action and request that the defendant waive service of a summons. The notice and request

(a) shall be in writing and shall be addressed directly to the defendant, if an individual, or else to an officer or managing or general agent (or other agent authorized by appointment of law to receive service of process) of a defendant subject to service;

(b) shall be dispatched through first-class mail or other reliable means;

(c) shall be accompanied by a copy of the complaint and shall identify the court in which it has been filed;

(d) shall inform the defendant of the consequences of compliance and of a failure to comply with the request;

(e) shall set forth the date on which the request is sent;

(f) shall allow the defendant a reasonable time to return the waiver, which shall be at least 30 days from the date on which the request is sent; and

(g) shall provide the defendant with an extra copy of the notice and request, as well as a prepaid means of compliance in writing.

If a defendant fails to comply with a request for waiver made by a plaintiff, the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure be shown.

(3) A defendant that, before being served with process, timely returns a waiver so requested is not required to serve an answer to the complaint until 60 days after the date on which the request for waiver of service was sent.

(4) When the plaintiff files a waiver of service with the court, the action shall proceed, except as provided in paragraph (3), as if a summons and complaint had been served at the time of filing the waiver, and no proof of service shall be required.

(5) The costs to be imposed on a defendant under paragraph (2) for failure to comply with a request to waive service of a summons shall include the costs subsequently incurred in effecting service together with the costs, including a reasonable attorney's fee, of any motion required to collect the costs of service.

4.08. Constructive Service. In cases where constructive service of process is permissible under the statutes of this state, such service shall be made in the manner prescribed by those statutes, unless otherwise expressly provided in these rules.

NOTES TO DECISIONS

1. Publication.

This case was a breach of contract suit filed in circuit court, yet there was no statute allowing for service by publication in a breach of contract action in circuit court; thus, plaintiff could not utilize service by publication pursu-

ant to the rule. Ebulueme v. Onoh, — S.W.3d —, 2019 Tenn. App. LEXIS 260 (Tenn. Ct. App. May 24, 2019).

4.09. Amendment. At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued. [Added by order filed February 1, 1995, effective July 1, 1995; by order effective July 1, 1997; and by order effective July 1, 1998.]

Advisory Commission Comments. 4.01: Rule 4.01 sets out the procedure for issuance and service of the summons upon the filing of a complaint. The Rule also provides for the issuance of separate or additional summonses against any defendant upon request of the plaintiff.

The [1988] amendment allows private service of process at the plaintiff's option. Service by a sheriff or deputy remains an alternative. [1988.]

4.02: Rule 4.02 provides that the summons shall be directed to the defendant. Rule 4.02 requires that the summons notify defendant that judgment by default will be entered for failing to appear and defend within the proper time. The Rule also requires that the summons state the name and address of the plaintiff's attorney, or of the plaintiff if the plaintiff has no attorney.

4.03: (1) Rule 4.03 fixes a definite time – 90 days – within which summons must be served; if not served within that period, it must be returned unserved. The Rule includes a requirement that the manner of service must be described and the person served must be identified on the return; thus any departure from the routine manner of service will instantly be apparent to the court and to defendant's counsel.

(2): Paragraph 2 explains how return of service of process by mail is accomplished. It is similar to the method used for return of service of process on nonresidents (Tenn. Code Ann. §§ 20-2-206; 20-2-211; 20-2-216). [1984.]

4.04: (1) Paragraph (1) of Rule 4.04 requires that a copy of the process, as well as of the complaint, be left with defendant. The paragraph authorizes service, in case of evasion or attempt to evade service, by leaving copies of summons and complaint at defendant's dwelling house or usual place of abode; but the Rule includes a provision, for protection of the defendant, that the copies must be left with a person of suitable age and discretion residing therein, and requires that that person's name appear on the proof of service. The Rule also includes a provision allowing service on an agent of an individual defendant when the agent is authorized to receive service on behalf of the individual served.

(2): Paragraph (2) of Rule 4.04 specifies a number of "retreating" alternative methods of service on infants and incompetents. If the first stated method of service is not possible, the second may be used; if the second is not possible, the third may be used, etc. The Rule further safeguards the interest of an otherwise competent infant by providing that, in addition to the service upon the appropriate guardian, parent, etc., personal service must be had on an unmarried infant who is age 14 or over, if otherwise competent.

(3): Paragraph (3) of Rule 4.04 allows service upon a partnership by serving a partner or managing agent of the partnership. The paragraph allows service upon an unincorporated association by serving a managing agent or officer of the unincorporated association. The Rule is not intended to affect Tenn. Code Ann. § 20-2-212, which requires that both resident and nonresident unincorporated associations and organizations, including nonresident partnerships and trusts, must, before doing business in Tennessee, appoint an agent for service of process, and failing such appointment, authorizes service upon the Secretary of State. Rule 4.04(3) provides an additional means of service where a managing agent or officer of the unincorporated association can be found in the state.

(4): Rule 4.04(4) fixes the same rules for service upon a foreign corporation doing business in the state as apply to service upon domestic corporations. The Rule allows service upon any officer or the managing agent of the corporation, and thus relieves the process server of the necessity of seeking any particular officer first. The Rule also allows service upon the chief agent of the corporation in the county where the action is brought, and specifies that service may also be had on any other agent of the corporation authorized by appointment or law to receive service on behalf of the corporation. This clause preserves statutory provisions authorizing service upon the secretary of state or other officer where such service is authorized by statute.

(5): Paragraph (5) of Rule 4.04 governs service upon a nonresident individual who transacts business through an office or agency in the

state, or upon a resident individual who transacts business in a county other than that in which he or she resides. Service may be had upon the person in charge of the office or agency in any action growing out of the business of that office or agency.

(7): In suits against a county, Rule 4.04(7) provides for service upon the chief executive officer of the county, or if that officer is absent from the county, upon the county attorney if there is one designated; if no county attorney is designated, service may be made on the county court clerk in the absence of the chief executive officer.

With the reorganization of county government structure, it is appropriate to substitute "chief executive officer of the county" for "presiding officer of the county court." In most counties the chief executive officer is the county executive. [1989.]

(8): In suits against a municipality, Rule 4.04(8) provides for service upon the chief executive officer thereof or upon the city attorney.

(9): In suits against any other governmental or quasi-governmental entity, paragraph (9) of Rule 4.04 provides for service upon any officer or managing agent thereof.

(10): Paragraph (10) of Rule 4.04 authorizes service of process by mail on residents of Tennessee. Service by mail should be inexpensive, expeditious and in most cases successful. If it is unsuccessful, traditional methods of service of process may be used. [1984.]

4.08: Rule 4.08 makes it clear that, in the absence of express provision in these Rules, no changes in the statutes governing constructive service are intended.

4.09: Rule 4.09 authorizes the court at any time to allow amendment of process or proof of service thereof, but conditions the exercise of the court's discretion upon the absence of a clear showing of material prejudice to the substantial rights of the party against whom process issued.

Advisory Commission Comments [1995]. New Rule 4.07 allows waiver of service along the lines of the current federal rule. The incentive for defendants to waive service is found both in the expanded time for service of a motion or answer and in the sanction of shifting of costs expended in perfecting traditional service.

Advisory Commission Comments [1997]. The title of Rule 4.04 is changed from "Personal Service and Service by Mail" to "Service Upon Defendant Within This State." This change is to make clear that the emphasis of the revised Rule 4 is on the distinction between the exercise of jurisdiction by service of process within the state and all other cases.

Previously, subpart 5 of Rule 4.04 provided for service upon a foreign corporation as follows: "(5) Upon a foreign corporation which is not qualified to do business in this state, or which has no agent authorized by appointment to receive service on its behalf, by making service as provided by statute; provided, that in every such case a copy of the summons and of the complaint shall be delivered or forwarded to the person or official designated in the statute to receive the service."

This subpart is deleted. A foreign corporation not qualified to do business in this state may be served as provided in Rule 4.04(4) if it is actually doing business in the state. Otherwise, service in a judicial district of the United States may be made according to Rule 4.05(3). For service outside the United States and its territories, see Rule 4A.

Former subpart 6 is renumbered to 5.

Revised Rule 4.04 also deletes former subpart 7, which provided for service upon nonresidents as follows: "(7) Upon other nonresidents, as provided by statute; provided, that in every such case, a copy of the summons and of the complaint shall be delivered or forwarded to the person or official designated in the statute to receive the service."

Rule 4.05 now provides for service upon persons outside the state. Former subparts (8), (9), (10), (11), and (12) are renumbered to (6), (7), (8), (9), and (10), respectively.

Rule 4.05, which is entitled "Service upon Defendant Outside this State," is a new subdivision. It replaces former Rule 4.05, which was captioned "constructive service."

This rule is derived largely from current Tenn. Code Ann. § 20-2-215(d). Subpart (1)(a) provides for service upon non residents by any means authorized for service upon a resident in Rule 4.04. Subpart (1)(b) is derived from Federal Rule of Civil Procedure 4(e)(1), which now permits service upon a defendant in whatever manner is permitted by the law of the state in which service is effected. Subpart (1) includes the words "when reasonably calculated to give actual notice," which is a Constitutional standard prescribed in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), to emphasize that any means employed must satisfy due process requirements as well those prescribed by rule or statute.

Courts are virtually unanimous in holding that service of process is not defeated by the defendant's refusal to accept a certified or registered letter. *See, e.g. Nikwei v. Ross School of Aviation, Inc.*, 822 F.2d 939, 942 (CA10 1987) (service by mail returned marked "refused" and defendant's conclusory affidavit insufficient to invalidate service); *Merriott v. Whitsell*, 476 S.W.2d 230, 232 (Ark. 1972)(non-resident who is subject to jurisdiction of Arkansas courts cannot defeat jurisdiction by simple expedient of refusing to accept a registered letter; avoidance of service of proper process by a willful act or refusal to act on part of defendant "would create an intolerable situation and should not be permitted"); *Cortez Development Co. v. New*

York Capital Group, Inc., 401 So. 2d 1163 (Fla. App. 1981)(when address was correct according to record and information received from persons at that address, defendant had succeeded in quashing earlier service accepted by another on his behalf at that address, and post office had returned mail marked refused, substituted service of process by certified mail upon individual was effective despite defendant's sworn statement that he did not refuse mail nor instruct anyone to refuse on his behalf); *Thomas Organ Co. v. Universal Music Co.*, 261 So. 2d 323, 327 (La. App. 1972)("sending by mail a certified copy of citation and petition satisfies the requirements of 'due process'"); *McIntee v. State of Minnesota, Department of Public Safety*, 279 N.W.2d 817 (Minn. 1979)(notice sent by certified mail was sufficient when addressee disregarded postal service notice to pick up the certified mail); *Patel v. Southern Brokers, Ltd.*, 289 S.E.2d 642, 644 (S.C. 1982)("we think it can hardly be logically argued that one may avoid the process of the court by merely refusing to accept a letter known to contain a Summons and Complaint").

As one court has stated:

A person may not deny personal service on the grounds of lack of delivery where the delivery was deliberately prevented by the action of the person to be served. ***

Where a statute provides for service by registered or certified mail, the addressee cannot assert failure of service when he willfully disregards a notice of certified mail delivered to his address under circumstances where it can be reasonably inferred that the addressee was aware of the nature of the correspondence.

Hankla v. Governing Board of Roseland Sch. Dist., 120 Cal. Rptr. 827, 834 (Cal. App. 1975). *See also European American Bank v. Abramoff*, 608 N.Y.S.2d 233 (N.Y. App. Div. 2 Dep't 1994)(service of process by mail is complete, regardless of delivery, when mailing itself is proper; bald denial of receipt of process served by mail insufficient to defeat service of process; regardless of delivery, when mailing itself is proper).

Actual notice in every case is not required. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). In *Wuchter v. Pizzutti*, 276 U.S. 13 (1928), the United States Supreme Court noted "a general trend of authority toward sustaining the validity of service of process, if the statutory provisions in themselves indicate that there is a reasonable probability that if the statutes are complied with, the defendant will receive actual notice... ." *Id* at 24. In *Nikwei v. Ross School of Aviation, Inc., supra,* the court declared it "well settled, that as to notice, due process does not require exact certainty." 822 F.2d at 944.

Former Rule 4.06 is renumbered to 4.09.

Rule 4.07, first adopted in 1995, allows waiver of service along the lines of the current federal rule. The 1995 Comment originally contained a form for waiver of service; however, two minor corrections were made to that form in 1997. To avoid any confusion, the original form has been deleted from the 1995 Comment and has been replaced with the following amended form.

This amended form should be used to request a waiver:

Notice of Lawsuit and Request for Waiver of Service of Summons

TO: (Name of defendant or officer or agent of corporate defendant) as (title) of (name of corporate defendant)

A lawsuit has been commenced against you (or the entity on whose behalf you are addressed). A copy of the complaint is attached to this notice. It has been filed in the (circuit or chancery) court for (county), Tennessee, and has been assigned civil action number _____.

This is not a formal summons or notification from the court, but rather a request that you sign and return the enclosed waiver of service in order to save the cost of serving you with a judicial summons and an additional copy of the complaint. The cost of service will be avoided if I receive a signed copy of the waiver within ___ days after the date designated below as the date on which this Notice and Request is sent. I enclosed a stamped and addressed envelope (or other means of cost-free return) for your use. An extra copy of the waiver is also attached for your records.

If you comply with this request and return the signed waiver, it will be filed with the court and no summons will be served on you. The action will then proceed as if you had been served on the date the waiver is filed, except that you will not be obligated to answer the complaint before 60 days from the date designated below as the date on which this notice is sent.

If you do not return the signed waiver within the time indicated, I will take appropriate steps to effect formal service in a manner authorized by the Tennessee Rules of Civil Procedure and will then, to the extent authorized by those Rules, ask the court to require you (or the party on whose behalf you are addressed) to pay the full costs of such service. In that connection, please read the statement concerning the duty of parties to waive the service of the summons, which is set forth on the reverse side (or at the foot) of the waiver form.

I affirm that this request is being sent to you on behalf of the plaintiff, this __ day of __(month)__, (year).

_____
Signature of Plaintiff's Attorney or
Unrepresented Plaintiff

This form should be used to waive service:

Waiver of Service of Summons

TO: _____

I acknowledge receipt of your request that I waive service of a summons in the action of _____, which is civil action number ___ in the _____Court. I have also received a copy of the complaint in the action, two copies of this instrument, and a means by which I can return the signed waiver to you without cost to me.

I agree to save the cost of service of a summons and an additional copy of the complaint in this lawsuit by not requiring that I (or the entity on whose behalf I am acting) be served with judicial process in the manner provided by Rule 4.

I (or the entity on whose behalf I am acting) will retain all defenses or objections to the lawsuit or to the jurisdiction or venue of the court except for objections based on a defect in the summons or in the service of the summons.

I understand that a judgment may be entered against me (or the party on whose behalf I am acting) if an answer or motion under Rule 12 is not served upon you within 60 days after _____.

_____ _____

Date Signature

Printed/typed name: _____

as _____

of _____.

To be printed on reverse side of the waiver form or set forth at the foot of the form:

Duty to Avoid Unnecessary Costs of Service of Summons

Rule 4 of the Tennessee Rules of Civil Procedure requires certain parties to cooperate in saving unnecessary costs of service of the summons and complaint. A defendant located in the United States who, after being notified of an action and asked by a plaintiff located in the United States to waive service of a summons, fails to do so will be required to bear the cost of such service unless good cause be shown for the failure to sign and return the waiver.

It is not good cause for a failure to waive service that a party believes that the complaint is unfounded, or that the action has been brought in an improper place or in a court that lacks jurisdiction over the subject matter of the action or over its person or property. A party who waives service of the summons retains all defenses and objections (except any relating to the summons or to the service of the summons), and may later object to the jurisdiction of the court or to the place where the action has been brought.

A defendant who waives service must within the time specified on the waiver form serve on the plaintiff's attorney (or unrepresented plaintiff) a response to the complaint and must also file a signed copy of the response with the court. If the answer or motion is not served within this time, a default judgment may be taken against that defendant. By waiving service, a defendant is allowed more time to answer than if the summons had been actually served when the request for waiver of service was received.

Rule 4.08 is the former 4.05 renumbered.
Rule 4.09 is former 4.06 renumbered.

Advisory Commission Comments [1998]. The amendment of Rule 4.03 removes the former requirement that a return must be made within the time during which the person served must respond.

Advisory Commission Comments [2004]. New paragraph 4.01(3) sanctions lawyer misconduct such as that in *Stempa v. Walgreen Company*, 70 S.W.3d 39 (Tenn. Ct. App. 2001), where original counsel for plaintiffs "instructed" the clerk not to issue summonses for almost a year, despite the paragraph 4.01(1) instruction that clerks must issue a summons "forthwith."

Rule 4.04(10) is amended to clarify that service by certified or registered return receipt mail must be addressed to an individual specified in the applicable subparagraph of the rule. For example, service by mail upon a domestic corporation must be addressed to one of the individuals specified in Rule 4.04(4).

Advisory Commission Comments [2005]. The amendment to Rule 4.03(1) increases time for service of a summons from 30 to 90 days.

Advisory Commission Comments [2016]. 4:01(1): Rule 4.01(1) previously required the trial court clerk, upon the filing of the complaint, to "forthwith issue the required summons and cause it, with necessary copies of the complaint and summons to be delivered for service to any person authorized to serve process." Subdivision (1) is amended by substituting the word "promptly" for the word "forthwith." This change is intended to emphasize that the clerk must issue the summons contemporaneously with, or soon after, the filing of the

complaint. Because subdivision (1) requires the clerk to "promptly" issue the summons and deliver it for service, the clerk is not permitted to delay issuing the summons (or delivering it for service) at the request of the plaintiff or plaintiff s counsel.

4.01(3): Subdivision (3) previously provided: "If a plaintiff or counsel for plaintiff (including third-party plaintiffs) intentionally causes delay of prompt issuance of a summons or prompt service of a summons, filing of the complaint (or third-party complaint) is ineffective." Because the meaning of the word "ineffective" was not clear, subdivision (3) is amended to provide that, under the specific circumstances covered by the subdivision, the filing of the complaint "will not toll any applicable statutes of limitation or repose." The underlying rationale for subdivision (3) is that a person or entity named as a defendant in a complaint is entitled to learn without undue delay that the person or entity has been sued; although good-faith efforts to serve the defendant can necessarily take some time, subdivision (3) means that the plaintiff or plaintiffs counsel cannot intentionally delay the issuance or service of process for tactical reasons.

4.03: Rule 4.03 is amended to add new subdivision (3), providing that the "[f]ailure to promptly file proof of service does not affect the validity of service." Subdivision (3), which is derived from Federal Rule of Civil Procedure 4(1)(3), essentially adopts in the rule the Supreme Court's analysis in *Fair v. Cochran*, 418 S.W.3d 542, 546 (Tenn. 2013) (stating that "no language in Rule 4.03(a) [sic - in context, "4.03(1)"] states or implies that the failure to return proof of service promptly renders commencement ineffective to toll the statute of limitations").

4.04(1): Rule 4.04(1) provides that a defendant who evades or attempts to evade service of the summons and complaint may be served "by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, whose name shall appear on the proof of service[.]" The address shown on the individual's drivers license, handgun-carry permit, utility bill, or other similar document may be used to prove that a particular location is the "individual's dwelling house or usual place of abode[.]"

4.04(11): The former last sentence of subdivision (11) ("For purposes of this paragraph, the United States Postal Service notation that a properly addressed registered or certified letter is "unclaimed," or other similar notation, is sufficient evidence of the defendant's refusal to accept delivery") is deleted because the Postal Service's notation that a registered or certified letter is "unclaimed" is not sufficient, by itself, to prove that service was "refused."

4.05(5): Subdivision (5) is amended in two ways. First, the last sentence of subdivision (5) ("For purposes of this paragraph, the United States Postal Service notation that a properly addressed registered or certified letter is "unclaimed," or other similar notation, is sufficient evidence of the defendant's refusal to accept delivery") is deleted, for the reason stated in the preceding Comment to Rule 4.04(11). Second, the following is added as the new last sentence of subdivision (5): "Service by mail shall not be the basis for the entry of a judgment by default unless the record contains a return receipt showing personal acceptance by the defendant or by persons designated by Rule 4.04 or statute." That text is derived from Rule 4.04(10) — which applies to service by mail on defendants within the State — and adding it to subdivision (5) imposes the same requirement on service by mail on defendants outside this State.

Advisory Commission Comments [2017]. 4.04(10) and 4.05. Rules 4.04(10) and 4.05 are amended to clarify the circumstances under which the plaintiff may obtain a default judgment when the defendant was served by mail. Under amended Rule 4.04(10) and new Rule 4.05(6), service by mail can be the basis for entry of a default judgment if the record contains either: a return receipt showing personal acceptance by the defendant or by persons designated by Rule 4.04(10), Rule 4.05(5), or statute; or a return receipt stating that the addressee or the addressee's agent refused to accept delivery, which is deemed to be personal acceptance by the defendant pursuant to Rule 4.04(11) or 4.05(5).

It should be noted that Rules 4.04(11) and 4.05(5) were amended in 2016 by deleting a former sentence in each rule which stated, in summary, that the United States Postal Service's notation on a return receipt that a properly addressed registered or certified letter was "unclaimed," or other similar notation, was sufficient evidence of the defendant's refusal to accept delivery. Thus, the Postal Service's notation that a registered or certified letter is "unclaimed" is no longer sufficient, by itself, to prove that service was "refused."

Advisory Commission Comments [2019]. 4.04(10) and 4.05. Rules 4.04(10) and 4.05 are amended to clarify the circumstances under which the plaintiff may obtain a default judgment when the defendant was served by mail. Under amended Rule 4.04(10) and new Rule 4.05(6), service by mail can be the basis for entry of a default judgment if the record contains either: a return receipt showing personal acceptance by the defendant or by persons designated by Rule 4.04(10), Rule 4.05(5), or statute; or a return receipt stating that the addressee or the addressee's agent refused to accept delivery, which is deemed to be personal acceptance by the defendant pursuant to Rule 4.04(11) or 4.05(5). Additionally, when the de-

fendant against which a plaintiff seeks a default judgment after service by mail is a domestic corporation, a foreign corporation authorized to conduct business in this state, or any entity required to register with the Tennessee Secretary of State and appoint a registered agent, the motion for default must be accompanied by evidence from the Tennessee Secretary of State showing that the name of the corporation and the name and address of the registered agent for service of process was correct on the certified mail. Normally, the "Filing Information" record for the entity should be sufficient "evidence" under Tenn. R. Evid. 803(8), as that public record shows the correct entity name and the name and address of the registered agent for service of process upon the records of the Tennessee Secretary of State. Statutory provisions must be consulted to determine the proper agent for any entity registered with the Tennessee Secretary of State: for example, when a domestic corporation or foreign corporation fails to have a registered agent for service of process or the agent cannot be found "with reasonable diligence," then the Tennessee Secretary of State is the agent for service of process for that corporation. Tenn. Code Ann., § 48-15-104(b). As another example, when a foreign corporation is conducting business in this state without a certificate of authority, service of process is governed by statutory provisions such as Tenn. Code Ann. §§ 20-2-214, 215 and Tenn. Code Ann. § 48-15-104. For certain regulated industries, service of process may be governed by other statutes: for example, the commissioner of the Department of Commerce and Insurance is the statutory agent for service of process for domestic and foreign insurers authorized to operate in the state of Tennessee. Tenn. Code Ann. §§ 56-2-103 and 56-2-504. Nothing in this amendment alters the validity of service upon statutory agents under existing law, but service by mail that is refused cannot be the basis for a default judgment unless the party moving for default demonstrates to the trial court that service was made using the correct entity name and a correct agent for service of process.

It should be noted that Rules 4.04(11) and 4.05(5) were amended in 2016 by deleting a former sentence in each rule which stated, in summary, that the United States Postal Service's notation on a return receipt that a properly addressed registered or certified letter was "unclaimed," or other similar notation, was sufficient evidence of the defendant's refusal to accept delivery. Thus, the Postal Service's notation that a registered or certified letter is "unclaimed" is no longer sufficient, by itself, to prove that service was "refused."

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated December 10, 2003, was ratified and approved by 2004 House Resolution 233 and Senate Resolution 115. The order promulgating the amendment of this rule provided that it take effect July 1, 2004.

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 6, 2005, was ratified and adopted by 2005 House Resolution 12 and Senate Resolution 7. The order promulgating the amendment of this rule provided that it take effect July 1, 2005.

The amendment of the Advisory Commission Comments to Rule 4.04(10), which deleted the former second paragraph of that comment, as promulgated and adopted by the Supreme Court in its order dated January 2, 2007, was ratified and approved by House Resolution 18 and Senate Resolution 11. The order promulgating the amendment of the Advisory Commission Comments provided that it take effect July 1, 2007.

The amendment of Rule 4 and its existing Advisory Commission Comments and the added [2016] Advisory Comment Notes, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 143 and Senate Resolution 81. The order promulgating the amendment of Rule 4 and its existing Advisory Commission Comments and the addition of [2016] Advisory Comment Notes provided that it take effect July 1, 2016.

Cross-References. Counterpart service of process, T.C.A. § 20-2-108.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 63, 64, 125, 127-131, 138, 148, 318, 328, 340.

Pritchard on Wills and Administration of Estates (4th ed., Phillips and Robinson), §§ 358, 838, 860, 861, 901.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-4-1, 1-4-4, 1-4-7, 1-4-8, 1-27.01-1.

Tennessee Jurisprudence. 1 Tenn. Juris., Abatement, Survival and Revival, §§ 3, 35; 1 Tenn. Juris., Agency, § 53; 1 Tenn. Juris., Amendments, §§ 2, 4, 7-11; 3 Tenn. Juris., Appearances, §§ 6, 7; 7 Tenn. Juris., Corporations, § 118; 10 Tenn. Juris., Ejectment, § 17; 11 Tenn. Juris., Equity, § 47; 15 Tenn. Juris., Injunctions, § 35; 16 Tenn. Juris., Interpleader, § 3; 18 Tenn. Juris., Minors, § 19; 20 Tenn. Juris., Partnership, § 52; 21 Tenn. Juris., Process, §§ 5-9, 12; 26 Tenn. Juris., Workers' Compensation, § 48.

Law Reviews. Civil Procedure — Carr v. Borchers: Tennessee's Nonresident Motorist Statute Revisited, 22 Mem. St. U.L. Rev. 357 (1992).

Civil Procedure — Long Arm Statute — Davenport v. State Farm Mut. Auto. Ins. Co.: Has Tennessee Fully Embraced the "Minimum Contacts" Test?, 19 Mem. St. U.L. Rev. 117 (1989).

Civil Procedure — Rejection of Transient

Jurisdiction Over an Unincorporated Association, 16 Mem. St. U.L. Rev. 291 (1986).

New Procedure Amendments (Donald F. Paine), 31 No. 4 Tenn. B.J. 5 (1995).

Service of Process Upon Foreign Defendants Under the Hague Convention (Michael L. Silhol), 28 No. 5 Tenn. B.J. 20 (1992).

The Long-Arm Wrestle: Personal Jurisdiction in Tennessee (Steven E. Winn), 56 Tenn. L. Rev. 557 (1989).

Attorney General Opinions. Fees for service of process by private citizens, OAG 88-199 (11/10/88).

Service by private individuals, OAG 89-41 (3/29/89).

Multiple summons for same defendant on same date authorized, OAG 94-148 (12/29/94).

A process server has the right to go to the dwelling house or usual place of abode of the intended recipient to serve a legal writ or process, but may not enter the dwelling itself or the abode itself, absent consent, OAG 01-148 (9/24/01).

NOTES TO DECISIONS

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1. In General.

A summons is not required for the prosecution of every action. Tennessee State Board of Education v. Cobb, 557 S.W.2d 276, 1977 Tenn. LEXIS 672 (Tenn. 1977).

Pro se litigants must comply with the requirements of Tenn. R. Civ. P. 3 and 4 regarding the filing of the complaint and the issuance of process. Hodges v. Tennessee AG, 43 S.W.3d 918, 2000 Tenn. App. LEXIS 785 (Tenn. Ct. App. 2000).

In an action that arose from a fatal fire at an apartment complex, plaintiffs' claims against defendants were barred by applicable statutes of limitations where plaintiffs' counsel intentionally caused delay of prompt service of summons, which rendered the initial filing of the complaint ineffective. Estate of Butler v. Lamplighter Apts., 278 S.W.3d 321, 2008 Tenn. App. LEXIS 488 (Tenn. Ct. App. Aug. 20, 2008).

2. Purpose of Rule.

The purpose of Tenn. R. Civ. P. 4 is to insure that process is served in a manner reasonably calculated to give a party defendant adequate notice of the pending judicial proceedings. Garland v. Seaboard C. R. Co., 658 S.W.2d 528, 1983 Tenn. LEXIS 726 (Tenn. 1983).

3. Construction and Interpretation.

Court adopted construction used by the federal courts for determining the sufficiency of service of process under F.R.C.P. 4(d)(3), the federal counterpart to Tenn. R. Civil P. 4.04(3) and (4). Federal courts have held that F.R.C.P. 4(d)(3) "does not require that service be made solely upon a restricted class of formally titled officials, but rather permits it to be made upon a representative so integrated with the organization that he will know what to do with the papers. Generally, service is sufficient when made upon an individual who stands in such a position as to render it fair, reasonable and just to imply the authority on his part to receive service." Garland v. Seaboard C. R. Co., 658 S.W.2d 528, 1983 Tenn. LEXIS 726 (Tenn. 1983).

4. Service Upon Secretary of State.

In a diversity suit by Tennessee plaintiffs against foreign airline doing business in Tennessee, defendant's motion to dismiss for lack of service was properly denied, since plaintiffs served process upon the secretary of state under T.C.A. § 20-2-215, which provides an alternative procedure for obtaining service where jurisdiction is assumed under the long arm statute. Gullett v. Qantas Airways, Ltd., 417 F. Supp. 490, 1975 U.S. Dist. LEXIS 12292 (M.D. Tenn. 1975).

5. Statutory Alternatives.

In wrongful death action arising out of accident in Kentucky where defendant was Delaware corporation doing business in Tennessee and where plaintiff had service of process on statutory agent and person in charge of defendant's local office, defendant's motion to dismiss on ground that T.C.A. § 20-2-201 limited service of process to transactions arising within state was denied as this was merely a procedural limitation, and Tenn. R. Civ. P. 4 and T.C.A. § 20-2-201 are procedural alternatives. Gallaher v. Chemical Leaman Tank Lines, Inc., 367 F. Supp. 1063, 1973 U.S. Dist. LEXIS 10476 (E.D. Tenn. 1973).

Where a statute dealing with a particular type of judicial action contains specific provisions for process and service, that method is permissible and may be followed in lieu of the general provisions of Tenn. R. Civ. P. 4. Tennessee State Board of Education v. Cobb, 557 S.W.2d 276, 1977 Tenn. LEXIS 672 (Tenn. 1977).

6. Counterpart Summons.

7. —Application.

This section has no application to local actions brought in the wrong county. Nashville v. Webb, 114 Tenn. 432, 85 S.W. 404, 1904 Tenn. LEXIS 97 (1905), superseded by statute as stated in, Five Star Express v. Davis, 866 S.W.2d 944, 1993 Tenn. LEXIS 413 (Tenn. 1993).

The privilege of issuing a counterpart summons to a county other than the county of suit must be based upon a proper joinder of defendants who are (1) jointly liable, or (2) severally liable upon the same instrument or judgment, and may not be based upon a misjoinder of parties. Rooney v. Callins, 62 Tenn. App. 105, 459 S.W.2d 430, 1970 Tenn. App. LEXIS 255 (Tenn. Ct. App. 1970).

8. —Real Defendant — Service in County.

The statute is imperative in its terms and only authorizes issuance of counterpart when suit has been instituted against a real, and not nominal, defendant. Yancey v. Marriott, Frisby & Co., 33 Tenn. 28, 1853 Tenn. LEXIS 2 (1853).

In transitory actions it is the service of the writ or summons in the county where the suit is issued which gives the court jurisdiction of the person. It is a good plea in abatement by the defendants by counterpart that the other defendant has no interest in the cause of action, and was fraudulently and solely made a defendant in order to draw the cause of action within the jurisdiction of the court of the plaintiff's county. Yancey v. Marriott, Frisby & Co., 33 Tenn. 28, 1853 Tenn. LEXIS 2 (1853); Achy v. Holland, 76 Tenn. 510, 1881 Tenn. LEXIS 39 (1881).

A party served in a county other than the one of suit, there being no service on another defendant there resident, may raise the lack of jurisdiction of his person by plea in abatement. Citizens' Bank & Trust Co. Bayles, 153 Tenn. 40, 281 S.W. 932, 1925 Tenn. LEXIS 4 (1926).

A party against whom the law affords no cause of action is not a material defendant. Western Auto. Casualty Co. v. Burnell, 17 Tenn. App. 687, 71 S.W.2d 474, 1933 Tenn. App. LEXIS 101 (Tenn. Ct. App. 1933).

If the defendant residing in the county where the action is commenced is not a material defendant, then the court in that county where the action is commenced is without jurisdiction over another defendant brought in by counterpart process. Isbell v. Strider, 192 Tenn. 685, 241 S.W.2d 828, 1951 Tenn. LEXIS 316 (1951).

A real, bona fide defendant must be duly served in the county where the action is commenced. Rooney v. Callins, 62 Tenn. App. 105, 459 S.W.2d 430, 1970 Tenn. App. LEXIS 255 (Tenn. Ct. App. 1970).

Where a transitory action is filed in a county other than the one where the cause of action arose and the service of original process is on a party that is not a real and material defendant, venue does not lie in the county in which the action was commenced. The court does not acquire jurisdiction over the person of defendants summoned by counterpart process in the face of a motion to dismiss the action for lack of venue. Romines v. K & S Engineering & Contracting Co., 556 S.W.2d 85, 1977 Tenn. LEXIS 610 (Tenn. 1977).

9. — —Prima Facie Jurisdiction — Establishment.

Where summons for two defendants was issued to sheriff of Wilson County and duly served in that county upon one of the defendants, and counterpart summons was issued to Washington County and served there upon other defendant, this was prima facie sufficient to give circuit court of Wilson County jurisdiction over both defendants. Curtis v. Kyte, 21 Tenn. App. 115, 106 S.W.2d 234, 1937 Tenn. App. LEXIS 13 (Tenn. Ct. App. 1937).

10. — —Order of Service.

The original process must be served on a real and material defendant in the county where issued before a counterpart can be issued to other counties. Western Auto. Casualty Co. v. Burnell, 17 Tenn. App. 687, 71 S.W.2d 474, 1933 Tenn. App. LEXIS 101 (Tenn. Ct. App. 1933); Chickasaw Wood Products Co. v. Lane, 22 Tenn. App. 596, 125 S.W.2d 164, 1938 Tenn. App. LEXIS 61 (Tenn. Ct. App. 1938).

11. — —Service on Defendant in County Not Shown — Effect.

A counterpart warrant issued to another county, without showing service on the resident defendant, is informal, but the judgment will be valid, and its execution will not be enjoined at the instance of the nonresident defendants

brought in by the counterpart process. White v. Lea, 77 Tenn. 449, 1882 Tenn. LEXIS 81 (1882).

12. ——Service on Nonresident Temporarily in County.

It is sufficient authority to issue a counterpart process to other counties, that the original process has been served on a material defendant found temporarily in the county where the suit is instituted, if he was in such county when the suit was instituted. Turley v. Hornsby, 71 Tenn. 264, 1879 Tenn. LEXIS 72 (1879).

13. ——Action under Workers' Compensation Law.

Under the Workers' Compensation Law the insurer is a "material defendant" upon whom service of the original summons may be had with counterpart against the employer. Flowers v. Aetna Casualty & Surety Co., 186 Tenn. 603, 212 S.W.2d 595, 1948 Tenn. LEXIS 587 (1948), overruled in part, Five Star Express v. Davis, 866 S.W.2d 944, 1993 Tenn. LEXIS 413 (Tenn. 1993).

14. ——Interpleader.

In a creditor's action in attachment against his debtor and an attachment defendant who filed a cross bill as an interpleader, making various other persons defendants as having claimed an interest in the attached fund and paying the fund into court, the jurisdiction of the interpleader lies in the county of a defendant's residence, the debtor and other defendants to be served by counterpart summons in the county of their residences. John Weis, Inc. v. Reed, 22 Tenn. App. 90, 118 S.W.2d 677, 1938 Tenn. App. LEXIS 9 (Tenn. Ct. App. 1938).

15. —Good Faith and Lack of Collusion — Requirement.

Before summons will be issued to another county, the court will look through the form to the substance of the transaction, to see that the party is a material defendant, and that a judgment is sought against him in good faith. Chickasaw Wood Products Co. v. Lane, 22 Tenn. App. 596, 125 S.W.2d 164, 1938 Tenn. App. LEXIS 61 (Tenn. Ct. App. 1938).

The true test for determining whether summons may issue to another county is whether the defendant served in the county where the suit is brought is a bona fide defendant to the action and whether his interest in the result of the action is in any manner adverse to that of the plaintiff with respect to the cause of action against the other defendants. Chickasaw Wood Products Co. v. Lane, 22 Tenn. App. 596, 125 S.W.2d 164, 1938 Tenn. App. LEXIS 61 (Tenn. Ct. App. 1938); Moore v. Gore, 191 Tenn. 14, 231 S.W.2d 361, 1950 Tenn. LEXIS 541 (1950).

The fact that the name of resident defendant's attorney, appears on the back of plaintiff's declaration and on the back of the summons as attorney for the plaintiff, is insufficient evidence to establish collusion. Chickasaw Wood Products Co. v. Lane, 22 Tenn. App. 596, 125 S.W.2d 164, 1938 Tenn. App. LEXIS 61 (Tenn. Ct. App. 1938).

The ultimate test in determining the validity of counterpart service under this section is the good faith of the plaintiff in joining in his suit a resident defendant having a real and antagonistic interest in the subject matter of the suit. Taylor v. McCool, 183 Tenn. 1, 189 S.W.2d 817, 1945 Tenn. LEXIS 267 (1945).

A party sued by original process need not necessarily be shown to be liable, but he must be sued in good faith, and a plea to the effect that such a party is sued solely to defeat one jurisdiction of its right, and confer it on another, is sufficient to abate the action if clearly sustained by proof. Moore v. Gore, 191 Tenn. 14, 231 S.W.2d 361, 1950 Tenn. LEXIS 541 (1950).

16. —Dismissal as to Defendant Served in County.

Where, in such case, before a trial, the plaintiff dismisses his suit as against the original resident defendant, it is a matter of abatement, and may be taken advantage of, though occurring after a plea in bar, by a plea in abatement, but not by motion to dismiss. Yancey v. Marriott, Frisby & Co., 33 Tenn. 28, 1853 Tenn. LEXIS 2 (1853); Turley v. Hornsby, 71 Tenn. 264, 1879 Tenn. LEXIS 72 (1879); Achy v. Holland, 76 Tenn. 510, 1881 Tenn. LEXIS 39 (1881).

Where plaintiff prior to suit for damages arising out of horse trade induced a nonresident who had acted as intermediary to come to Tennessee for the avowed purpose of discussing horse trade but for the real purpose of obtaining service on the intermediary in order to sue other party in the trade who was a resident of a county other than that in which plaintiff lived and Court of Appeals on appeal from judgment against both defendants dismissed suit as to intermediary on the ground that he had no real or antagonistic interest in subject matter of suit the Supreme Court dismissed suit against other defendant. Taylor v. McCool, 183 Tenn. 1, 189 S.W.2d 817, 1945 Tenn. LEXIS 267 (1945).

If action is dismissed as to sole defendant located in county where suit is filed the court loses jurisdiction of proceeding as to defendants located outside county. Isbell v. Strider, 192 Tenn. 685, 241 S.W.2d 828, 1951 Tenn. LEXIS 316 (1951).

Where plaintiff's action against a resident defendant cannot survive motions made preliminary to trial, the resident defendant is not a real and material defendant for the purpose of locating venue or the acquisition of jurisdiction over nonresident defendants by counterpart process. Romines v. K & S Engineering & Contracting Co., 556 S.W.2d 85, 1977 Tenn. LEXIS 610 (Tenn. 1977).

17. —Judgment.

In action brought in county lacking jurisdiction, the proceedings and judgment are void, where question of venue was raised. Western Auto. Casualty Co. v. Burnell, 17 Tenn. App. 687, 71 S.W.2d 474, 1933 Tenn. App. LEXIS 101 (Tenn. Ct. App. 1933).

18. —Misjoinder of Parties.

Suit by business brokers against all stockholders of corporation to recover commissions allegedly due on sale of all capital stock of the corporation was based on separate asserted rights against each stockholder for separate commissions and amounted to misjoinder of parties and actions, and would abate as to stockholders served by counterpart summons after suit was commenced in county where a single stockholder resided. Rooney v. Callins, 62 Tenn. App. 105, 459 S.W.2d 430, 1970 Tenn. App. LEXIS 255 (Tenn. Ct. App. 1970).

19. Agents.

Person who was admitted in open court as being "chief agent" and highest ranking officer for defendant in the county was in position to render it fair, reasonable and just to imply authority on his part to receive service of process on behalf of unincorporated association. Garland v. Seaboard C. R. Co., 658 S.W.2d 528, 1983 Tenn. LEXIS 726 (Tenn. 1983).

From the record before the court, it was undisputed that an owner was not authorized by the driver to accept service of process on his behalf; in absence of any evidence demonstrating that the owner was an agent authorized by appointment or by law to receive service on behalf of the individual served, court concluded that service of process was improper. Watson v. Garza, 316 S.W.3d 589, 2008 Tenn. App. LEXIS 681 (Tenn. Ct. App. Nov. 7, 2008).

20. —Attorneys.

Where service upon the parties' attorneys was by agreement of counsel, and the record did not disclose that the defendant sought to contest such manner of service of process, service upon the attorney for defendant constituted notice to the defendant. Braswell v. Carothers, 863 S.W.2d 722, 1993 Tenn. App. LEXIS 294 (Tenn. Ct. App. 1993).

Service on defendant's attorney did not trigger the 30-day time limit for filing a notice of removal under 28 U.S.C. § 1446(b), as service was never validly effected under Fed. R. Civ. P. 4(h) or Tenn. R. Civ. P. 4.04(4); although the attorney did not refuse to accept the summons and complaint, it was not shown that the attorney was a corporate officer, managing agent, or otherwise authorized to accept service, and the attorney-client relationship did not convey the necessary authority. Arthur v. Litton Loan Servicing Lp, 249 F. Supp. 2d 924, 2002 U.S. Dist. LEXIS 26348 (E.D. Tenn. 2002).

21. Issuance of Summons.

The term "forthwith," contained in Tenn. R. Civ. P. 4, prevents the adoption of a blanket rule that would render ineffective the commencement of a lawsuit simply because a summons is not issued at the moment the complaint is filed. Hine v. Commercial Carriers, Inc., 802 S.W.2d 218, 1990 Tenn. LEXIS 485 (Tenn. 1990).

For purposes of Tenn. R. Civ. P. 4, the term "forthwith" means within a reasonable time after the complaint has been filed. This determination is to be made considering all of the facts and circumstances of the particular case, including prejudice to the defendant, if any. Hine v. Commercial Carriers, Inc., 802 S.W.2d 218, 1990 Tenn. LEXIS 485 (Tenn. 1990).

A summons need not necessarily be issued simultaneously with the filing of a complaint in order for the complaint to toll the statute of limitations. Hine v. Commercial Carriers, Inc., 802 S.W.2d 218, 1990 Tenn. LEXIS 485 (Tenn. 1990).

The drafters of Tenn. R. Civ. P. 3 and Tenn. R. Civ. P. 4 undoubtedly contemplated that a summons would be issued relatively close to the time the complaint is filed as process cannot be returned, served or unserved, unless it is first issued. Hine v. Commercial Carriers, Inc., 802 S.W.2d 218, 1990 Tenn. LEXIS 485 (Tenn. 1990).

Service of process may be valid for jurisdictional purposes under Tenn. R. Civ. P. 4 but still be insufficient to toll the statute of limitations under Tenn. R. Civ. P. 3, which is directed toward commencement of actions and circumstances under which the statute may be prevented from running. First Tenn. State Bank, N.A. v. Dougherty, 963 S.W.2d 507, 1997 Tenn. App. LEXIS 519 (Tenn. Ct. App. 1997).

Proceedings in the chancery court for review of an administrative decision may be initiated without the issuance of a summons. JACO v. Department of Health, Bureau of Medicaid, 950 S.W.2d 350, 1997 Tenn. LEXIS 408 (Tenn. 1997), overruled in part, Schering-Plough Healthcare Prods. v. State Bd. of Equalization, 999 S.W.2d 773, 1999 Tenn. LEXIS 407 (Tenn. 1999).

Where prisoner failed to provide the clerk and master with copies of complaint and completed summons forms which would have enabled the clerk and master to issue the summons "forthwith" as required by Tenn. R. Civ. P. 4.01(1), and prisoner offered no excuse for failure to do so, the order dismissing the complaint for failure to prosecute was affirmed. Hodges v. Tennessee AG, 43 S.W.3d 918, 2000 Tenn. App. LEXIS 785 (Tenn. Ct. App. 2000).

Although Tenn. R. Civ. P. 4.03(2) does not set forth a specific time in which the affidavit must be filed, the requirements of the rule must be met within a reasonable time in order for process to be effective. Faulks v. Crowder, 99 S.W.3d 116, 2002 Tenn. App. LEXIS 640 (Tenn.

Ct. App. 2002), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 102 (Tenn. Feb. 3, 2003).

Filing of the Tenn. R. Civ. P. 4.03(2) affidavit over one year and nine months after service was attempted and a voluntary dismissal was taken as to those defendants was not within a reasonable amount of time. Faulks v. Crowder, 99 S.W.3d 116, 2002 Tenn. App. LEXIS 640 (Tenn. Ct. App. 2002), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 102 (Tenn. Feb. 3, 2003).

22. Sufficiency of Process.

Under Tenn. R. Civ. P. 4, additional summonses on a plaintiff's complaint may be obtained and issued only upon request of the plaintiff, and summons upon the driver did not constitute proper service because it was obtained and issued upon request of the pedestrian's insurer. Temlock v. McGinnis, 211 S.W.3d 238, 2006 Tenn. App. LEXIS 482 (Tenn. Ct. App. 2006), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 1171 (Tenn. Dec. 18, 2006).

Because notification of a suit was not a valid substitute for service of process as required by Tenn. R. Civ. P. 4.03, a party so notified could not be deemed served for the purpose of tolling the statute of limitations under Tenn. R. Civ. P. 3 and the savings statute, T.C.A. § 28-1-105(a), when there was no actual service of process. Sims v. Adesa Corp., 294 S.W.3d 581, 2008 Tenn. App. LEXIS 170 (Tenn. Ct. App. Mar. 25, 2008).

23. Limitations on Service of Process.

Even though a sheriff and deputy were legally on property to serve civil process, nothing in law justified the sheriff's proceeding down a lane behind the residence for over 100 yards to serve the process even if the sheriff believed the person was "hiding" from service. State v. Harris, 919 S.W.2d 619, 1995 Tenn. Crim. App. LEXIS 448 (Tenn. Crim. App. 1995).

24. Improper Service.

The process server's merely taping a copy of the summons and complaint to defendant's door failing to leave the documents with a person did not comply with Tenn. R. Civ. P. 4. Toler by Lack v. City of Cookeville, 952 S.W.2d 831, 1997 Tenn. App. LEXIS 89 (Tenn. Ct. App. 1997).

Mailing a copy of the summons and complaint, first class postage attached with return address requested, did not comply with the requirement of Tenn. R. Civ. P. 4 for service by mail. Toler by Lack v. City of Cookeville, 952 S.W.2d 831, 1997 Tenn. App. LEXIS 89 (Tenn. Ct. App. 1997).

Where a copy of the summons and complaint were left at the mayor's office, but not personally delivered to the mayor, service was insufficient in that delivery, had to be upon the chief executive officer, i.e. the mayor. State ex rel. Barger v. City of Huntsville, 63 S.W.3d 397, 2001 Tenn. App. LEXIS 604 (Tenn. Ct. App. 2001), review or rehearing denied, State ex rel. Barger v. City of Huntsville, — S.W.3d —, 2002 Tenn. LEXIS 2 (Tenn. Jan. 7, 2002).

Trial court did not err in denying a conservator's motion for a default judgment on a crossclaim against the department of veterans' affairs because the department had not been served, and it was not a party because it had not filed a pleading, nor had it made an appearance in the conservatorship proceedings; since the department had not waived its sovereign immunity, the probate court did not have jurisdiction over it. AmSouth Bank v. Cunningham, 253 S.W.3d 636, 2006 Tenn. App. LEXIS 144 (Tenn. Ct. App. Feb. 27, 2006).

Plaintiffs' service to defendants via registered mail was ineffective and service could not be considered timely because the certified mail was sent to an address where defendants did not work and the receipt was signed by a person who did not have authority to sign for defendants. Dolan v. United States, 514 F.3d 587, 2008 FED App. 48P, 2008 U.S. App. LEXIS 1790 (6th Cir. Jan. 28, 2008), cert. denied, 171 L. Ed. 2d 888, 128 S. Ct. 2971, 554 U.S. 919, 2008 U.S. LEXIS 5183 (U.S. 2008).

Although individual argued that trial court should have granted his motion for suggestion of diminution of record and allow him to amend the summons pursuant to Tenn. R. Civ. P. 4.09 to show that it was served on the driver by the owner's wife, fact that the driver had actual knowledge of attempted service did not render the service effectual if the individual did not serve the process in accordance with the Tenn. R. Civ. P. 4.01; therefore, court declined to hold that service of process was proper even though the driver ultimately received a copy of the summons and complaint and had notice of the lawsuit, and found no abuse of discretion in trial court's decision to deny the motion for suggestion of diminution of the record. Watson v. Garza, 316 S.W.3d 589, 2008 Tenn. App. LEXIS 681 (Tenn. Ct. App. Nov. 7, 2008).

25. Delay in Serving Process.

In clients' legal malpractice action, trial court erred in denying their former attorney's motion to dismiss because clients' intentional nine and one-half month delay in service of the summons after the filing of the complaint against their former attorney rendered the filing of the complaint ineffective pursuant to Tenn. R. Civ. P. 4.01(3). Jones v. Cox, 316 S.W.3d 616, 2008 Tenn. App. LEXIS 697 (Tenn. Ct. App. Nov. 25, 2008), appeal denied, — S.W.3d —, 2009 Tenn. LEXIS 282 (Tenn. June 1, 2009).

RULE 4A

SERVICE UPON DEFENDANT IN A FOREIGN COUNTRY

Service upon (1) an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, (2) a corporation, or (3) a partnership or other unincorporated association (including a limited liability company) may be effected in a place not within any judicial district of the United States:

(1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or

(2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or

(B) as directed by the foreign authority in response to a letter rogatory or letter of request; or

(C) unless prohibited by the law of the foreign country, by

(i) delivery to the individual personally of a copy of the summons and the complaint; or

(ii) any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the party to be served; or

(3) in the case of a corporation, by service as provided in 4.04(4) upon any corporation that has acted as the corporate defendant's agent in relation to the matter that is the subject of the litigation or the stock of which is wholly owned by the corporate defendant.

(4) by other means not prohibited by international agreement as may be directed by the court. [Effective July 1, 1997.]

Advisory Commission Comments. Rule 4A, which is captioned "Service Upon Defendant in a Foreign Country," is an entirely new rule. The Rule is based, with substantial revisions, on the current Federal Rule of Civil Procedure 4(f), but omits the phrase "Unless otherwise provided by federal law" from the first sentence. The bracketed parts have also been added to make clear that this provision is applicable to business associations as well as to individuals.

Litigation in the United States increasingly includes international elements and often foreign defendants, and certain treaties have important implications for civil litigation in American courts. For example, the multilateral international convention, "Service Abroad of Judicial and Extrajudicial Documents," often referred to as the Hague Service Convention, became effective in the United States on February 10, 1969. *Kadota v. Hosogai*, 608 P.2d 68, 71 (Ariz. App. 1980). Its importance has increased dramatically in recent years as a consequence of both the increase in international trade and the addition of signatories to the convention.

Litigants are obliged to consider the possible impact of international treaties upon litigation. Reliance solely upon the specific provisions of Tennessee law may result in service of process being invalidated by treaties such as the Hague Service Convention. *Wilson v. Honda Motor Co., Ltd.*, 776 F. Supp. 339, 342, 1991 U.S. Dist. LEXIS 15397 (E.D. Tenn. 1991). Under the Supremacy Clause of the United States Constitution, treaty provisions for service abroad prevail over contrary state law, *Kadota v. Hosogai*, 608 P.2d 68, 71 (Ariz. App. 1980), and are thus controlling even in the absence of recognition by state rule. Rule 4A, however, reminds the lawyer to consider overriding treaties and also provides for alternative means of service.

Moreover, applicable treaties may actually expand the service options in some cases. See, e.g., *Semet, Lickstein, Morgenstern, Berger, Friend, Brooke & Gordon, P.A. v. Sawada*, 643 So.2d 1188, 1189 (Fla. App. 1994) (under the Supremacy Clause, service upon defendant in

compliance with Hague Service Convention is valid service of process).

Subpart 4A(3) provides specific direction to the courts on a question that has not yet been addressed by Tennessee law. The provision establishes that a subsidiary corporation that is simply the alter ego of a foreign corporation may be the agent for service of process under appropriate circumstances. Given the hostility to litigation in American courts that may be found in some foreign countries, such a provision will allow an attorney in some cases to avoid the expense and inconvenience of having to attempt service in a foreign country.

Compliance with the Hague Service Convention, for example, is required only when service on the defendant is in a signatory country outside of the United States. If the defendant has an agent for service of process in the United States, service upon that corporation may be in accordance with state law. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 707 (1988). If service of process on a domestic agent, therefore, is proper under both state law and the Due Process Clause of the United States Constitution, the Hague Service Convention does not apply.

Whether there has been compliance with the Hague Service Convention may in itself present tricky problems of interpretation. For example, a substantial body of authority has developed on both sides of the question of whether Japan permits service of process by mail. See *Pennebaker v. Kawasaki Motors Corp., U.S.A.*, 155 F.R.D. 153, 154, 1994 U.S. Dist. LEXIS 5837 (S.D. Miss. 1994); *McClenon v. Nissan Motor Corporation in U.S.A.*, 726 F. Supp. 822, 825, 1989 U.S. Dist. LEXIS 15072 (N.D. Fla. 1989).

For additional cases illustrating the importance of compliance with international treaties, see *Ackermann v. Levine*, 788 F.2d 830 (CA2 1986); *Bankston v. Toyota Motor Corp.*, 123 F.R.D. 595 (W.D. Ark. 1989), aff'd, remanded, Bankston v. Toyota Motor Corp., 889 F.2d 172 (CA8 1989); *Harris v. Browning-Ferris Industries Chemical Services, Inc.*, 100 F.R.D. 775 (M.D. La. 1984); *Lyman Steel Corp. v. Ferrostaal Metals Corp.*, 747 F. Supp. 389 (N.D. Ohio 1990); *Raffa v. Nissan Motor Co., Ltd.*, 141 F.R.D. 45 (E.D. Pa. 1991); *Honda Motor Co. Ltd. v. Superior Court of Santa Clara*, 10 Cal. App. 4th 1043, 12 Cal. Rptr. 2d 861 (6th Dist. 1992).

RULE 4B

SERVICE UPON SECRETARY OF STATE AS AGENT FOR SERVICE OF PROCESS

(1) Whenever the law of this state permits service of any process, notice, or demand, upon a defendant outside the territorial limits of this state, the secretary of state may be served as the agent for that defendant. Service shall be made by delivering to the secretary of state the original and one copy of such process, notice, or demand, duly certified by the clerk of the court in which the suit or action is pending or brought, together with the proper fee. A statement that identifies the grounds for which service on the secretary of state is applicable must be included.

(2) The secretary of state shall endorse the time of receipt upon the original and copy and immediately shall promptly send, postage prepaid, the certified copy by registered or certified return receipt mail to the defendant, along with a written notice that service was so made. If the defendant to be served is a corporation, the secretary of state shall send the copy, along with a written notice that service of the original was made, addressed to such corporation at its registered office or principal office as shown in the records on file in the secretary of state's office or as shown in the official registry of the state or country in which such corporation is incorporated. If none of the previously mentioned addresses is available to the secretary of state, service may be made on any one (1) of the incorporators at the address set forth in the charter. The secretary of state may require the plaintiff or the plaintiff's attorney to furnish the latter address.

(3) In case it shall appear, either before or after the lodging of process as above provided that such nonresident is dead, then either original or alias process may issue hereunder directed to the personal representative of such nonresident deceased and shall be sent as herein provided to the court with

probate jurisdiction for the county and state of the residence of the deceased at the time of the nonresident's death. No appearance need be made nor shall judgment be taken against such personal representative until the lapse of sixty (60) days from the date of mailing the process herein to such probate court. The procedure for mailing such process and proof of service thereof shall be as provided for service upon living persons.

(4) The fee paid by plaintiff, when fact of payment is endorsed on the original process by the secretary of state, shall be taxed as plaintiff's cost, to abide the judgment.

(5) Acceptance of such registered or certified mail by any member of the addressee's family, over the age of sixteen (16) years and residing in the same dwelling with him, shall constitute a sufficient delivery thereof to the addressee.

(6) The refusal or failure of a defendant, or the defendant's agent, to accept delivery of the registered or certified mail provided for in subpart (1), or the refusal or failure to sign the return receipt, shall not affect the validity of such service; and any such defendant refusing or failing to accept delivery of such registered or certified mail shall be charged with knowledge of the contents of any process, notice, or demand contained therein.

(7) When the registered or certified mail return receipt is received by the secretary of state or when a defendant refuses or fails to accept delivery of the registered or certified mail and it is returned to the secretary of state, the secretary of state shall forward the receipt or such refused or undelivered mail to the clerk of the court in which the suit or action is pending, together with the original process, notice, or demand, a copy of the notice sent to the defendant corporation and the secretary of state's affidavit setting forth his or her compliance with this Rule. Upon receipt thereof, the clerk shall copy the affidavit on the rule docket of the court and shall mark it, the receipt or refused or undelivered mail, and the copy of notice as of the day received and place them in the file of the suit or action where the process and pleadings are kept, and such receipt or refused or undelivered mail, affidavit, and copy of notice shall be and become a part of the technical record in the suit or action and thereupon service on the defendant shall be complete.

(8) The secretary of state shall keep a record of all processes, notices, and demands served under this Rule, which record shall include the time of such service and the secretary of state's action with reference thereto. [Effective July 1, 1997; and amended by order effective July 1, 1998.]

Advisory Commission Comments. Rule 4B is new. It is based upon Tenn. Code Ann. §§ 20-2-211 & 20-2-215. It is added to ensure that all general provisions for service of process are included in the Tennessee Rules of Civil Procedure.

The amendment to the first sentence of the rule is technical. [1998.]

RULE 5

SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

5.01. Service — When Required. Unless the court otherwise orders, every order required by its terms to be served; every pleading subsequent to the original complaint; every paper relating to discovery required to be served on a party; every amendment; every written motion other than one which may

be heard ex parte; and, every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar papers shall be served upon each of the parties; but no service need be made on parties adjudged in default for failure to appear, except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons, or for constructive service, in Rules 4, 4A, or 4B. [As amended by order entered January 31, 1984, effective August 20, 1984; and by order entered January 26, 1999, effective July 1, 1999.]

NOTES TO DECISIONS

1. Rule Complied With.

Debtor's claim based on a trial court hearing a creditor's motion to dismiss the debtor's complaint in the debtor's absence failed because (1) the debtor was admittedly served with a copy of the motion and notice of hearing, but failed to appear, and (2) any waiver of local rules was not an abuse of discretion. Brock v. Fed Loan Servicing, — S.W.3d —, 2020 Tenn. App. LEXIS 139 (Tenn. Ct. App. Mar. 26, 2020).

5.02. Service — How Made. Service shall be made pursuant to one of the methods set forth in (1), (2), or (3). Whenever under these rules service is required or permitted to be made on a party represented by an attorney, the service shall be made on the attorney unless service on the party is ordered by the court. If an attorney has filed a notice of limited scope representation or a notice of limited appearance for an otherwise self-represented person, pursuant to Rule 11.01(b), service shall be made on the self-represented person and on the attorney until such time as a notice of completion of limited scope representation has been filed. After notice of completion of limited scope representation has been filed, service on the attorney previously providing limited scope representation shall no longer be necessary.

(1) Service on the attorney or on a party may be made by delivering to the attorney a copy of the document to be served, or by mailing it to such person's last known address, or if no address is known, by leaving the copy with the clerk of the court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at such person's office with a clerk or other person in charge thereof; or, if there is none in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing. Documents which may be filed by facsimile transmission pursuant to Rule 5A may be served by facsimile transmission.

(2)(a) Service on any attorney may also be made by mailing the attorney the document in Adobe PDF to the attorney's email address, which shall be promptly furnished on request. The sender shall include language in the subject line designed to alert the recipient that a document is being served under this rule. On the date that a document served under this rule is electronically sent to an attorney, the sender shall send by mail, facsimile or hand-delivery a certificate that advises that a document has been transmit-

ted electronically. The certificate shall state the caption of the action; the trial court file number; the title of the transmitted document; the number of pages of the transmitted document (including all exhibits thereto); the sender's name, address, telephone number and electronic mail address; the electronic mail address of each recipient; and the date and time of the transmission. The certificate shall also include words to this effect: "If you did not receive this document, please contact the sender immediately to receive an electronic or physical copy of this document." The certificate shall be sent to all counsel of record.

(b) A sender who emails a document and is notified that it was not received must promptly furnish a copy of the document to the attorney who did not receive it.

(c) A document transmitted by email shall be treated as a document that was mailed for purposes of computation of time under Rule 6.

(d) For good cause shown, an attorney may obtain a court order prohibiting service of documents on that attorney by electronic mail and requiring that all documents be served under subsection (1) or (3).

(3)(a) Service required by these rules also may be made on any registered user of a court's Efiling system by filing any document that may be E-served with that court's E-filing system. Eservice shall constitute effective service under these rules and no other service on such registered users is required, unless otherwise ordered by the court.

(b) Any attorney or any self-represented party who is not a registered user of an E-filing system, or known by the E-filer not to have been E-served, must be served by a means authorized in subsection (1) or (2) of this rule.

(c) Unless ordered otherwise by the court, a court or court clerk may, through such court's Efiling system, transmit to registered users all notices, orders, opinions, or judgments filed by the court or court clerk, which transmission shall constitute proper service and shall satisfy the notice requirements of Tenn. R. Civ. P. 58 or any other applicable rules of procedure.

(d) Any court has the discretion, for good cause shown, to order that a means of service authorized in these rules other than E-service be required in a particular case.

(d) Any court has the discretion, for good cause shown, to order that a means of service authorized in these rules other than E-service be required in a particular case.

(e) A document that is E-served shall be treated as a document that was mailed for purposes of computation of time under Rule 6.

(f) For purposes of E-service under Rule 5, the definitions in Rule 5B shall apply. [As amended by order entered January 31, 1984, effective August 20, 1984; by order entered December 10, 2003, effective July 1, 2004; by order entered December 14, 2009, effective July 1, 2010; and by order filed January 13, 2012, effective July 1, 2012; amended by order dated January 16, 2020, effective July 1, 2020.]

Advisory Commission Comments [2010]. The Commission is aware that many attorneys serve documents on one another electronically but, because the current rule does not provide electronic service is sufficient service, also send a paper copy of the document. This rule change

is designed to allow attorneys to accomplish service of pleadings and other papers electronically without the need to send a physical copy.

The requirement that the sender shall include language in the subject line designed to alert the recipient that a document is being served under this rule is intended to reduce the possibility that the recipient might overlook the service of a document. Words in the subject line to the effect of "TRCP Rule 5 Service of Document in *Smith v. Jones*" are sufficient.

Adobe PDF was chosen as the format because it is required for federal court filings and virtually all attorneys have ready access to it. Of course, the parties may stipulate to the use of a different format.

The mailing or hand delivery of a certificate was included out of concern, well-founded or not, that an email transmitting a document could be lost in cyberspace. The certificate requirement puts the receiving attorney on notice that a document has been sent and, if the document was not received, will allow that attorney to initiate a process for promptly obtaining a copy of it.

The rule provides a mechanism for a court to order, for good cause shown, that electronic service of pleadings and papers not be permitted in a particular case.

Advisory Commission Comments [2012]. The first paragraph of Rule 5.02 is amended to address service of pleadings and other papers in cases in which an attorney has filed a notice of limited scope representation or a notice of limited appearance for an otherwise self-represented person, pursuant to Rule 11.01(b).

Advisory Commission Comments [2020]. Rule 5.02(3) has been added to provide for electronic service through a court's E-Filing system, provided that such a system has been authorized by such court pursuant to Rule 5B of these rules. The amended rule authorizes E-service through a court's electronic transmission facilities as to any registered user of such facilities. An attorney or party who chooses to become a registered user of a court's E-filing system shall be required to accept service through the court's electronic facilities unless otherwise ordered by the court in that particular case. As a result of this amendment, service may be effectuated under these rules by any of three means: the conventional means of service authorized in Rule 5.02(1), by electronic transmission or email as authorized in Rule 5.02(2), or by E-service pursuant to Rule 5.02(3) in those courts that have adopted an E-filing system that complies with Rule 5B and the technological standards promulgated by the Tennessee Supreme Court.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated December 14, 2009, was ratified and approved by 2010 Senate Resolution 180 and 2010 House Resolution 239. The order promulgating the amendment of this rule provided that it take effect July 1, 2010.

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 13, 2012, was ratified and approved by 2012 Senate Resolution 78 and House Resolution 193. The order promulgating the amendment of this rule provided that it take effect July 1, 2012.

The amendment of Rule 5, which amended subdivision 5.02 and added the [2020] Advisory Comments, as promulgated and adopted by the Supreme Court in its order dated January 16, 2020, was ratified and approved by 2020 House Resolution 236 and Senate Resolution 141. The order promulgating the amendment of subdivision 5.02 and the addition of the [2020] Advisory Comments, provided that it take effect July 1, 2020.

NOTES TO DECISIONS

Analysis

1. Mailing to Party's Address of Record Sufficient.
2. Lawyer-Disciplinary Proceeding.

1. Mailing to Party's Address of Record Sufficient.

In declaring a debt owed to appellees nondischargeable, the bankruptcy court did not err in giving preclusive effect to a Tennessee court default judgment entered in their favor and against a chapter 7 debtor in a fraud action, as those proceedings were not fundamentally unfair; even if appellees knew of the debtor's new address, their mailings to him to his address of record after his counsel withdrew constituted proper service under the Tennessee Rules of Civil Procedure, and it was his responsibility to update his address with the clerk of court. Couch v. Panther Petro., LLC (In re Couch) — F.3d —, 2017 FED App. 609N, 2017 U.S. App. LEXIS 22251 (6th Cir. Nov. 6, 2017).

2. Lawyer-Disciplinary Proceeding.

Board of Professional Responsibility complied fully with the requirements when it served a lawyer's attorney with a copy of the Hearing Panel's judgment because the Board served the lawyer by mailing a copy of the Hearing Panel's judgment to him in the care of his attorney. Bd. of Prof'l Responsibility of the Supreme Court of Tenn. v. Justice, 577 S.W.3d 908, 2019 Tenn. LEXIS 288 (Tenn. July 2, 2019), cert. denied, 206 L. Ed. 2d 187, 140 S. Ct. 1212, — U.S. —, 2020 U.S. LEXIS 944 (U.S. Feb. 24, 2020).

5.03. Service — Proof of. Whenever any pleading or other paper is served under 5.01 and 5.02, proof of the time and manner of such service shall be filed before action is taken thereon by the court or the parties. Proof may be by certificate of a member of the bar of the court or by affidavit of the person who served the papers, or by any other proof satisfactory to the court.

5.04. Service — Numerous Defendants. In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other persons, and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

5.05. Filing. All papers after the complaint required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter, but the court may on motion of a party or on its own initiative order that depositions upon oral examination; interrogatories; requests for documents; requests for admission; and answers and responses thereto not be filed unless on order of the court or for use in the proceeding. [As amended by order entered January 31, 1984, effective August 20, 1984.]

5.06. Filing with the Court Defined. The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge, in which event he or she shall note thereon the filing date and forthwith transmit them to the office of the clerk. The clerk shall endorse upon every pleading and other papers filed with the clerk in an action the date and hour of the filing. Recycled paper with the highest feasible percentage postconsumer waste content is recommended and encouraged for all papers filed with the court.

If papers required or permitted to be filed pursuant to the rules of civil procedure are prepared by or on behalf of a pro se litigant incarcerated in a correctional facility and are not received by the clerk of the court until after the time fixed for filing, filing shall be timely if the papers were delivered to the appropriate individual at the correctional facility within the time fixed for filing. This provision shall also apply to service of paper by such litigants pursuant to the rules of civil procedure. "Correctional facility" shall include a prison, jail, county workhouse or similar institution in which the pro se litigant is incarcerated. Should timeliness of filing or service become an issue, the burden is on the pro se litigant to establish compliance with this provision. [As amended by order entered May 25, 1993, effective July 1, 1993; and by order effective July 1, 1997; as amended by order entered January 28, 2000, effective July 1, 2000.]

Advisory Commission Comments. Rule 5 requires service of pleadings filed subsequent to the original complaint, orders, written motions, discovery papers, and other papers, upon each of the parties. Exceptions are made with respect to motions which may be heard ex parte (Rule 5.01), and with respect to pleadings filed by various defendants when the court orders

that, because of numerous defendants, pleadings need not be served as between defendants (Rule 5.04). The Rule spells out the details of how service shall be made, and provides that proof of service is accomplished by certificate of a member of the bar, or by affidavit of the person serving the copy, or by other proof satisfactory to the court. The details set out in the Rule are designed to give every reasonable assurance that a copy of the pertinent papers in the suit actually reach adversary parties through their counsel or directly.

The Rule provides that copies need not be served on parties adjudged in default for failure to appear; but if the pleadings assert new or additional claims for relief against such parties in default, copies must be served upon the parties. Rule 55 sets out the circumstances and procedures for entering judgment by default for failure to appear.

5.01: In litigation involving more parties than a single plaintiff and single defendant, it sometimes is essential for every party to keep abreast of all procedural developments despite the lack of a direct effect on each litigant. Consequently, the Commission advises deletion of the "affected thereby" language; all papers must be served on all parties "unless the court otherwise orders." [1984.]

5.05: Often there is no utility in filing discovery papers with the clerk, and the amendment gives parties and judges the option of abandoning the requirement. A local court rule could constitute an "order" on the court's initiative. Because filing of such papers may be a necessary step toward offering them into evidence, however, the final wording is included: "or for use in the proceedings." [1984.]

Advisory Commission Comments [1997]. The amendment conforms pro se prisoner filings of trial court papers to the provision in T.R.A.P. 20(a) concerning appellate court papers.

Advisory Commission Comments [2000]. Pro se litigants who are incarcerated in correctional facilities cannot ensure the timely mailing of their mail and, as a consequence, cannot control the timely filing of their legal papers. This amendment deletes the previous, pro se prisoner-filing provision contained in Rule 5.06 and substitutes a clarified provision. The pro se prisoner filing provision applies to all "papers required or permitted to be filed pursuant to the rules of civil procedure," including the filing of a complaint under Rule 3.

Court and Advisory Commission Comments. It is the public policy of the State of Tennessee to encourage recycling and the use of recycled products and materials. This policy is reflected in the Tennessee Solid Waste Planning and Recovery Act (title 68, ch. 211, part 6) and in the Solid Waste Management Act of 1991 (title 68, ch. 211, part 8). The underlined portion of Rule 5.06 denotes the addition to Rule 5.06 effective July 1, 1993, in which the Court recommends and encourages that all papers filed in the Tennessee courts be submitted on recycled paper.

Advisory Commission Comments [2004]. An additional method of service of pleadings and other papers, by facsimile transmission, is limited by the conditions in Rule 5A on filing by facsimile. For example, such service is limited to those documents which may be filed by facsimile transmission. Also, the sender bears the risk of ineffective transmission.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated December 10, 2003, was ratified and approved by 2004 House Resolution 233 and Senate Resolution 115. The order promulgating the amendment of this rule provided that it take effect July 1, 2004.

In its order filed August 27, 2015, the Supreme Court provided: "The Advisory Commission on the Rules of Practice and Procedure annually presents recommendations to the Court to amend the Tennessee Rules of Appellate, Civil, Criminal, and Juvenile Procedure and the Tennessee Rules of Evidence. With its meeting on August 14, 2015, the Advisory Commission completed its 2014-2015 term, and the Commission thereafter transmitted its recommendations to the Court."

"The court hereby publishes the Advisory Commission's recommended amendments set out in the two Appendices to this order. Appendix I sets out the proposed amendments tot he Rules of Appellate, Civil, and Criminal Procedure. Appendix II sets out a proposed comprehensive revision of the Rules of Juvenile Procedure, which, if adopted, will replace in its entirety the current version of the Rules of Juvenile Procedure."

"The court hereby solicits written comments on the proposed amendments from the bench, the bar, and the public. The deadline for submitting written comments is Wednesday, November 25, 2015. Written comments may either be submitted by email to appellatecourtclerk@tncourts.gov or by mail addressed to: James Hivner, Clerk, Re: 2016 Rules Package, 100 Supreme Court Building, 401 7th Avenue North, Nashville, TN 37219-1407 and should reference the docket number set out above [No. ADM2015-01631]."

The proposed amendment to Tennessee Rules of Civil Procedure, Rule 5.06, promulgated by the Supreme Court in its order dated August 27, 2015, would add the following sentence at the beginning of the second paragraph of the rule: "If required to be signed in accordance with these rules or by statute, the original pleading or other paper filed with the clerk shall contain an original handwritten penned signature, except as otherwise provided in Rule 5A or Rule 5B."; and would add the following 2016 Advisory Commission Comments: "Advi-

sory Commission Comments [2016]. Rule 5.06 is amended by adding the first sentence of the second paragraph. That sentence provides that an original pleading or other paper filed with the clerk must contain an original handwritten penned signature, except as otherwise provided in Rule 5A (governing facsimile filing of papers) or Rule 5B (governing electronic filing, signing or verification in those districts in which electronic filing is allowed by local rule)."

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 122, 148, 318.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-5-1, 1-5-5 — 1-5-7.

Tennessee Jurisprudence. 1 Tenn. Juris., Abatement, Survival and Revival, § 35; 1 Tenn. Juris., Amendments, §§ 2, 3, 17; 2 Tenn. Juris., Appeal and Error, § 87; 3 Tenn. Juris., Appearances, § 8; 11 Tenn. Juris., Equity, §§ 47; 20 Tenn. Juris., Pleading, § 5.

Law Reviews. Counterclaims and Statutes of Limitations — A Critical Commentary on Present Tennessee Law (John L. Sobieski, Jr.), 42 Tenn. L. Rev. 291.

Nonsuits IV: An Updated List of Don'ts (Donald F. Paine), 39 No. 2 Tenn. B.J. 15 (2003).

What's happening with e-filing in Tennessee? (Judge William C. Koch Jr.), 37 No. 3 Tenn. B.J. 26 (2001).

NOTES TO DECISIONS

Analysis

1. In General.
2. Service Upon Attorney.
3. Service of Writ of Scire Facias.
4. New or Additional Claim.
5. Prisoner Mailbox Rule.

1. In General.

Tenn. R. Civ. P. 5.01 and 5.02 control the service of written notice. Wester v. Childress, 625 S.W.2d 710, 1981 Tenn. LEXIS 511 (Tenn. 1981).

Store owner presented a memorandum of law in support of its motion for summary judgment to the trial judge, but it did not appear that the memorandum of law of either party was filed so as to be included in the trial court record; there was no indication that the trial court followed the procedure as set out in Tenn. R. Civ. P. 5.05 and 5.06, where memoranda of law served upon a party and considered by the trial court must be filed with the clerk. Jennings v. Sewell-Allen Piggly Wiggly, 173 S.W.3d 710, 2005 Tenn. LEXIS 825 (Tenn. 2005).

Inmate did not present sufficient evidence to demonstrate his compliance with Tenn. R. Civ. P. 5.06 where he failed to set forth in his motion for a new trial or in his brief filed on appeal sufficient proof to show his compliance with Rule 5.06; without such proof, it was clear that the inmate filed his petition well beyond the 60-day limit provided for in T.C.A. § 27-9-102. Jackson v. Tenn. Dep't of Corr., 240 S.W.3d 241, 2006 Tenn. App. LEXIS 356 (Tenn. Ct. App. May 31, 2006).

In a lessor's action to recover unpaid rent against a lessee, where the lessee failed to make a separate motion for sanctions as required by Tenn. R. Civ. P. 11.03 and failed to serve a copy of the motion upon the lessor as provided in Tenn. R. Civ. P. 5, the lessee was not entitled to recover attorney fees as sanctions; the procedures set forth in Tenn. R. Civ. P. 11.03 are clearly and unambiguously written, and are couched in mandatory terms. Mitrano v. Houser, 240 S.W.3d 854, 2007 Tenn. App. LEXIS 312 (Tenn. Ct. App. May 16, 2007), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 854 (Tenn. Sept. 17, 2007).

2. Service Upon Attorney.

In light of Tenn. R. Civ. P. 5.02, requiring service upon counsel when a party is represented by counsel, an interpretation of Tenn. R. Civ. P. 53.04(1) that only parties need be notified of the filing of a master's report was erroneous. Wester v. Childress, 625 S.W.2d 710, 1981 Tenn. LEXIS 511 (Tenn. 1981).

Act of father's attorney in Minnesota in mailing an answer to mother's attorney in Tennessee did not constitute filing as required by Tenn. R. Civ. P. 5.06. Dooley v. Dooley, 980 S.W.2d 369, 1998 Tenn. App. LEXIS 119 (Tenn. Ct. App. 1998).

3. Service of Writ of Scire Facias.

The commissioner is appointed the attorney for service of process for all insurance companies doing business in Tennessee, and service of process and notice on the commissioner is permitted by T.C.A. § 56-2-504. However, although this latter statute sets out a general method of such service, the specificity of T.C.A. § 29-32-106 controls the method of service of the writ of scire facias. Indemnity Ins. Co. v. Blackwell, 653 S.W.2d 262, 1983 Tenn. App. LEXIS 546 (Tenn. Ct. App. 1983).

Service of writ of scire facias may be had on insurer, surety on bail bond, by reading or offering to read the writ to the personnel in the commissioner's office or upon the commissioner of finance and insurance, and service may also be had on surety by reading or offering to read the writ to the personnel in the bondsmen's office or upon the bondsmen. Indemnity Ins. Co. v. Blackwell, 653 S.W.2d 262, 1983 Tenn. App. LEXIS 546 (Tenn. Ct. App. 1983).

4. New or Additional Claim.

A motion to amend a complaint to increase damages was required to be served on defendants who had defaulted in a personal injury

action. Holder v. Drake, 908 S.W.2d 393, 1995 Tenn. LEXIS 563 (Tenn. 1995), rehearing denied, — S.W.2d —, 1995 Tenn. LEXIS 666 (Tenn. Nov. 6, 1995).

5. Prisoner Mailbox Rule.

Appellate court lacked jurisdiction to consider an inmate's appeal because the inmate's notice of appeal was filed well outside the 30-day time period for filing and the notice was not timely delivered to the appropriate individual at the correctional facility under the so-called Prisoner Mailbox Rule as it could be inferred that the notice was still in the inmate's possession when the inmate signed the notice. Houston v. Brown, — S.W.3d —, 2020 Tenn. App. LEXIS 519 (Tenn. Ct. App. Nov. 18, 2020).

RULE 5A

FACSIMILE FILING OF PAPERS

5A.01. Definitions. — (1) "Facsimile filing" means the facsimile transmission of an original document which is received in the original document's entirety by the trial court clerk and filed by the clerk.

(2) "Facsimile machine" means a device capable of sending a facsimile transmission using the international standard for scanning, coding, and transmission established for Group 3 machines by the Consultative Committee of International Telegraphy and Telephone of the International Telecommunications Union in regular resolution. Any facsimile machine used to send documents to a court must send at an initial transmission speed of no less that 4800 baud and be able to generate a transmission record.

(3) "Facsimile transmission" is the transmission of a document by a system that encodes a document into electrical signals, transmits these electrical signals over a telephone line, and reconstructs the signals to print a duplicate of the original document at the receiving end.

(4) "Sender" is the person or entity sending the facsimile transmission to the court.

(5) "Transmission record" means the document printed by the sending facsimile machine stating the telephone number of the receiving machine, the number of pages sent, the transmission time and date, and an indication of any errors in transmission.

5A.02. Filing Procedures. — (1) The trial court clerk shall accept papers for filing by facsimile transmission as provided in this rule. The trial court clerk shall maintain a dedicated telephone line for the clerk's facsimile machine.

(2) Any document filed by facsimile transmission shall be accompanied by the uniform cover sheet set forth in the comment to this rule stating: the caption of the case; the trial court docket number; the title of the transmitted document; the number of pages of the facsimile transmission (including the cover sheet); the sender's name, address, voice telephone number, and facsimile telephone number; and the date of the facsimile transmission. The cover sheet shall also contain clear and concise instructions as to the filing of the transmitted document.

(3) The filing of the original document shall not be required after facsimile filing. The sender shall retain the original document in the sender's possession or control during the pendency of the action and shall produce such document upon request by the court or any party to the action. Upon failure to produce such document, the court may strike the document filed by facsimile

transmission.

(4) The following documents shall not be filed in the trial court by facsimile transmission:

(a) Any pleading or similar document for which a filing fee and/or litigation tax must be paid (excluding the facsimile service charge), including, without limitation, a complaint commencing a civil action, an appeal from the general sessions court to the circuit court, and an appeal to a trial court from an inferior tribunal, board or officer;

(b) A summons;

(c) A will or codicil to a will; a bond; or any pleading or document requiring an official seal;

(d) A confidential document that the court previously has ordered to be filed under seal;

(e) A notice of appeal.

(5) No facsimile filing shall exceed fifty (50) pages in length, including the cover sheet, unless authorized by the court; absent such authorization, a facsimile transmission exceeding fifty (50) pages, including the cover sheet, shall not be filed by the clerk. A facsimile filing may not be split into multiple facsimile transmissions to avoid this page limitation. All documents filed by facsimile transmission shall comply with all applicable rules of court, including, without limitation, rules governing the content and form of pleadings and other papers; the signing of pleadings, motions and other papers; and the service of all papers.

(6) The original document sent by facsimile transmission shall be on letter-sized paper (8 ½ by 11 inches). Originals on larger-sized paper may be reduced prior to facsimile transmission if the reduction to 8 ½ by 11 inch paper renders a legible and complete copy of the original.

(7) The clerk is not required to notify the sender by return facsimile transmission or voice telephone call that the facsimile document has been received by the clerk or that the facsimile document has not been received in its entirety. This provision shall not relieve the clerk of any notice requirements imposed by law or by the court. [As amended by order filed December 21, 2016, effective July 1, 2017.]

NOTES TO DECISIONS

1. Facsimile Filing.

Grant of summary judgment against the patient in his medical malpractice action was proper pursuant to Tenn. R. Civ. P. 5A.02(4)(c) because fax-filing an affidavit was not permitted; thus, the patient failed to respond to anesthesiologist's and medical group's motion for summary judgment. Wilson v. Schwind, 260 S.W.3d 454, 2007 Tenn. App. LEXIS 811 (Tenn. Ct. App. Dec. 28, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 448 (Tenn. June 30, 2008).

5A.03. Effect of Facsimile Filing. — (1) A facsimile transmission received by the clerk after 4:30 p.m. but before midnight, clerk's local time, on a day the clerk's office is open for filing shall be deemed filed as of that business day. A facsimile transmission received after midnight but before 8:00 a.m., clerk's local time, on a business day, or a facsimile transmission received by the clerk on a Saturday, Sunday, legal holiday, or other day on which the clerk's office for filing is closed, shall be deemed filed on the preceding business day.

Upon receiving a facsimile transmission in its entirety, the clerk shall note the filing date on the facsimile filing in the same manner as with original pleadings or other documents filed by mail or in person. For purposes of this provision, "received by the clerk" means the date and time the facsimile transmission is received by the clerk as indicated by the date and time printed on the facsimile transmission by the clerk's facsimile machine.

(2) A signature reproduced by facsimile transmission shall be treated as an original signature.

(3) The sender bears the risk of using facsimile transmission to convey a document to a court for filing, including, without limitation, malfunction of facsimile equipment, whether the sender's or the clerk's equipment; electrical power outages; incorrectly dialed telephone numbers; or receipt of a busy signal from the clerk's facsimile telephone number. In the event that a facsimile transmission to the clerk is unsuccessful, the sender may file the document by mail or in person; in such cases, the filing date shall be determined as provided in Rules 5.06 and 6, Tenn. R. Civ. P. However, if a facsimile transmission is not received in its entirety by the clerk because of a transmission error, the sender may move acceptance nunc pro tunc by filing a written motion with the court. The motion shall be accompanied by the sender's transmission record, the original document that was the subject of the attempted transmission, and an affidavit of the sender detailing the facts concerning the attempted transmission. The court, in its discretion, may order filing of the original document nunc pro tunc.

5A.04. Facsimile Service Charge. — The sender of the facsimile transmission shall pay to the trial court clerk a service charge for each facsimile filing in the amount of five dollars ($5.00) plus one dollar ($1.00) per page of the facsimile filing (including the cover sheet). Payment of the service charge, accompanied by a copy of the facsimile filing cover sheet, shall be received by the trial court clerk not later than ten (10) calendar days after the facsimile filing. The facsimile service charge shall be paid by the sender as provided in this rule and shall not be taxed as court costs, subject to the following exception. If the sender is either a party who has been allowed to proceed on a paupers oath or an attorney for such a party, timely payment of the facsimile service charge under this rule is suspended, and the charges shall be taxed as court costs. [As added by order entered December 10, 2003, effective July 1, 2004.]

Advisory Commission Comments [2004]. Rule 5A is adopted to provide for the filing of papers in the trial court by facsimile transmission. Rule 5A.02(4), however, expressly provides that certain documents (listed in that subparagraph) may *not* be filed via facsimile transmission. In addition, the Commission points out that Rule 5A does not authorize the *service* of documents by facsimile transmission. *See* Rule 5A.02(5) (requiring, in pertinent part, compliance with all applicable rules of court governing service of papers). Please refer to Rule 5, Tenn. R. Civ. P., for the provisions in these Rules governing the service of pleadings and other papers after the filing of the original complaint; amended Rule 5.02 permits service by fax if filing by fax is permitted.

Rule 5A.02(1) requires the trial court clerk to maintain a dedicated telephone line for the clerk's facsimile machine. In those jurisdictions in which it is not feasible for each clerk to maintain a dedicated telephone line for facsimile filing, it is the Commission's intent that the respective clerks may jointly maintain a dedicated telephone line for the use of the various clerks. For example, the Circuit Court Clerk and the Clerk & Master in such a jurisdiction may share a dedicated telephone line for facsimile filings in their respective courts.

Advisory Commission Comments [2017].

Rule 5A.02(5) is amended to increase the page limit for facsimile filings from ten (10) to fifty (50).

Compiler's Notes. The adoption of this rule, as promulgated and adopted by the Supreme Court in its order dated December 10, 2003, was ratified and approved by 2004 House Resolution 233 and Senate Resolution 115. The order promulgating the adoption of this rule provided that it take effect July 1, 2004.

The amendment of Rule 5A, which amended subdivision 52.02(5) and added the [2017] Advisory Comments, as promulgated and adopted by the Supreme Court in its order dated December 21, 2016, was ratified and approved by 2017 House Resolution 20 and Senate Resolution 13. The order promulgating the amendment of subdivision 52.02(5) and addition of the [2017] Advisory Comments, provided that it take effect July 1, 2017.

Uniform Facsimile Filing Cover Sheet.

TENNESSEE COURTS
UNIFORM FACSIMILE FILING COVER SHEET

TO (COURT CLERK): _____

WITH (COURT): _____

CLERK'S FAX NUMBER: _____

CASE NAME: _____

DOCKET NUMBER: _____

TITLE OF DOCUMENT: _____

FROM (SENDER): _____

SENDER'S ADDRESS: _____

_____

SENDER'S VOICE TELEPHONE NUMBER: _____

SENDER'S FAX TELEPHONE NUMBER: _____

DATE: _____ TOTAL PAGES, INCLUDING COVER PAGE: _____

FILING INSTRUCTIONS/COMMENTS (attach additional sheet if necessary):

Unless authorized by the Court, a facsimile transmission exceeding ~~ten (10)~~fifty (50) pages, including the cover page, shall not be filed by the clerk.

Rule 5B

ELECTRONIC FILING, SIGNING, OR VERIFICATION

Any court governed by these rules may, by local rule, allow documents to be filed, signed, and verified by registered users of an E-filing system. Any local rule that allows documents to be E-filed may also allow such documents to be

E-served. Pleadings and other documents filed or served electronically under such local rule shall be considered the same as written documents filed or served by conventional means. The following definitions shall apply herein:

(a) "E-file" or "E-filing" means the proper electronic transmission of original documents to and from the court for the purposes of E-filing using the court's E-filing system.

(b) "E-Filer" means a registered user who e-files a document.

(c) "E-Filing system" means a system adopted by local rule of any Circuit, Chancery, Criminal, Probate, Juvenile or General Sessions Court Clerk that allows for the E-filing of documents and is in compliance with the technological standards promulgated by the Tennessee Supreme Court.

(d) "E-service" or "E-served" means the automatically generated electronic transmission to all participants in a case who are registered users, by and through the E-filing system, of (i) a notice of the filing of a document with a copy of the document attached, (ii) a notice of the filing of a document with a hyperlink to the document, or (iii) a notice of the filing of a document and the document can be accessed by the registered user in the E-filing system.

(e) A "registered user" is a person who has properly registered with and has been authorized by a court system administrator to use an E-filing system for the E-filing of documents in accordance with the requirements of a local rule of court. A registered user is deemed to have consented to E-service and is responsible for maintaining a valid and current e-mail address in the E-filing system. [As added by order entered December 14, 2009, effective July 1, 2010; amended by order dated January 16, 2020, effective July 1, 2020; amended by order dated January 16, 2020, effective July 1, 2020.]

Advisory Commission Comments [2010]. The courts in certain counties have expressed a desire to implement an electronic filing system. This rule permits trial courts, by local rule, to adopt such systems.

Electronic filing systems have also been implemented in all of the federal district courts (with the sole exception of the United States District Court for the Northern Mariana Islands) and in a number of states. Electronic filing offers numerous advantages over traditional "paper filing," including vastly increased public access to court documents and reduction of the time and expense incurred by litigants and court personnel in filing, storing, and retrieving documents.

The Commission envisions that, in the not too distant future, all of Tennessee's courts will adopt electronic case filing systems. In order to achieve statewide uniformity, the systems utilized throughout the state must comply with technological standards promulgated by the Supreme Court. Without such uniformity, the desired ease of access to data and cost efficiencies could not be achieved.

Advisory Commission Comments [2020]. Rule 5B is amended along with Rule 5.02 to provide for a means of service through a Court's e-filing system adopted in accordance with the first sentence of this rule. The existing Rule 5B provides for e-filing under applicable local rules, but does not provide for service to be made through an e-filing system. The 2020 amendment provides rules for service to be accomplished through an e-filing system. These definitions apply when service is made through an e-filing system under Rule 5.02.

Compiler's Notes. The enactment of this rule, as promulgated and adopted by the Supreme Court in its order dated December 14, 2009, was ratified and approved by 2010 Senate Resolution 180 and 2010 House Resolution 239. The order promulgating the amendment of this rule provided that it take effect July 1, 2010.

The amendment of Rule 5B, which amended the introductory language and added subdivisions (a) through (e) and added the [2020] Advisory Comments, as promulgated and adopted by the Supreme Court in its order dated January 16, 2020, was ratified and approved by 2020 House Resolution 236 and Senate Resolution 141. The order promulgating the amendment of the introductory language and added subdivisions (a) through (e) and the addition of the [2020] Advisory Comments, provided that it take effect July 1, 2020.

RULE 6

TIME

6.01. Computation. In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the date of the act, event or default after which the designated period of time begins to run is not to be included. The last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a legal holiday as defined in Tenn. Code Ann. § 15-1-101, or, when the act to be done is the filing of a paper in court, a day on which the office of the court clerk is closed or on which weather or other conditions have made the office of the court clerk inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than eleven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. [As amended by order entered January 21, 1988, effective August 1, 1988; by order entered January 26, 1999, effective July 1, 1999; by order entered December 10, 2003, effective July 1, 2004; and by order entered December 21, 2010, effective July 1, 2011.]

Advisory Commission Comments [2011]. Rule 6.01 is amended to define "legal holiday" by reference to statute, Tenn. Code Ann. § 15-1-101. The status of a day as a legal holiday is statutory; thus, for the purpose of filing papers in court, it does not depend on whether the clerk's office is open for business. For example, state offices might be open on Columbus Day, pursuant to the governor's authority under Tenn. Code Ann. § 4-4-105(a)(3) to substitute the day after Thanksgiving for the Columbus Day holiday; in such circumstances, however, Columbus Day is still a "legal holiday" for purposes of computing time periods under the rule.

Rule 6.01 also is amended to add a reference to days on which the office of the court clerk is closed.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order filed December 21, 2010, was ratified and approved by 2011 House Resolution 34 and Senate Resolution 12. The order promulgating the amendment of this rule provided that it take effect July 1, 2011.

NOTES TO DECISIONS

Analysis

1. Waiver of Objection to Defective Notice.
2. Summary Judgment.

1. Waiver of Objection to Defective Notice.

Although the Department of Health failed to provide proper notice to the physician of an expert's deposition testimony under Tenn. R. Civ. P. 32.04(1), 6.01, and 6.05, the physician did not have the option to wait until the contested case hearing to object; instead of promptly asserting a challenge to the admissibility of the deposition, the physician expressed no objection for seven weeks. By failing to promptly object in writing, the physician waived his right to object to the defective notice of the deposition and the admissibility of that deposition at the final hearing to revoke the physician's medical license. Roy v. Tenn. Bd. of Med. Examiners, 310 S.W.3d 360, 2009 Tenn. App. LEXIS 484 (Tenn. Ct. App. July 24, 2009), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 199 (Tenn. Feb. 22, 2010).

2. Summary Judgment.

Trial court erred in finding that plaintiff's response to defendant's motion for summary judgment was untimely filed because it was timely filed; plaintiff served and filed her response exactly five days before the hearing, which was not later than five days under Tenn. R. Civ. P. 56.04, and the result was the same if the time was calculated by counting forward beginning the calculation on the date the response was filed and applying the rules of calculation set out in Tenn. R. Civ. P. 6.01. Cartwright v. Tenn. Farmers Mut. Ins. Co., 453 S.W.3d 910, 2014 Tenn. App. LEXIS 504 (Tenn. Ct. App. Aug. 21, 2014), appeal denied, Cartwright v. Tenn. Farmers Mut. Ins. Co., — S.W.3d —, 2015 Tenn. LEXIS 45 (Tenn. Jan. 15, 2015).

6.02. Enlargement. When by statute or by these rules or by a notice given thereunder or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion, (1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done, where the failure to act was the result of excusable neglect, but it may not extend the time for taking any action under Rules 50.02, 59.01, 59.03 or 59.04, except to the extent and under the conditions stated in those rules. This subsection shall not apply to the time provided in Tennessee Rule of Appellate Procedure 4(a) for filing a notice of appeal, nor to the time provided in Tennessee Rule of Appellate Procedure 24(b) and (c) for filing a transcript or statement of evidence. [As amended by order entered January 23, 2001, effective July 1, 2001.]

NOTES TO DECISIONS

ANALYSIS

1. Motion to Substitute Parties.
2. Motion to Enlarge Time.

1. Motion to Substitute Parties.

Denial of motions filed by the administrator ad litem for the estate of a third-party plaintiff was appropriate because, after a suggestion of death was properly served, the administrator ad litem inexcusably failed to move to substitute and failed to move for an enlargement of time to substitute. Likewise, the administrator ad litem failed to timely file a motion for reconsideration or to alter or amend. Pearson v. Koczera, — S.W.3d —, 2018 Tenn. App. LEXIS 246 (Tenn. Ct. App. May 7, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 619 (Tenn. Sept. 17, 2018), cert. denied, Dry v. Steele, 203 L. Ed. 2d 205, 139 S. Ct. 1205, — U.S. —, 2019 U.S. LEXIS 1346 (U.S. Feb. 19, 2019).

When a trial court held that the decedent's claims passed automatically on the decedent's death from unrelated causes after the commencement of a medical malpractice action to the surviving spouse without need to substitute parties, remand was necessary because the court erroneously ruled—as the co-executors of the estate were the appropriate parties to revive the action—and was to determine whether the response to the health care providers' motion to dismiss was to be construed as a motion for enlargement of time to substitute parties. Joshlin v. Halford, — S.W.3d —, 2019 Tenn. App. LEXIS 537 (Tenn. Ct. App. Nov. 6, 2019).

When a trial court held that the decedent's claims passed automatically on the decedent's death from unrelated causes after the commencement of a medical malpractice action to the surviving spouse without need to substitute parties, remand was necessary because the court erroneously ruled—as the co-executors of the estate were the appropriate parties to revive the action—and was to determine whether the response to the health care providers' motion to dismiss was to be construed as a motion for enlargement of time to substitute parties. Joshlin v. Halford, — S.W.3d —, 2019 Tenn. App. LEXIS 537 (Tenn. Ct. App. Nov. 6, 2019).

Trial court did not abuse its discretion in denying a motion to dismiss when a substitute plaintiff was not timely named following the death of original plaintiff and in granting a late-filed motion for substitution on the basis of excusable neglect because there was a delay in the issuance of a death certificate, there were procedural delays in the appointment of the executor, no prejudice resulted, the delay had little effect on the litigation as the original trial judge entered an order of recusal, and there was no allegation of bad faith. Valentine v. Holt, — S.W.3d —, 2020 Tenn. App. LEXIS 25 (Tenn. Ct. App. Jan. 22, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 328 (Tenn. June 3, 2020).

Trial court properly dismissed plaintiff's personal injury lawsuit and denied plaintiff's relief based on excusable neglect; plaintiff filed suit against the former personal representative of defendant, after the estate was opened, administered, and closed. The trial court found that the original lawsuit, while timely filed, was a nullity because the estate had been closed. The failure to strictly follow the statute by naming the personal representative was fatal to the survivability of the action. Algee v. Craig, — S.W.3d —, 2020 Tenn. App. LEXIS 137 (Tenn. Ct. App. Mar. 31, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 329 (Tenn. July 23, 2020).

2. Motion to Enlarge Time.

Administrator ad litem for the estate of a third-party plaintiff was not entitled to any

relief based on a claim of excusable negligence because the conduct of the administrator was not excusable as the administrator failed to take any action to timely preserve a cause of action despite having actual knowledge of a suggestion of death, actual knowledge of the filing of a motion to dismiss for failure to substitute and motion for judgment on the pleadings, and actual notice of a hearing on the pending motions. Pearson v. Koczera, — S.W.3d —, 2018 Tenn. App. LEXIS 246 (Tenn. Ct. App. May 7, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 619 (Tenn. Sept. 17, 2018), cert. denied, Dry v. Steele, 203 L. Ed. 2d 205, 139 S. Ct. 1205, — U.S. —, 2019 U.S. LEXIS 1346 (U.S. Feb. 19, 2019).

Circuit court properly denied a motion filed by an injured driver and his wife (the plaintiffs) to enlarge the time frame for obtaining new service of process of the defendant driver, and dismissed their automobile negligence suit because they failed to timely serve the defendant with process, acknowledged that their counsel's failure to investigate the lack of personal service sooner was negligent, and failed to follow up with the process server or the trial court clerk to determine whether they needed to effectuate alias service despite having almost 10 months to do so. Webster v. Isaacs, — S.W.3d —, 2019 Tenn. App. LEXIS 404 (Tenn. Ct. App. Aug. 21, 2019).

6.03. Unaffected by Expiration of Term — Chambers Orders. (1) The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it.

(2) The judge or chancellor may make or direct in chambers any order, rule, judgment or decree in any civil action, except the conducting of a trial when a jury is required and of the hearing and determination by final decree of any contested divorce case unless consented to by the parties. [As amended July 1, 1979.]

6.04. For Motions — Affidavits. (1) A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five (5) days before the time specified for the hearing, unless a specific period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application.

(2) When a motion is supported by affidavit the affidavit shall be served with the motion; except as otherwise provided in Rule 56.04 and Rule 59.03, opposing affidavits may be served not later than one (1) day before the hearing, unless the court permits them to be served at some other time. [As amended by order entered January 26, 1999, effective July 1, 1999 and by order entered January 28, 2000, effective July 1, 2000.]

6.05. Additional Time after Service by Mail. Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon such party and the notice or paper is served upon such party by mail three (3) days shall be added to the prescribed period.

Advisory Commission Comments. If a clerk's office is closed all day on a date other than a Saturday, Sunday, or legal holiday, a lawyer would be unable to gain entrance to file a document on the "deadline." Consequently the [1988] amendment extends the deadline to the next business day that the courthouse is open. [1988.]

6.01: By statute, "The time within which any act provided by law is to be done, shall be computed by excluding the first day and including the last, unless the last day is a Saturday, a Sunday, or a legal holiday, and then it shall also be excluded." Tenn. Code Ann. § 1-3-102.

Rule 6.01 adopts the same formula as that provided by the foregoing statute, with two additions: (1) If the last day of a period falls on a Saturday, Sunday, or legal holiday, the period

runs until the end of the next day which is not a Saturday, Sunday or legal holiday. Thus, if the period would normally expire, for example, on November 9, but November 9 fell on a Saturday, November 10 was a Sunday, and November 11 was a legal holiday, the Rule makes it clear that the period would run until the end of the day, Tuesday, November 12.

(2) When the prescribed period is less than eleven days, intermediate Saturdays, Sundays and holidays are excluded. When the time allowed is so short, the party limited by the time should not be further handicapped by losing one or more days because normal business operations are suspended by Saturday, Sunday, or legal holiday observances.

6.02: Rule 6.02 establishes a single standard for the courts to follow in granting enlargement of the time periods within which various acts must be done. Extension is to be allowed liberally when request is made before the original period or any previous extension thereof has expired. Extension is to be allowed, even after expiration of the original period or any previous extension thereof, where the failure to take timely action was due to excusable neglect. The power to enlarge the time under this Rule does not apply to time periods fixed by Rule 50.02 (Party whose motion for directed verdict made at close of all the evidence was not granted, may, within 30 days after entry of judgment or discharge of jury without a verdict, move for judgment in accordance with the party's motion for directed verdict); Rule 59.01 (Motion for new trial must be filed and served within 30 days after entry of judgment); Rule 59.03 (Motion to alter or amend a judgment must be filed within 30 days after entry of judgment); or Rule 59.04 (Court on its own initiative may alter or amend judgment or order a new trial within 30 days after judgment).

6.03: The time within which an act is required to be done or a proceeding taken is fixed to allow the parties a reasonable time in which to act. To allow this reasonable time to be affected or limited by the continuance or expiration of a term of court is to introduce a variable which may make the time allowed in a particular case unreasonable and thus work a hardship upon a party. Accordingly, this Rule eliminates court terms as a factor in computing allowable time periods.

6.04: Rule 6.04 fixes five days for all motions requiring notice, unless a different time is fixed for a particular motion by these Rules or by the court. The exception referred to in paragraph (2) of Rule 6.04 allows a party 10 days to file opposing affidavits in response to affidavits supporting a motion for a new trial.

6.05: Rule 6.05 is included to guard against injustice caused by loss of time required for notice to be delivered through the mails.

Advisory Commission Comments [1999].

6.01. The expansion of seven to eleven days in the final sentence of Rule 6.01 is to eliminate confusion over whether the mailing of a five day notice creates an eight day period because of Rule 6.05. No longer will that be an issue, as any period less than eleven days requires exclusion of weekends and holidays.

6.04. Rule 6.04(2) is amended to make clear that summary judgment affidavits are governed by Rule 56.04, which contains a different service deadline.

Advisory Commission Comments [2000]. The amendment to Rule 6.04(2) is needed to conform to the renumbering of paragraphs in Rule 59.

Advisory Commission Comments [2001]. This technical amendment to Rule 6.02 deletes references to repealed statutes and substitutes references to the Rules of Appellate Procedure.

Advisory Commission Comments [2004]. The second sentence of Rule 6.01 is altered to adopt federal language covering snow days and the like which make a clerk's office "inaccessible" for filing. Earlier language required that the office be "closed."

Compiler's Notes. This rule may supersede T.C.A. § 1-3-102 in part.

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated December 10, 2003, was ratified and approved by 2004 House Resolution 233 and Senate Resolution 115. The order promulgating the amendment of this rule provided that it take effect July 1, 2004.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 153, 359.

Pritchard on Wills and Administration of Estates (4th ed., Phillips and Robinson), §§ 78, 702.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-6-1, 1-6-2, 1-7-5.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 30, 87; 3 Tenn. Juris., Appearances, § 7; 15 Tenn. Juris., Injunctions, §§ 45, 49; 16 Tenn. Juris., Judges, § 14.

Law Reviews. A Survey of Civil Procedure in Tennessee — 1977, IV. Pretrial Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 308.

Amended Rules (Donald F. Paine), 36 No. 6 Tenn. B.J. 13 (2000).

Computing Limitations of Actions in Tennessee (Sean M. Haynes), 31 No. 5 Tenn. B.J. 28 (1995).

New Rules! (Donald F. Paine), 35 No. 8 Tenn. B.J. 32 (1999).

The Law of Continuances (Donald F. Paine), 36 No. 2 Tenn. B.J. 19 (2000).

NOTES TO DECISIONS

Analysis

1. Construction.
2. Applicability.
3. Late Affidavit.
4. "Notice or Other Paper."
5. Prejudice.
6. Excusable Neglect.
7. Waiver of Objection to Defective Notice.

1. Construction.

The word "shall" as used in Tenn. R. Civ. P. 6, should be construed as a mandatory requirement, that is, an affidavit filed in support of a motion for summary judgment must be filed with the motion. Union Livestock Yards, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 552 S.W.2d 392, 1976 Tenn. App. LEXIS 210 (Tenn. Ct. App. 1976).

Since excusable neglect must be proved, not merely alleged, a motion seeking an enlargement of time filed after an applicable deadline has expired should be accompanied by an affidavit stating the circumstances that prevented the moving party from acting within the required time. Hickman v. Tenn. Bd. of Paroles, 78 S.W.3d 285, 2001 Tenn. App. LEXIS 773 (Tenn. Ct. App. 2001).

Because the time for filing a motion to alter or amend is not based upon the date of "service of a notice or other paper," Tenn. R. Civ. P. 6.05 does not apply to the filing of a Tenn. R. Civ. P. 59 motion; if that were not the case, a literal reading of Tenn. R. Civ. P. 6.05 and 58 would result in two separate periods being added to the normal 30-day period for filing a Tenn. R. Civ. P. 59 motion or a notice of appeal, Tenn. R. Civ. P. 58 would grant up to an additional five days and Tenn. R. Civ. P. 6.05 would grant an additional three days (in cases in which the clerk mailed the requested copy of the judgment), for a total of up to eight additional days. This result never was intended by the rules commission, and it certainly was not intended by the supreme court in its adoption of the amendments to Tenn. R. Civ. P. 58. Binkley v. Medling, 117 S.W.3d 252, 2003 Tenn. LEXIS 850 (Tenn. 2003), rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 1262 (Tenn. 2003).

In accordance with Tenn. R. Civ. P. 6.01, the intermediate Saturday and Sunday are excluded from the calculation of time because the period of time prescribed by the rule is less than 11 days. Kenyon v. Handal, 122 S.W.3d 743, 2003 Tenn. App. LEXIS 196 (Tenn. Ct. App. 2003), appeal denied, Kenyon v. Handal, M.D., — S.W.3d —, 2003 Tenn. LEXIS 906 (Tenn. 2003).

Because plaintiff electronically filed and served her response to defendant's motion for summary judgment three days did not have to be added to the computation of time; the clear intent of the rule is not to shorten a party's response time but rather to give a party additional time to respond under certain circumstances. Cartwright v. Tenn. Farmers Mut. Ins. Co., 453 S.W.3d 910, 2014 Tenn. App. LEXIS 504 (Tenn. Ct. App. Aug. 21, 2014), appeal denied, Cartwright v. Tenn. Farmers Mut. Ins. Co., — S.W.3d —, 2015 Tenn. LEXIS 45 (Tenn. Jan. 15, 2015).

2. Applicability.

Tenn. R. Civ. P. 6 extends the time period when a party is required to do some act after service of a notice or other paper; if the act is predicated on some other event, like the entry of a final judgment or order, then the rule does not apply. Begley Lumber Co. v. Trammell, 15 S.W.3d 455, 1999 Tenn. App. LEXIS 577 (Tenn. Ct. App. 1999).

Where, 33 days after entry of the trial court's judgment, appellant contemnor filed a motion to alter or amend, that motion was untimely under Tenn. R. Civ. P. 58 and was therefore insufficient to toll commencement of the 30-day period for filing a notice of appeal, because Tenn. R. Civ. P. 6.05 did not apply to the mailing of a copy of entry of judgment requested pursuant to Tenn. R. Civ. P. 58; consequently, the "three-day rule" contained in Tenn. R. Civ. P. 6.05, and relied upon by the contemnor, did not apply because the contemnor failed to carry his burden of proving his compliance with Tenn. R. Civ. P. 58, i.e. he failed to prove the date on which the clerk mailed the notice of entry of the judgment. Binkley v. Medling, 117 S.W.3d 252, 2003 Tenn. LEXIS 850 (Tenn. 2003), rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 1262 (Tenn. 2003).

Tenn. R. Civ. P. 6.01 did not apply to the computation of time of an appeal from a general sessions court because the Tennessee rules of civil procedure did not apply to the action of general sessions courts; the issue of computation was controlled by the general law. State v. Smith, 278 S.W.3d 325, 2008 Tenn. Crim. App. LEXIS 273 (Tenn. Crim. App. Apr. 11, 2008).

3. Late Affidavit.

Where an affidavit filed in support of a motion for summary judgment was not filed with the motion as required by Tenn. R. Civ. P. 6, but the opposing party was not prejudiced by the late affidavit, the error was harmless. Union Livestock Yards, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 552 S.W.2d 392, 1976 Tenn. App. LEXIS 210 (Tenn. Ct. App. 1976).

Trial courts should employ the standards in Tenn. R. Civ. P. 6.02 to determine whether a plaintiff is entitled to an enlargement of time in which to file an affidavit in a summary judgment motion. Kenyon v. Handal, 122 S.W.3d 743, 2003 Tenn. App. LEXIS 196 (Tenn. Ct.

App. 2003), appeal denied, Kenyon v. Handal, M.D., — S.W.3d —, 2003 Tenn. LEXIS 906 (Tenn. 2003).

Tenn. R. Civ. P. 6.02 distinguishes between requests for enlargement made before the expiration of the specified time period and those made after the original time period has elapsed; if the request is made after the original time has elapsed, the party requesting the enlargement must demonstrate that its failure to meet the deadline was due to excusable neglect and that the opposing party has not been prejudiced by the delay. Kenyon v. Handal, 122 S.W.3d 743, 2003 Tenn. App. LEXIS 196 (Tenn. Ct. App. 2003), appeal denied, Kenyon v. Handal, M.D., — S.W.3d —, 2003 Tenn. LEXIS 906 (Tenn. 2003).

The party's reason for failing to meet the filling deadline may be the single most important of the four factors and the trial court should examine the proffered reason to determine: (1) Whether the circumstances involved were under a party's own control; and (2) Whether the party was paying appropriate attention to the matter in light of the surrounding circumstances. Thus, granting relief from filing deadlines under Tenn. R. Civ. P. 6.02 has been characterized as "repair work when lawyers have good reasons." Kenyon v. Handal, 122 S.W.3d 743, 2003 Tenn. App. LEXIS 196 (Tenn. Ct. App. 2003), appeal denied, Kenyon v. Handal, M.D., — S.W.3d —, 2003 Tenn. LEXIS 906 (Tenn. 2003)

The Tennessee Rules of Civil Procedure contain deadlines for filing affidavits opposing a motion for summary judgment. Tenn. R. Civ. P. 56.04 requires these affidavits, and presumably a response to a motion, to be filed no later than five days before the hearing. The 5-day deadline in Tenn. R. Civ. P. 56.04 is an exception to Tenn. R. Civ. P. 6.04(2) that otherwise permits opposing affidavits to be served no later than 1 day before the hearing. Kenyon v. Handal, 122 S.W.3d 743, 2003 Tenn. App. LEXIS 196 (Tenn. Ct. App. 2003), appeal denied, Kenyon v. Handal, M.D., — S.W.3d —, 2003 Tenn. LEXIS 906 (Tenn. 2003).

4. "Notice or Other Paper."

The provisions of Tenn. R. Civ. P. 6 may not be used to extend the time for filing a petition to review a final order of the department of safety because such an order cannot be considered "notice or other paper" as provided for in subsection 6.05. Cheairs v. Lawson, 815 S.W.2d 533, 1991 Tenn. App. LEXIS 319 (Tenn. Ct. App. 1991).

5. Prejudice.

Trial courts' grant of plaintiffs' motions for an extension of time and for substitution of estate of defendant as a party was a valid exercise of procedural judicial discretion; the defendant had failed to establish prejudice as a result of plaintiffs' delay in moving for the substitution of parties within 90 days of the suggestion of death, and the defense was well aware of the plaintiffs' suit, an answer had been filed and discovery between the parties had begun, and at trial liability was admitted. Douglas v. Estate of Robertson, 876 S.W.2d 95, 1994 Tenn. LEXIS 91 (Tenn. 1994).

6. Excusable Neglect.

Concept of excusable neglect is broad enough to apply to simple, faultless omission and, more commonly, to omissions caused by carelessness. Accordingly, the concept of excusable neglect can be used to excuse a failure to comply with a filing deadline that is attributable to a filer's negligence; however, not all negligent acts should be considered excusable. Kenyon v. Handal, 122 S.W.3d 743, 2003 Tenn. App. LEXIS 196 (Tenn. Ct. App. 2003), appeal denied, Kenyon v. Handal, M.D., — S.W.3d —, 2003 Tenn. LEXIS 906 (Tenn. 2003).

The process for determining whether a failure to meet a deadline has been caused by excusable neglect is as follows: finding whether neglect is excusable is an equitable determination "taking account of all relevant circumstances surrounding the party's omission." The relevant circumstances envelop the big picture of both causes and effects, including: (1) The danger of prejudice to the party opposing the late filing; (2) The length of the delay and its potential impact on proceedings; (3) The reason why the filing was late and whether that reason or reasons were within the filer's reasonable control; and (4) The filer's good or bad faith. These circumstances must be weighed both with and against each other because, if considered separately, they may not all point in the same direction in a particular case. Kenyon v. Handal, 122 S.W.3d 743, 2003 Tenn. App. LEXIS 196 (Tenn. Ct. App. 2003), appeal denied, Kenyon v. Handal, M.D., — S.W.3d —, 2003 Tenn. LEXIS 906 (Tenn. 2003).

Trial court did not err in denying a patient's motion for enlargement of time in a medical malpractice action because the court found no excusable neglect; the patient had not submitted her expert's affidavit by the court's deadline which had been extended once and the court stated that it would not be extended again, the doctor's ability to prepare for trial had been impaired by the delays, and there was no good reason why the patient's prior medical records had not been obtained sooner. Williams v. Baptist Mem'l Hosp., 193 S.W.3d 545, 2006 Tenn. LEXIS 310 (Tenn. 2006).

Supreme Court of Tennessee adopts the U.S. Supreme Court's framework for deciding the existence of excusable neglect: (1) The risk of prejudice to parties opposing the late filing; (2) The delay and its potential impact on proceedings; (3) The reasons why the filings were late and whether the reasons were within the filer's reasonable control; and (4) The good or bad

faith of the filer. Williams v. Baptist Mem'l Hosp., 193 S.W.3d 545, 2006 Tenn. LEXIS 310 (Tenn. 2006).

7. Waiver of Objection to Defective Notice.

Although the Department of Health failed to provide proper notice to the physician of an expert's deposition testimony under Tenn. R. Civ. P. 32.04(1), 6.01, and 6.05, the physician did not have the option to wait until the contested case hearing to object; instead of promptly asserting a challenge to the admissibility of the deposition, the physician expressed no objection for seven weeks. By failing to promptly object in writing, the physician waived his right to object to the defective notice of the deposition and the admissibility of that deposition at the final hearing to revoke the physician's medical license. Roy v. Tenn. Bd. of Med. Examiners, 310 S.W.3d 360, 2009 Tenn. App. LEXIS 484 (Tenn. Ct. App. July 24, 2009), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 199 (Tenn. Feb. 22, 2010).

RULE 7

PLEADINGS ALLOWED; FORM OF MOTIONS

7.01. Pleadings. There shall be a complaint and an answer; and there shall be a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summonsed under the provisions of Rule 14; and there shall be a third-party answer, if a third-party complaint is served. No other pleading shall be allowed, except that the court may order a reply to an answer or to a third-party answer. [As amended by order entered January 26, 1999, effective July 1, 1999.]

Advisory Commission Comments. 7.01: Rule 7.01 adopts the federal practice of cutting off pleadings after complaint and answer, except that a reply or answer by plaintiff is allowed in cases of counterclaim and cross-claim, and a third-party answer is allowed where a third-party complaint is filed.

NOTES TO DECISIONS

1. Pleading.

Trial court could consider codefendant's answer in ruling on defendant's motion to dismiss as both the complaint and answer were considered pleadings. Deja Vu of Nashville, Inc. v. Brasfield & Gorrie, LLC, — S.W.3d —, 2019 Tenn. App. LEXIS 76 (Tenn. Ct. App. Feb. 8, 2019).

7.02. Motions and Other Papers. (1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.

(2) The rules applicable to captions, signing, and other matters form of pleadings apply to all motions and other papers provided for by these rules.

Advisory Commission Comments. 7.02: Because of the importance of motions in the procedures set out in these Rules, it is desirable that motions, other than those made at a hearing or trial and which may not have been anticipated in time to put them in writing, be made in writing.

Advisory Commission Comments [2012]. 7.02: Effective July 1, 2012, the Supreme Court adopted Tenn. Sup. Ct. R. 10B, governing motions seeking disqualification or recusal of a judge. Section 1 of Rule 10B provides a procedural framework for determining when the judge of a court of record should not preside over the case. In summary, Section 1 provides for the filing of a motion for disqualification or recusal and also provides for the judge's prompt ruling on the motion. Section 2 of Rule 10B governs appeals from the denial of such motions, and it provides that such appeals may be effected either by filing an interlocutory appeal as of right authorized by the rule or by raising the disqualification or recusal issue in an appeal as of right at the conclusion of the case.

Under Section 2.01, those two methods of appeal are "the *exclusive* methods for seeking appellate review of any issue concerning the trial court's ruling on a motion filed pursuant to this Rule." (Emphasis added.) As a result, "neither Tenn. R. App. P. 9 nor Tenn. R. App. P. 10 may be used to seek an interlocutory or extraordinary appeal by permission concerning the judge's ruling on such a motion." Tenn. Sup. Ct. R. 10B, Explanatory Comment to Section 2.

Attorneys or self-represented litigants should consult Tenn. Sup. Ct. R. 10B concerning the procedure for filing motions seeking the disqualification or recusal of a judge and for appealing from a denial of such a motion.

Compiler's Notes. The amendment of the 2012 Advisory Commission Comments for § 7.02, as promulgated and adopted by the Supreme Court in its order dated January 13, 2012, was ratified and approved by 2012 House Resolution 193 and Senate Resolution 78. The order promulgating the deletion of the comments provided that the amendment take effect July 1, 2012.

NOTES TO DECISIONS

1. In General.

Trial court properly declined to address appellant's constitutional issue because appellant did not raise the issue until appellant filed a reply brief on appellant's motion for relief from judgment. Gentry v. Casada, — S.W.3d —, 2020 Tenn. App. LEXIS 416 (Tenn. Ct. App. Sept. 17, 2020).

7.03. Demurrers, Pleas, etc., Abolished. Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used.

Advisory Commission Comments. 7.03: Rule 7.03 is a corollary to the simplification of a pleading provided in Rule 7.01. The function of the demurrer, plea, etc., can be served by one of the pleadings allowed under Rule 7.01 or by motion.

Advisory Commission Comments [2013]. The 2013 Advisory Commission Comment to Tenn. R. Civ. P. 3 provides guidance for determining whether a statutorily authorized "petition" is considered a "complaint" or a "motion" for purposes of the Rules of Civil Procedure.

Compiler's Notes. The amendment of Rule 7, which added the 2013 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 18, 2012, was ratified and approved by House Resolution 36 and Senate Resolution 12. The order promulgating the addition of the 2013 Advisory Commission Comments provided that it take effect July 1, 2013.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 161-163, 187, 659.

Pritchard on Wills and Administration of Estates (4th ed., Phillips and Robinson), §§ 359, 745.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-7-1, 1-7-3, 1-10.01-1, 1-13.02.

Tennessee Jurisprudence. 1 Tenn. Juris., Abatement, Survival and Revival, §§ 2, 4, 16, 18; 1 Tenn. Juris., Accord and Satisfaction, §§ 6, 7; 1 Tenn. Juris., Actions, § 30; 1 Tenn. Juris., Amendments, §§ 8, 17; 1 Tenn. Juris., Alteration of Instruments, §§ 17, 22; 2 Tenn. Juris., Appeal and Error, §§ 28, 30, 87, 96, 118, 131-135, 216, 224, 232, 236, 241, 246-251; 3 Tenn. Juris., Appearances, §§ 6, 11; 3 Tenn. Juris., Attachment and Garnishment, §§ 77, 170; 4 Tenn. Juris., Automobiles, § 36; 8 Tenn. Juris., Costs, § 62; 8 Tenn. Juris., Cotenancy, § 8; 9 Tenn. Juris., Demurrers and Motions to Dismiss, §§ 1, 2; 9 Tenn. Juris., Dismissal, Discontinuance and Nonsuit, § 7; 10 Tenn. Juris., Ejectment, §§ 17, 18, 25; 11 Tenn. Juris., Equity, §§ 48, 50; 11 Tenn. Juris., Evidence, § 49; 15 Tenn. Juris., Injunctions, §§ 16, 30, 43; 18 Tenn. Juris., Lost Instruments and Records, § 4; 18 Tenn. Juris., Mandamus, § 25; 20 Tenn. Juris., New Trials, § 27; 20 Tenn. Juris., Pleading, §§ 7, 15, 16; 22 Tenn. Juris., Res Judicata, § 40; 24 Tenn. Juris., Usury, § 24.

Law Reviews. A Survey of Civil Procedure in Tennessee — 1977, IV. Pretrial Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 308.

Judicial Notice in Tennessee (Robert Banks, Jr. and Elizabeth T. Collins), 21 Mem. St. U.L. Rev. 431 (1991).

What's happening with e-filing in Tennessee? (Judge William C. Koch Jr.), 37 No. 3 Tenn. B.J. 26 (2001).

NOTES TO DECISIONS

ANALYSIS

1. Procedure.
2. Special Plea.
3. Particularity of Pleading.

1. Procedure.

Trial court did not abuse its discretion by dismissing pro se inmate's divorce petition for failure to prosecute the claim without having given him prior notice of the dismissal, where

he knew that the original summons had been returned unserved and permitted the case to languish for seven months without making any effort to see to it that his wife was properly served; moreover, his position on appeal was undermined by his failure to avail himself of the post-judgment remedies available to him through a Tenn. R. Civ. P. 59.04 motion to alter or amend the trial court's judgment within 30 days after entry explaining his reasons for failing to serve his wife or otherwise prosecute his case, or Tenn. R. Civ. P. 60.02 arguing mistake, inadvertence, surprise, or excusable neglect. Hessmer v. Hessmer, 138 S.W.3d 901, 2003 Tenn. App. LEXIS 346 (Tenn. Ct. App. 2003).

2. Special Plea.

Under Tenn. R. Civ. P. 7 the only authorized pleadings are a complaint and an answer, but a "special plea" alleging a prior release from liability and filed with the answer, although not a permissible pleading, could be treated as a part of the answer, thus raising the issue of the effect of the release. Layhew v. Dixon, 527 S.W.2d 739, 1975 Tenn. LEXIS 647 (Tenn. 1975).

3. Particularity of Pleading.

Tenn. R. Civ. P. 7.02 and 9.02, requiring particularity of pleading, are mandatory as a prerequisite to invoking the jurisdiction of the trial judge to exercise his discretion in granting or refusing the extraordinary relief of disturbing the finality of a judgment on any of the grounds authorized in Tenn. R. Civ. P. 60.02(1). Hopkins v. Hopkins, 572 S.W.2d 639, 1978 Tenn. LEXIS 655 (Tenn. 1978).

The trial court did not err in denying relief under Tenn. R. Civ. P. 60.02 to correct a final divorce decree which did not mention an award to the wife of the husband's interest in certain real and personal property which the wife claimed she received at the divorce hearing wherein the pleading filed and at the hearing thereon, the wife failed to explain or justify the failure to include in the final decree presented 16 days after the divorce hearing, vestiture of the property alleged to have been awarded to her, and the failure to discover that omission within 30 days following entry of the decree, during which time the trial judge retained control. Hopkins v. Hopkins, 572 S.W.2d 639, 1978 Tenn. LEXIS 655 (Tenn. 1978).

Party's articulation of party's defense in a memorandum of law accompanying a motion did not state with the required particularity the grounds for the motion. Pendleton v. Mills, 73 S.W.3d 115, 2001 Tenn. App. LEXIS 689 (Tenn. Ct. App. 2001).

Articulating a defense in a memorandum accompanying a motion does not amount to compliance with Tenn. R. Civ. P. 7.02(1), requiring that a motion state with particularity the grounds therefor. Hickman v. Tenn. Bd. of Paroles, 78 S.W.3d 285, 2001 Tenn. App. LEXIS 773 (Tenn. Ct. App. 2001).

Trial court erroneously granted an insurer's motion to dismiss in a contract action brought by a decedent's survivor; the motion on its face did not comply with civil procedure rules, as it did not state, with particularity, the motion's grounds. Finchum v. Ace, USA, 156 S.W.3d 536, 2004 Tenn. App. LEXIS 538 (Tenn. Ct. App. 2004), review or rehearing denied, Finchum v. ACE, USA, — S.W.3d —, 2005 Tenn. LEXIS 68 (Tenn. 2005).

RULE 8

GENERAL RULES OF PLEADING

8.01. Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain: (1) a short and plain statement of the claim showing that the pleader is entitled to relief; and (2) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

Law Reviews. Pleading Standard — Webb v. Nashville Area Habitat for Humanity, Inc.: The Enduring Myth of Conley in Tennessee State Courts, 43 U. Mem. L. Rev. 889 (2013).

NOTES TO DECISIONS

Analysis

1. Insufficient Claim.
2. Disciplinary Proceedings.

1. Insufficient Claim.

Employee's complaint against a university was insufficient to state a claim under Tennessee Public Protection Act (TPPA), T.C.A. § 50-1-304, because, although the employee alleged that he was demoted for refusing to participate in or for refusing to remain silent about illegal activities, the TPPA required a complete severance of employment to bring suit; the university had removed the employee as department head, but continued to employ him as a tenured

professor after removing him as department head. Harman v. Univ. of Tenn., 353 S.W.3d 734, 2011 Tenn. LEXIS 871 (Tenn. Sept. 16, 2011).

Partnerships' tort claims against a law firm, an attorney's professional limited liability company (PLLC), and a title company that sounded in tort were not sufficiently pleaded under Tenn. R. Civ. P. 8.01 or, where they sounded in fraud, were not pleaded with particularity as required by Tenn. R. Civ. P. 9.02. However, their complaint did sufficiently plead a cause of action for aiding and abetting the breach of a fiduciary duty against a title company, the law firm, an attorney, and the attorney's PLLC; to the extent that the alleged aiding and abetting was the result of a plan or design by them, conspiracy also may have lied for that tort, and the complaint sufficiently pleaded causes of action for misappropriation or conversion and conspiracy against the attorney, individually, but not against the law firm, the title company, or the attorney's PLLC due to lack of particularity in the pleadings as to those parties. PNC Multifamily Capital Institutional Fund XXVI Ltd. P'ship v. Bluff City Cmty. Dev. Corp., 387 S.W.3d 525, 2012 Tenn. App. LEXIS 288 (Tenn. Ct. App. May 4, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 680 (Tenn. Sept. 19, 2012).

Even if a pro se mortgagor's complaint averred causes of action other than fraud, the mortgagor failed to plead those claims in accordance with Tenn. R. Civ. P. 8.01 because, at most, the complaint showed that a mortgagee mistakenly foreclosed on the mortgagor's home while the property was part of a bankruptcy proceeding and then properly foreclosed on the property several months after the bankruptcy proceeding was dismissed; the facts relied on by the mortgagor did not show that he was entitled to any kind of relief. Diggs v. Lasalle Nat'l Bank Ass'n, 387 S.W.3d 559, 2012 Tenn. App. LEXIS 347 (Tenn. Ct. App. May 30, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 763 (Tenn. Oct. 17, 2012).

Health club member failed to demonstrate a claim for gross negligence against a health club because the member's complaint did not state a claim for gross negligence and that failure left only the member's claims of ordinary negligence. Boswell v. YMCA, — S.W.3d —, 2019 Tenn. App. LEXIS 160 (Tenn. Ct. App. Mar. 29, 2019).

Because an administrator was not entitled to relief which the administrator, nor the predecessor in interest to the administrator, did not request, reversal of the trial court's award of rent to the administrator was appropriate as the compliant was required to set forth a claim for relief that included (1) a short and plain statement of the claim showing that the pleader was entitled to relief; and (2) a demand for judgment for the relief which the pleader sought. Hunt v. Lowery, — S.W.3d —, 2019 Tenn. App. LEXIS 519 (Tenn. Ct. App. Oct. 24, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 184 (Tenn. Mar. 26, 2020).

2. Disciplinary Proceedings.

Though the Tennessee Rules of Civil Procedure generally apply in attorney disciplinary proceedings, it is only where the Tennessee Supreme Court Rules do not provide otherwise, and thus the disciplinary rule governs the content requirements for petitions in attorney disciplinary proceedings, not the civil procedure rule; because the petition for discipline filed in this case complied with the requirements of the disciplinary rule, the petition was not procedurally deficient. Mabry v. Bd. of Prof'l Responsibility, 458 S.W.3d 900, 2014 Tenn. LEXIS 1046 (Tenn. Dec. 30, 2014).

8.02. Defenses — Form of Denials. A party shall state in short and plain terms his or her defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If the party is without knowledge or information sufficient to form a belief as to the truth of an averment, he or she shall so state and this will have the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. [As amended by order filed January 13, 2012, effective July 1, 2012.]

Advisory Commission Comments [2012]. The change to Rule 8.02 eliminates the rarely used possibility of a responsive pleading that denies all averments, including denying the identities of the parties to a suit.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 13, 2012, was ratified and approved by 2012 House Resolution 193 and Senate Resolution 78. The order promulgating the amendment of this rule provided that it take effect July 1, 2012.

NOTES TO DECISIONS

1. Defense of Waiver.

Judgment of the trial court was reversed with respect to taxpayer's entitlement to an offset under the doctrine of equitable recoupment, because the elements of equitable recoupment were not pled or tried by implication in the trial court. Accordingly, the corporation waived the affirmative defense of equitable recoupment where it neither pled it in accordance with Tenn. R. Civ. P. 8.03 and where it was not tried by implication. ADT Sec. Servs. v. Johnson, 329 S.W.3d 769, 2009 Tenn. App. LEXIS 775 (Tenn. Ct. App. Nov. 19, 2009), rehearing denied, ADT Sec. Servs., Inc. v. Johnson, — S.W.3d —, 2009 Tenn. App. LEXIS 861 (Tenn. Ct. App. Dec. 16, 2009), appeal denied, ADT Sec. Servs. v. Johnson, — S.W.3d —, 2010 Tenn. LEXIS 579 (Tenn. June 17, 2010).

8.03. Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively facts in short and plain terms relied upon to constitute accord and satisfaction, arbitration and award, express assumption of risk, comparative fault (including the identity or description of any other alleged tortfeasors), discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, statute of repose, waiver, workers' compensation immunity, and any other matter constituting an affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court, if justice so requires, shall treat the pleading as if there had been a proper designation. [As amended by order adopted January 28, 1993, effective July 1, 1993; amended by order entered January 28, 2000, effective July 1, 2000; and amended by order filed December 29, 2005, effective July 1, 2006.]

NOTES TO DECISIONS

ANALYSIS

1. Failure to Raise Affirmative Defense.
2. Waiver of Defenses.
3. Defense of Waiver.
4. Failure to Brief.
5. Failure to Comply.
6. Affirmative Defense Properly Pled.
7. Bankrutpcy Discharge.

1. Failure to Raise Affirmative Defense.

In a medical negligence action, an expert's opinion as to a patient's possible contribution to the injury suffered during laser eye correction surgery was not admissible because defendant did not affirmatively plead comparative negligence under Tenn. R. Civ. P. 8.03. Dickson v. Kriger, 374 S.W.3d 405, 2012 Tenn. App. LEXIS 91 (Tenn. Ct. App. Feb. 10, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 414 (Tenn. June 19, 2012).

Because an insured failed to raise an argument in the trial court in response to the uninsured motorist carrier's motion for summary judgment, the insured was barred from arguing equitable estoppel on appeal; because the insured was barred from arguing the issue of equitable estoppel on appeal, any factual allegations solely regarding equitable estoppel wee not material to the issues properly raised in the case. Liput v. Grinder, 405 S.W.3d 664, 2013 Tenn. App. LEXIS 136 (Tenn. Ct. App. Feb. 27, 2013), appeal denied, — S.W.3d —, 2013 Tenn. LEXIS 615 (Tenn. July 11, 2013).

Appellant entered a general denial with her answer that was accepted by the trial court and was effective insofar as the trial court recognized her denial of the debt's validity, but she did not, however, assert a timely affirmative defense, and thus the trial court did not err by determining that appellant had waived any affirmative defense, including an assertion that the money transfers were gifts, by failing to plead it in her answer. Mclaughlin v. McLaughlin, — S.W.3d —, 2019 Tenn. App. LEXIS 521 (Tenn. Ct. App. Oct. 28, 2019).

Even if a board of zoning appeals failed to specifically raise the res judicata defense in its answer, the defense was tried with the property owner's express consent as the owner responded to the board's answer but did not argue that the board waived its res judicata defense. Accordingly, the trial court did not err in applying the doctrine of res judicata in the case. Hirt v. Metro. Bd. of Zoning Appeals, — S.W.3d —, 2020 Tenn. App. LEXIS 190 (Tenn. Ct. App. Apr. 27, 2020).

Trial court did not abuse its discretion in ordering a retrial a health care liability lawsuit alleging negligence in the medical treatment which a doctor provided to a patient before the patient died because the doctor shifted blame to a non-party when the doctor testified that the nurses at a hospital never notified the doctor of the patient's ongoing chest pain, but the doctor did not plead the comparative fault of any nurse in the doctor's answer. Kanipe v. Patel, — S.W.3d —, 2020 Tenn. App. LEXIS 433 (Tenn. Ct. App. Sept. 28, 2020).

2. Waiver of Defenses.

Employee's argument that the recruiting company's conduct relative to housing constituted fraud; however, the employee never pled fraud as an affirmative defense, as required by Tenn. R. Civ. P. 8.03; never raised fraud as a defense during trial; and the motion to amend the answer to include fraud as an affirmative defense was denied by the trial court. Therefore, that defense was waived. Vintage Health Res., Inc. v. Guiangan, 309 S.W.3d 448, 2009 Tenn. App. LEXIS 567 (Tenn. Ct. App. Aug. 25, 2009), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 188 (Tenn. Feb. 22, 2010).

Trial court did not abuse its discretion by denying an employer's motions to dismiss and to amend its answer because the running of the statute of repose in T.C.A. § 29-26-116(a)(3) did not deprive the trial court of subject matter jurisdiction, and the statute was not raised as an affirmative defense under Tenn. R. Civ. P. 8.03 at any time before trial. Pratcher v. Methodist Healthcare Memphis Hosps., 407 S.W.3d 727, 2013 Tenn. LEXIS 594 (Tenn. June 28, 2013).

Uninsured motorist carrier did not waive the affirmative defense of insufficient service of process because the carrier did not allege that it was not properly and timely served but simply argued that an insured could not impose liability against it; the insured could not claim that he was not aware that the alleged tortfeasor was not served with process Liput v. Grinder, 405 S.W.3d 664, 2013 Tenn. App. LEXIS 136 (Tenn. Ct. App. Feb. 27, 2013), appeal denied, — S.W.3d —, 2013 Tenn. LEXIS 615 (Tenn. July 11, 2013).

Doctor timely raised her statute of limitations defense when she raised it in her first answer to the complaint and also raised it in a motion to dismiss for failure to state a claim upon which relief could be granted prior to filing her answer in the case. A party does not waive its statute of limitations defense by failing to raise such defense in its pre-answer motion; instead, the defense may be raised by a motion to dismiss for failure to state a claim upon which relief can be granted, or in the party's answer to the complaint. Young v. Lisa Kennedy, 429 S.W.3d 536, 2013 Tenn. App. LEXIS 523 (Tenn. Ct. App. Aug. 13, 2013), rehearing denied, Young v. Kennedy, 429 S.W.3d 536, 2013 Tenn. App. LEXIS 849 (Tenn. Ct. App. 2013), appeal denied, Young ex rel. Estate of Young v. Kennedy, — S.W.3d —, 2014 Tenn. LEXIS 174 (Tenn. Feb. 11, 2014).

Where a next of kin argued that under Tenn. R. Civ. P. 8.03 a statute of limitations constituted an affirmative defense that had to be pled and that a medical center waived that defense in the first case, pursuant to Tenn. R. Civ. P. 12.08, the center could have presented its defense of the statute of limitations in the first suit in a motion, in its answer, or in an amendment to its answer. Given that the next of kin took a voluntary non-suit early on in the proceedings, it could not be said that the medical center waived its right to present the defense of the statute of limitations in the first suit. Byrge v. Parkwest Med. Ctr., 442 S.W.3d 245, 2014 Tenn. App. LEXIS 38 (Tenn. Ct. App. Jan. 30, 2014), appeal denied, — S.W.3d —, 2014 Tenn. LEXIS 538 (Tenn. June 24, 2014).

Notarized affidavit of service indicating that a spouse was personally served by a process server at the spouse's address in India, which was filed in the trial court, created a rebuttable presumption that proper service was achieved in a divorce proceeding. Furthermore, the spouse's failure to recite any facts to support the spouse's argument that service of process was flawed, constituted a waiver of the issue. Singh v. Singh, — S.W.3d —, 2019 Tenn. App. LEXIS 334 (Tenn. Ct. App. July 3, 2019).

Lessor effectively waived the defense of laches because the lessor did not assert this defense to the lessee's action for breach of the parties' lease agreement in the lessor's answer or by motion and raised the issue for the first time on appeal. B.W. Byrd Metal Fabricators, Inc. v. Alcoa, Inc., — S.W.3d —, 2019 Tenn. App. LEXIS 401 (Tenn. Ct. App. Aug. 19, 2019).

The proponents of a purported last will by the decedent failed to question the form the contestants used to contest the will in any of their filings with the probate court, and they never raised a statute of limitations or service of process argument, thus depriving that court of the opportunity to address these issues. Because the proponents failed to raise any of these issues before the probate court, they were precluded from raising them on appeal. In re Estate of Dattel, — S.W.3d —, 2020 Tenn. App. LEXIS 277 (Tenn. Ct. App. June 12, 2020),

appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 555 (Tenn. Oct. 9, 2020).

3. Defense of Waiver.

In an action over the parties' duties under a construction contract, the development corporation did not object to the trial court's reliance on the affirmative defense of waiver, nor did it object to the construction corporation's failure to comply with Tenn. R. Civ. P. 8.03. The development corporation chose not to raise the issue on appeal and the appellate court therefore considered the affirmative defense of waiver as if the construction corporation properly raised it below. Madden Phillips Constr. v. Ggat Dev. Corp., 315 S.W.3d 800, 2009 Tenn. App. LEXIS 645 (Tenn. Ct. App. Sept. 25, 2009), appeal denied, Madden Phillips Constr., Inc. v. GGAT Dev. Corp., — S.W.3d —, 2010 Tenn. LEXIS 291 (Tenn. Mar. 15, 2010).

4. Failure to Brief.

Finding that an employment agreement was unconscionable was improper because unconscionability was never pled, the employment agreement was not unconscionable, and the agreement was not contrary to public policy. Even the employee's counsel did not interpret the public policy defense to include an unconscionability defense; on two separate occasions, the employee's attorney asked the trial court for a short recess in order to research the elements of unconscionability, noting that he had not briefed the issue. Vintage Health Res., Inc. v. Guiangan, 309 S.W.3d 448, 2009 Tenn. App. LEXIS 567 (Tenn. Ct. App. Aug. 25, 2009), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 188 (Tenn. Feb. 22, 2010).

5. Failure to Comply.

Grant of summary judgment in favor of a physician in the patient's medical-negligence action was inappropriate because the physician failed to comply with Tenn. R. Civ. P. 8.03, thereby waiving the defense of insufficiency of service of process. Mere notice of a possible problem was insufficient to satisfy R. 8.03. Allgood v. Gateway Health Sys., 309 S.W.3d 918, 2009 Tenn. App. LEXIS 635 (Tenn. Ct. App. Sept. 22, 2009), rehearing denied, 309 S.W.3d 918, 2009 Tenn. App. LEXIS 745 (Tenn. Ct. App. Oct. 20, 2009), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 389 (Tenn. Apr. 14, 2010).

6. Affirmative Defense Properly Pled.

In a medical-malpractice action, because the physician established an affirmative defense, the burden of production shifted to the patient's daughter to demonstrate a disputed issue of material fact regarding when the cause of the action accrued and she failed to establish a genuine issue of material fact regarding whether the patient was placed on inquiry notice of her medical malpractice claim during her first appointment with a neurologist. However, there was a genuine issue of material fact regarding whether the patient was of unsound mind on the date the cause of action accrued, thus tolling the limitations period. Sherrill v. Souder, 325 S.W.3d 584, 2010 Tenn. LEXIS 988 (Tenn. Oct. 28, 2010).

Allegations in the record were sufficient to plead a statute of limitations defense as the complaint contained detailed allegations regarding the dates of all of the doctor's allegedly negligent acts, and the doctor's motion to dismiss contained facts, not conclusory allegations, that would support a finding that the complaint was untimely. Young v. Lisa Kennedy, 429 S.W.3d 536, 2013 Tenn. App. LEXIS 523 (Tenn. Ct. App. Aug. 13, 2013), rehearing denied, Young v. Kennedy, 429 S.W.3d 536, 2013 Tenn. App. LEXIS 849 (Tenn. Ct. App. 2013), appeal denied, Young ex rel. Estate of Young v. Kennedy, — S.W.3d —, 2014 Tenn. LEXIS 174 (Tenn. Feb. 11, 2014).

Medical providers did not waive the affirmative defense of insufficiency of service of process because a deceased patient's wife did not file the returns of the summonses until approximately seven months after the medical providers filed their answer, and the medical providers filed a motion to dismiss setting forth additional facts supporting their affirmative defense approximately two weeks after the returns of the summonses were filed. Eskridge v. NHC Healthcare Farragut, LLC, — S.W.3d —, 2020 Tenn. App. LEXIS 350 (Tenn. Ct. App. Aug. 6, 2020).

7. Bankrutpcy Discharge.

Motion to reopen debtor's Chapter 7 case was denied, as her intended relief, to file an adversary proceeding to obtain a determination that an arbitration award entered against her violated the discharge injunction, was barred by the Rooker-Feldman doctrine. Further, discharge injunction was self-executing and thus, an adversary proceeding was not necessary to reiterate that her personal assets could not be used to collect prepetition debt; her discharge could be raised as an affirmative defense to any Tennessee state court collection proceeding; and moreover, the final judgment confirming the arbitration award did not purport to charge her with any obligation in her personal capacity. In re Khan, — B.R. —, 2016 Bankr. LEXIS 254 (Bankr. E.D. Tenn. Jan. 26, 2016).

8.04. Effect of Failure to Deny. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided. Averments in a pleading to which a responsive pleading is required are admitted when not denied in the responsive pleading, except that the following allegations must be proved:

(1) Those against a person under any disability;

(2) Those against executors or administrators;

(3) Those necessary to sustain an action for divorce or annulment;

(4) Those against persons whose names and residences are unknown, where there has been no attachment of property;

(5) Those against persons whose parental rights are sought to be terminated. [As amended by order adopted December 10, 2003, effective July 1, 2004; and by order adopted January 8, 2009, effective July 1, 2009.]

Advisory Commission Comments [2009]. Even without denial of averments in an answer, allegations in a complaint must be proved in actions to terminate parental rights.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 8, 2009, was ratified and approved by 2009 House Resolution 15 and Senate Resolution 16. The order promulgating the amendment of this rule provided that it take effect July 1, 2009.

NOTES TO DECISIONS

1. Assertion of Fifth Amendment Privilege.

Defendant's assertion of a Fifth Amendment privilege in answer to the allegations of a complaint in a civil proceeding cannot, in and of itself, be taken as an admission of the allegations in accordance with this rule. However, an assertion of the privilege does not give the defendant absolute discretion to circumvent the provisions of the rule; the person who claims the privilege is not the sole judge of its validity, and, if it clearly appears that he is mistaken as to its justification, the district court may require him to answer. Smith ex rel. Agee v. Palmer, — S.W.3d —, 2019 Tenn. App. LEXIS 53 (Tenn. Ct. App. Jan. 30, 2019).

8.05. Pleading to Be Concise and Direct — Statutes, Ordinances and Regulations — Consistency. (1) Each averment of a pleading shall be simple, concise and direct. No technical forms of pleading or motions are required. Every pleading stating a claim or defense relying upon the violation of a statute shall, in a separate count or paragraph, either specifically refer to the statute or state all of the facts necessary to constitute such breach so that the other party can be duly apprised of the statutory violation charged. The substance of any ordinance or regulation relied upon for claim or defense shall be stated in a separate count or paragraph and the ordinance or regulation shall be clearly identified. The manner in which violation of any statute, ordinance or regulation is claimed shall be set forth.

(2) A party may set forth two (2) or more statements of a claim or defense alternately or hypothetically. When two (2) or more statements are made in the alternative and one (1) of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as he or she has, regardless of consistency.

NOTES TO DECISIONS

Analysis

1. Requirements Not Satisfied.
2. Requirements Satisfied.
3. Alternative Pleading.

1. Requirements Not Satisfied.

Business' action challenging the constitutionality of a local ordinance was properly dismissed because the businesses failed to satisfy the pleading requirements of Tenn. R. Civ. P. 8.05 as the pleadings were devoid of any facts, and merely asserted broad and vague accusations and legal conclusions. Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County, 311 S.W.3d 913, 2009 Tenn. App. LEXIS 683 (Tenn. Ct. App. Oct. 12, 2009).

Debtor was not entitled to relief on appeal because (1) the debtor's complaint's general reference to the Tennessee Uniform Electronic Transactions Act did not identify statutes allegedly violated, and (2) the debtor's appellate brief did not contain a statement of the issues presented for review and the debtor's minimal substantive appellate argument did not entitle the debtor to relief. Brock v. Fed Loan Servicing, — S.W.3d —, 2020 Tenn. App. LEXIS 139 (Tenn. Ct. App. Mar. 26, 2020).

2. Requirements Satisfied.

Employee's amended complaint specifically referred to the statute upon which the employee was relying to state a claim of retaliatory discharge, T.C.A. § 50-1-304, and thus comported with Tenn. R. Civ. P. 8.05(1). The amended complaint, while not a model of pleading, provided the employer with sufficient notice of the claims alleged and sufficiently pleaded a legal cause of action. Webb v. Nashville Area Habitat for Humanity, Inc., 346 S.W.3d 422, 2011 Tenn. LEXIS 623 (Tenn. July 21, 2011).

3. Alternative Pleading.

Trial court erred in concluding that the Continuing Contract Law was not violated because a dismissed teacher could pursue alternative theories, and the undisputed facts demonstrated that the school board did not notify the teacher of her nonrenewal prior to the statutory deadline. Dallas v. Shelby Cty. Bd. of Educ., 603 S.W.3d 32, 2019 Tenn. App. LEXIS 399 (Tenn. Ct. App. Aug. 19, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 174 (Tenn. Apr. 1, 2020).

8.06. Construction of Pleadings.

All pleadings shall be so construed as to do substantial justice.

Advisory Commission Comments. 8.01: Rule 8.01 provides that a pleading that sets forth a claim for relief must contain a short and plain statement of the claim and a demand for judgment for the relief sought. The rule also authorizes demands for alternative or different types of relief.

8.02: Rule 8.02 provides for the filing of the answer, which sets forth defenses to each claim asserted and which admits or denies the averments upon which the adverse party relies. If the defendant intends to controvert every averment of the complaint, the defendant may do so by a general denial, but the signature of the defendant's attorney, as required by Rule 11, is the certificate of the attorney that there is good ground to support the pleading; general denials under these circumstances should be rare.

8.03: Rule 8.03 lists affirmative defenses which must be raised in a pleading to a preceding pleading. The rule provides that the party relying upon a matter constituting an avoidance or affirmative defense must set forth the facts constituting such defenses in short and plain terms, just as under Rule 8.02 the party must set forth express denials of claims asserted by the adverse party.

8.04: Rule 8.04 adopts the general principle that averments in a pleading to which a responsive pleading is required are admitted when not denied in the responsive pleading. Four special cases involving subject matter or persons which might make the general rule oppressive are excepted from the operation of the Rule.

8.05: Rule 8.05(1) sets out the requirements for stating a claim or defense based upon a statute, ordinance or regulation. Rule 8.05(2) allows the statement of all the claims or defenses a party has, and expressly permits inconsistent pleading.

Advisory Commission Comments [1993]. "Comparative fault" is substituted for "contributory negligence" in light of *McIntyre v. Balentine*, 833 S.W.2d 52 (Tenn. 1992). Note that the defendant must identify or describe other alleged tortfeasors who should share fault, or else the defendant normally would be barred from shifting blame to others at trial.

Advisory Commission Comments [1998]. *Perez v. McConkey*, 872 S.W.2d 897 (Tenn. 1994), transformed implied assumption of risk from an absolute defense to a criterion position within comparative fault analysis. Contractual express assumption remains as a complete defense to liability.

Advisory Commission Comments [2000]. The former defense of injury by fellow servant was abolished by *Glass v. City of Chattanooga*, 858 S.W.2d 312 (Tenn. 1993).

Advisory Commission Comments [2004]. Because of the prevalence of long arm statutes providing personal jurisdiction over nonresidents, the amendment deletes the requirement of a prima facie case when the nonresident defendant fails to deny an allegation in the complaint.

Advisory Commission Comments [2006]. The affirmative defenses of statute of repose and workers' compensation immunity are added to the list in Rule 8.03.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated December 10, 2003, was ratified and approved by 2004 House Resolution 233 and Senate Resolution 115. The order promulgating the amendment of this rule provided that it take effect July 1, 2004.

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated December 29, 2005, was ratified and approved by 2006 House Resolution 200 and Senate Resolution 95. The order promulgating the amendment of this rule provided that it take effect July 1, 2006.

Cross-References. Procedure in actions on bonds, T.C.A. § 20-6-202.

Successive actions on same contract or transaction, T.C.A. § 20-6-201.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 39, 56, 92, 102, 103, 105, 141, 143, 146, 159-161, 163, 167, 169, 176, 220, 386, 395, 400, 498, 553.

Pritchard on Wills and Administration of Estates (4th ed., Phillips and Robinson), §§ 745, 749.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-8, 1-8-1, 1-8-2, 1-8-02.1, 1-8.03-1, 1-8.03-23, 1-8.04-1, 1-8.05-1, 1-8.05-2, 1-12.05-1.

Tennessee Jurisprudence. 1 Tenn. Juris., Abatement, Survival and Revival, § 20; 1 Tenn. Juris., Accord and Satisfaction, §§ 6, 7; 1 Tenn. Juris., Actions, § 30; 1 Tenn. Juris., Amendments, §§ 8, 17; 1 Tenn. Juris., Adverse Possession, § 63; 1 Tenn. Juris., Agency, § 57; 3 Tenn. Juris., Assignments for the Benefit of Creditors, § 17; 4 Tenn. Juris., Bankruptcy, § 18; 7 Tenn. Juris., Contracts, § 88; 9 Tenn. Juris., Damages, § 40; 9 Tenn. Juris., Demurrers and Motions to Dismiss, § 22; 9 Tenn. Juris., Dismissal, Discontinuance and Nonsuit, § 10; 10 Tenn. Juris., Ejectment, § 11; 10 Tenn. Juris., Duress and Undue Influence, § 12; 11 Tenn. Juris., Equity, §§ 45, 48-99; 11 Tenn. Juris., Evidence, § 195; 13 Tenn. Juris., Fraud and Deceit, § 42; 13 Tenn. Juris., Frauds, Statute of, § 32; 15 Tenn. Juris., Insurance, §§ 84, 104; 18 Tenn. Juris., Limitations of Actions, § 52; 18 Tenn. Juris., Lost Instruments and Records, § 3; 19 Tenn. Juris., Negligence, §§ 16, 32; 20 Tenn. Juris., Payment, § 23; 20 Tenn. Juris., Pleading, §§ 3, 6, 9, 15; 21 Tenn. Juris., Process, § 5; 22 Tenn. Juris., Specific Performance, § 18; 26 Tenn. Juris., Workers' Compensation, § 50.

Law Reviews. A Higher Standard: 'Twombly' Requires More for Notice Pleading (Andree Sophia Blumstein), 43 Tenn. B.J. 12 (2007).

An Exegesis of the Ejectment Statutes of Tennessee (R.D. Cox), 18 Mem. St. U.L. Rev. 581 (1988).

Comparative Fault in Tennessee: Where Are We Going and Why Are We in this Handbasket? 67 Tenn. L. Rev. 765 (2000).

Election of Remedies in Tennessee; Making the Right Choices (Steven W. Feldman), 37 No. 1 Tenn. B.J. 14 (2001).

The McIntire Saving Statute (Donald F. Paine), 33 No. 4 Tenn. B.J. 21 (1997).

The Use of Collateral Estoppel in Private Civil RICO Actions (Laura Ginger), 54 Tenn. L. Rev. 31 (1986).

Torts — Ridings v. Ralph M. Parsons Co.: The Tennessee Supreme Court Rejects Use of Employer Negligence to Reduce Liability of Defendants in Post-McIntyre On-the-Job Tort Cases, 26 U. Mem. L. Rev. 1533 (1996).

Workmen's Compensation in Tennessee: The Second Injury Fund, 6 Mem. St. U.L. Rev. 715.

Workers' Compensation Outline (Paul Campbell III), 18 No. 3 Tenn. B.J. 11 (1982).

10 Significant Differences Between State and Federal Civil Procedure, 38 No. 7 Tenn. B.J. 27 (2002).

NOTES TO DECISIONS

Analysis

1. Claim for Relief.
2. —Damages.
3. —Sufficiency of Pleadings.
4. —Simple, Concise and Direct.
5. —Election of Remedies.
6. Answer Required.
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9. —Release.
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17. —Attack on Notice.
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19. Pleadings as Stipulations.
20. Extrajudicial Admissions.
21. Pro Se Litigants.
22. Joinder.

1. Claim for Relief.

2. —Damages.

A claim for "damages, actual, compensatory and punitive" is a claim for both property damages and personal injuries. Motors Ins. Corp. v. Blakemore, 584 S.W.2d 204, 1978 Tenn. App. LEXIS 355 (Tenn. Ct. App. 1978).

3. —Sufficiency of Pleadings.

Where the complaint alleged defective roads because of negligent installation of drains and culverts and requested correction of the drainage problems and reconstruction of the roads or a money judgment, the complainant had stated the relief desired and the general factual basis to satisfy Tenn. R. Civ. P. 8. Williamson County v. Twin Lawn Development Co., 498 S.W.2d 317, 1973 Tenn. LEXIS 459 (Tenn. 1973).

In contract action, where defendants failed to set forth in short and plain terms the affirmative defense of the statute of frauds, and failed to give notice as required by statute that they intended to prove a foreign law, the trial court correctly refused defendant's motion to plead the foreign state's statute of frauds, which was filed after the proof was concluded and the case taken under advisement. Barrton Scientific, Inc. v. Moss, 542 S.W.2d 375, 1975 Tenn. App. LEXIS 182 (Tenn. Ct. App. 1975).

Where plaintiff brought an action for wrongful death, but did not rely on the violation of any statute as the basis of her cause of action, it was not necessary to include an express reference to the wrongful death statutes in her complaint. Adams v. Carter County Memorial Hospital, 548 S.W.2d 307, 1977 Tenn. LEXIS 544 (Tenn. 1977).

There is no duty on the part of the court to create a claim that the pleader does not spell out in the complaint. Donaldson v. Donaldson, 557 S.W.2d 60, 1977 Tenn. LEXIS 667 (Tenn. 1977).

To make a claim for malicious prosecution, the complaint must state that proceedings were instituted without cause and that these proceedings were terminated in plaintiff's failure. Donaldson v. Donaldson, 557 S.W.2d 60, 1977 Tenn. LEXIS 667 (Tenn. 1977).

Tenn. R. Civ. P. 8 requires that the facts upon which a claim for relief is founded be stated, and this cannot be done simply by exhibiting a series of correspondence without elaboration or comment. W & O Constr. Co. v. Smithville, 557 S.W.2d 920, 1977 Tenn. LEXIS 679 (Tenn. 1977).

The court declined to except a discretionary appeal where the pleadings did not convey a reasonable certainty of meaning and did not show, by a fair and natural construction, a substantial cause of action or defense. H. H. Luttrell & Associates v. Bank of Quitman, 559 S.W.2d 942, 1978 Tenn. LEXIS 703 (Tenn. 1978).

Where the complaint in a wrongful death action was incorrectly styled by designating the plaintiff as deceased, by next friend, the parents of deceased, but in the complaint, the parents alleged that they were the parents of deceased and that they had suffered great monetary damages "by reason of her wrongful death," although the complaint in a wrongful death was in improper form and was in need of extensive amendment, the complaint should be construed as one asserting an action for damages for wrongful death by the parents and next of kin of the deceased. Chapman v. King, 572 S.W.2d 925, 1978 Tenn. LEXIS 666 (Tenn. 1978).

In action for slander it was not necessary that the exact words of an allegedly defamatory statement be stated in the complaint since it is the substance of the statement and not the form that is significant. Handley v. May, 588 S.W.2d 772, 1979 Tenn. App. LEXIS 354 (Tenn. Ct. App. 1979).

Even though the pleading contained no formal demand of judgment for any excess, it amounted to a counterclaim and was sufficient to support the judgment. International Harvester Credit Corp. v. Ingram, 619 S.W.2d 134, 1981 Tenn. App. LEXIS 511 (Tenn. Ct. App. 1981).

Plaintiffs' pleading breach of contract and tortious misrepresentation did not provide sufficient notice to allow defendant to prepare a defense to claim of violation of Consumer Protection Act. Estate of Wilson v. Arlington Auto Sales, Inc., 743 S.W.2d 923, 1987 Tenn. App. LEXIS 2764 (Tenn. Ct. App. 1987).

All pleadings must be construed so as to do substantial justice, and that in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity and that malice, intent, knowledge, and other conditions of the mind may be averred generally. Ezell v. Graves, 807 S.W.2d 700, 1990 Tenn. App. LEXIS 746 (Tenn. Ct. App. 1990).

Where plaintiffs' pleading stated that the defendants alleged themselves to be the owners of land belonging to the plaintiffs, that the defendants never spoke to the plaintiffs or told them they were going to advertise the land for sale, that the defendants' deed was champertous and declared void, and as a result of the defendants' libel of title that plaintiffs had been damaged, plaintiffs' complaint was sufficient to put defendants on notice of what was being claimed against them. Ezell v. Graves, 807 S.W.2d 700, 1990 Tenn. App. LEXIS 746 (Tenn. Ct. App. 1990).

In an action for breach of contract for sale of a business, where plaintiff averred that she had lost her entire investment and prayed for return of her down payment plus other damages, the wording did not preclude rescission as a possible remedy. Lamons v. Chamberlain, 909

S.W.2d 795, 1993 Tenn. App. LEXIS 324 (Tenn. Ct. App. 1993), rehearing denied, — S.W.2d —, 1993 Tenn. App. LEXIS 377 (Tenn. Ct. App. May 24, 1993).

A cause of action sounding in nuisance was sufficiently stated in a complaint alleging that defendants allowed to accumulate on their property, trash, junk, and debris and that the same constituted a nuisance. Aldridge v. Morgan, 912 S.W.2d 151, 1995 Tenn. App. LEXIS 344 (Tenn. Ct. App. 1995), appeal denied, — S.W.2d —, 1995 Tenn. LEXIS 593 (Tenn. Oct. 2, 1995).

Despite Tenn. R. Civ. P. 9.02's particularity requirements, the sufficiency of claims under state consumer protection acts must be determined in light of Tenn. R. Civ. P. 8's liberal pleading standards. Harvey v. Ford Motor Credit Co., 8 S.W.3d 273, 1999 Tenn. App. LEXIS 314 (Tenn. Ct. App. 1999), review or rehearing denied, — S.W.3d —, 1999 Tenn. App. LEXIS 448 (Tenn. Ct. App. 1999), review or rehearing denied, — S.W.3d —, 1999 Tenn. LEXIS 669 (Tenn. 1999).

Dismissal of the former wife's contempt petition was improper because the wife's petition alleged willful violations of the parties' divorce decree and it also satisfied all of the requirements of Tenn. R. Crim P. 42(b); the allegations further complied with Tenn. R. Civ. P. 8.05, which required that civil pleadings be simple, concise, and direct, and that they set forth the manner in which a violation was claimed; there was no question that the husband knew the nature of the proceeding he was facing. Long v. McAllister-Long, 221 S.W.3d 1, 2006 Tenn. App. LEXIS 561 (Tenn. Ct. App. 2006), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 69 (Tenn. 2007).

An instruction on superseding cause was not justified by the record in the patient's medical malpractice action because whether the patient's arachnoiditis resulted from the first surgery performed by the physician or whether the condition was simply the natural progression of preexisting degenerative disc disease were issues relating to cause-in-fact in with neither, either, or both could be determined to be causes-in-fact; such consideration of cause-in-fact then laid the basis for the standard charge as to proximate cause but could not justify a charge on superseding cause. Godbee v. Dimick, 213 S.W.3d 865, 2006 Tenn. App. LEXIS 601 (Tenn. Ct. App. 2006), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 66 (Tenn. 2006).

Local government narrowly satisfied the requirements of Tenn. R. Civ. P. 8.05(1) by clearly identifying the zoning ordinance on which it was relying in its case against two real estate developers, stating its substance in a separate paragraph of the amended complaint, and recounting the manner in which the developers had allegedly violated it. Metro. Gov't of Nashville & Davidson County v. Barry Constr. Co., 240 S.W.3d 840, 2007 Tenn. App. LEXIS 93 (Tenn. Ct. App. Feb. 21, 2007), rehearing denied, 240 S.W.3d 840, 2007 Tenn. App. LEXIS 140 (Tenn. Ct. App. Mar. 14, 2007).

4. —Simple, Concise and Direct.

The failure to file a complaint in simple, concise and direct terms does not necessarily require dismissal in the first instance. Collier v. Slayden Bros. Ltd. Partnership, 712 S.W.2d 106, 1985 Tenn. App. LEXIS 3318 (Tenn. Ct. App. 1985).

A pleading challenged under Tenn. R. Civ. P. 8.05 should be tested using the frequently followed rule that a pleading should not be dismissed, no matter how inartfully worded, if it states a good cause of action. Collier v. Slayden Bros. Ltd. Partnership, 712 S.W.2d 106, 1985 Tenn. App. LEXIS 3318 (Tenn. Ct. App. 1985).

T.C.A. § 56-7-105 does not conflict with Tenn. R. Civ. P. 8.05(1). Estate of Wilson v. Arlington Auto Sales, Inc., 743 S.W.2d 923, 1987 Tenn. App. LEXIS 2764 (Tenn. Ct. App. 1987).

Appellant listed 17 issues for review that had nothing to do with grounds upon which pleading was dismissed, and the appellate court held that neither his initial motion nor the subsequent filings were sufficiently coherent to have satisfied simplified pleading requirements of Tenn. R. Civ. P. 8.01. Simmons v. Gath Baptist Church, 109 S.W.3d 370, 2003 Tenn. App. LEXIS 51 (Tenn. Ct. App. 2003), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 442 (Tenn. 2003).

5. —Election of Remedies.

Even though parties are allowed to plead inconsistent claims or defenses, pursuing an inconsistent remedy to judgment amounts to an irrevocable choice. Hayes v. Civil Serv. Comm'n of Metro. Gov't, 907 S.W.2d 826, 1995 Tenn. App. LEXIS 386 (Tenn. Ct. App. 1995).

Trial court did not abuse its discretion by dismissing pro se inmate's divorce petition for failure to prosecute the claim without having given him prior notice of the dismissal where he knew that original summons had been returned unserved and permitted case to languish for seven months without making any effort to see to it that his wife was properly served; moreover, his position on appeal was undermined by his failure to avail himself of the post-judgment remedies available to him through Tenn. R. Civ. P. 59.04 motion to alter or amend the trial court's judgment within 30 days after entry explaining his reasons for failing to serve his wife or otherwise prosecute his case, or Tenn. R. Civ. P. 60.02 arguing mistake, inadvertence, surprise, or excusable neglect. Hessmer v. Hessmer, 138 S.W.3d 901, 2003 Tenn. App. LEXIS 346 (Tenn. Ct. App. 2003).

Election of remedies doctrine did not preclude buyers from recovering punitive damages under common law misrepresentation claim and attorney fees under T.C.A. § 47-18-

109(e)(1), because the two remedies were not inconsistent with each other, nor did they provide double redress for a single wrong. Miller v. United Automax, 166 S.W.3d 692, 2005 Tenn. LEXIS 580 (Tenn. 2005).

6. Answer Required.

Tenn. R. Civ. P. 8 contemplates that every petition that sets forth a claim for relief shall be met by an answer in writing. Smith v. Smith, 643 S.W.2d 320, 1982 Tenn. LEXIS 367 (Tenn. 1982).

Assignee raised no objection to the trial court's decision upon the ground that it was based upon an affirmative defense not raised in accordance with Tenn. R. Civ. P. 8.03, nor did the assignee otherwise object to the debtor's failure to comply with that Rule, and it was well-settled that an issue not raised in the trial court would not be entertained on appeal. C & W Asset Acquisition, LLC v. Oggs, 230 S.W.3d 671, 2007 Tenn. App. LEXIS 57 (Tenn. Ct. App. Jan. 30, 2007), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 490 (Tenn. May 14, 2007).

7. Affirmative Defenses.

All of the statutory defenses to a divorce action listed in T.C.A. §§ 36-4-112 and 36-4-120 are affirmative defenses under Tenn. R. Civ. P. 8.03. Thomasson v. Thomasson, 755 S.W.2d 779, 1988 Tenn. LEXIS 153 (Tenn. 1988).

It was improper to dismiss the case on the basis of Tenn. R. Civ. P. 12.02(5), because the moving party failed to comply with Tenn. R. Civ. P. 8.03, in that it failed to include in its motion to dismiss a recitation of those facts, in short and plan terms, upon which it was relying for dismissal. Barker v. Heekin Can Co., 804 S.W.2d 442, 1991 Tenn. LEXIS 69 (Tenn. 1991).

Where defense of independent contractor did not raise matter outside the scope of plaintiff's prima facie case, it was not an affirmative defense. Winford v. Hawissee Apartment Complex, 812 S.W.2d 293, 1991 Tenn. App. LEXIS 72 (Tenn. Ct. App. 1991).

In a products liability action, defendants' averment in the answer that they relied "on all of the defenses contained in the Tennessee Products Liability Act" did not include the defense of comparative negligence or assumption of risk, and the trial court correctly ruled that the evidence did not warrant a charge on either of these affirmative defenses. Whaley v. Rheem Mfg. Co., 900 S.W.2d 296, 1995 Tenn. App. LEXIS 126 (Tenn. Ct. App. 1995), appeal denied, — S.W.2d —, 1995 Tenn. LEXIS 296 (Tenn. May 30, 1995).

A defendant in a negligence case must, pursuant to Tenn. R. Civ. P. 8, plead comparative fault as an affirmative defense if the defendant wishes to introduce evidence that a person other than the defendant caused the plaintiff's injury. George v. Alexander, 931 S.W.2d 517, 1996 Tenn. LEXIS 615 (Tenn. 1996).

A defendant in a medical malpractice action who wishes to attribute fault to a nonparty must affirmatively plead this defense. Free v. Carnesale, 110 F.3d 1227, 1997 FED App. 120P, 1997 U.S. App. LEXIS 6534 (6th Cir. Tenn. 1997).

Pleading in medical malpractice case insufficient to raise affirmative defense. Free v. Carnesale, 110 F.3d 1227, 1997 FED App. 120P, 1997 U.S. App. LEXIS 6534 (6th Cir. Tenn. 1997).

Dismissal of a medical malpractice complaint against a doctor was overturned, as the doctor waived the affirmative defense of insufficient service of process by waiting nearly two years after answering the original complaint before asserting the defense. Faulks v. Crowder, 99 S.W.3d 116, 2002 Tenn. App. LEXIS 640 (Tenn. Ct. App. 2002), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 102 (Tenn. Feb. 3, 2003).

Federal appellate court found an action alleging substantive due process and equal protection rights violations to be barred by res judicata where plaintiffs had commenced an action in state court which was based on similar facts and which resulted in a judgment in their favor, although that court had declined to impose the injunctive relief and the federal action monetary relief, because the federal court was required to give res judicata effect to the state court judgment pursuant to 28 U.S.C. § 1738; it was proper for the court to have raised the issue of res judicata on its own, even if it was not raised by the parties in the pleadings pursuant to Fed. R. Civ. P. 8(c) and Tenn. R. Civ. P. 8.03, because it was an appropriate circumstance for the court to so act, and the bar was applicable against one who was not a party in the state court action where privity was found. Hutcherson v. Lauderdale County, 326 F.3d 747, 2003 FED App. 109P, 2003 U.S. App. LEXIS 6717 (6th Cir. Tenn. 2003).

8. —Accord and Satisfaction.

Cashing by supplier of check marked "Acct. in full" did not constitute accord and satisfaction, where person with whom supplier had dealt as issuer-contractor's agent marked through the words prior to cashing. Failure of surety on the bond to deny that timely notice of the claim was given and that suit was brought within six months after completion of the project in its answer denied it the right to rely on those defenses. Sawner v. M. P. Smith Constr. Co., 526 S.W.2d 492, 1975 Tenn. App. LEXIS 176 (Tenn. Ct. App. 1975).

9. —Release.

Since release must be pleaded as an affirmative defense, a motion to dismiss on the basis of a release did not amount to a motion for summary judgment under Tenn. R. Civ. P. 56.02 nor could it be so considered under Tenn. R. Civ. P. 12.02 and the motion therefor did not

prevent the plaintiff from taking a voluntary nonsuit under Tenn. R. Civ. P. 41.01. Hixson v. Stickley, 493 S.W.2d 471, 1973 Tenn. LEXIS 507 (Tenn. 1973).

Guarantor's lack of consent to creditor's release or surrender of security for debt which is guaranteed is not an affirmative defense which must be pleaded specially. Ottenheimer Publishers, Inc. v. Regal Publishers, Inc., 626 S.W.2d 276, 1981 Tenn. App. LEXIS 521 (Tenn. Ct. App. 1981).

10. —Statute of Limitations.

Where claimant in a workers' compensation action raised the issue of the statute of limitations in his complaint by averring facts which indicated the time for filing suit against the second injury fund had passed, and by specifically averring a proposition of law which claimant contended was sufficient to toll the statute, and where opposing party joined issue with the plea, claimant was sufficiently served notice that the statute of limitations was an issue. Travelers Ins. Co. v. Austin, 521 S.W.2d 783, 1975 Tenn. LEXIS 695 (Tenn. 1975).

A coram nobis petition was time barred where, even though the state did not specifically cite T.C.A. § 27-7-103 in its motion to dismiss, the fact that it did cite T.C.A. § 40-30-102, the statute of limitations applicable to post-conviction claims, was sufficient to give notice that it intended to rely on a statute of limitations. Sands v. State, 903 S.W.2d 297, 1995 Tenn. LEXIS 331 (Tenn. 1995), overruled in part, Nunley v. State, 552 S.W.3d 800, 2018 Tenn. LEXIS 382 (Tenn. July 19, 2018).

Failure to specifically plead a statute of limitations does not result in a waiver of the defense if the opposing party is given fair notice of the defense and an opportunity to rebut it. Sands v. State, 903 S.W.2d 297, 1995 Tenn. LEXIS 331 (Tenn. 1995), overruled in part, Nunley v. State, 552 S.W.3d 800, 2018 Tenn. LEXIS 382 (Tenn. July 19, 2018).

The purpose of the rule requiring that a statute of limitations defense be specifically pleaded is to prevent a party from raising a defense at the last possible moment and thereby prejudicing the opposing party's opportunity to rebut the defense. George v. Bldg. Materials Corp. of Am., 44 S.W.3d 481, 2001 Tenn. LEXIS 375 (Tenn. 2001).

It is within the trial court's discretion to decide whether to allow a party to file a statute of limitations plea after the trial has begun. George v. Bldg. Materials Corp. of Am., 44 S.W.3d 481, 2001 Tenn. LEXIS 375 (Tenn. 2001).

T.C.A. § 20-1-119 gives an additional 90 days to file suit against a potential nonparty tortfeasor whenever an answer gives notice of the nonparty's identity and alleges facts that reasonably support a conclusion that the nonparty caused or contributed to an injury, and T.C.A. § 20-1-119 applies whether the nonparty is alleged to be partially responsible or totally responsible for the injuries; therefore, summary judgment was inappropriately granted to the state in a case where a county's answer in a personal injury case relating to the placement of a stop alleged that the state was responsible for the maintenance of the area. Austin v. State, 222 S.W.3d 354, 2007 Tenn. LEXIS 434 (Tenn. 2007).

11. —Collateral Estoppel.

The doctrine of collateral estoppel or estoppel by judgment, which is an extension of the principle of res judicata, is applicable only where it affirmatively appears that the issue involved in the case under consideration has already been litigated in a prior suit between the same parties. Cole v. Arnold, 545 S.W.2d 95, 1977 Tenn. LEXIS 603 (Tenn. 1977).

12. —Res Judicata.

Since res judicata is an affirmative defense, the proper way to present it is by a pleading (answer) and not by a motion. Usrey v. Lewis, 553 S.W.2d 612, 1977 Tenn. App. LEXIS 289 (Tenn. Ct. App. 1977), overruled, Jackson v. Smith, 387 S.W.3d 486, 2012 Tenn. LEXIS 812 (Tenn. Nov. 16, 2012).

Identity of the issue of fault in separate trials arising out of the same automobile collision does not render the cases sufficiently identical to justify the application of res judicata; identity of parties is required. Usrey v. Lewis, 553 S.W.2d 612, 1977 Tenn. App. LEXIS 289 (Tenn. Ct. App. 1977), overruled, Jackson v. Smith, 387 S.W.3d 486, 2012 Tenn. LEXIS 812 (Tenn. Nov. 16, 2012).

Where plaintiffs obtained a severance whereby they abstained from participation in the consolidated trial of other cases arising out of the same collision, their request for severance did not subject them to the results of the consolidated trial. Usrey v. Lewis, 553 S.W.2d 612, 1977 Tenn. App. LEXIS 289 (Tenn. Ct. App. 1977), overruled, Jackson v. Smith, 387 S.W.3d 486, 2012 Tenn. LEXIS 812 (Tenn. Nov. 16, 2012).

Where court did not have before it copies of the opinion or order alleged to conclude the plaintiff's rights nor any record of the context in which they were issued, the prior decision could not be held final and conclusive so as to bar a second suit according to the principles of res judicata. Scales v. Scales, 564 S.W.2d 667, 1977 Tenn. App. LEXIS 270 (Tenn. Ct. App. 1977).

In order to succeed on a plea of res judicata, or estoppel by judgment, the party raising the defense must plead it, and must carry the burden of proving it. Gregory v. Gregory, 803 S.W.2d 242, 1990 Tenn. App. LEXIS 770 (Tenn. Ct. App. 1990).

To carry the burden of proving res judicata, the party raising the defense must generally put in evidence the record or a copy of the

record of the former case, and if the record does not conclusively show that a particular matter was determined in the former proceeding, the party relying on res judicata as a defense must supplement the record by other proof. Gregory v. Gregory, 803 S.W.2d 242, 1990 Tenn. App. LEXIS 770 (Tenn. Ct. App. 1990).

Where the amount of child support arrearage was determined in a foreign court in a Uniform Reciprocal Enforcement of Support Act (title 36, ch. 5, part 2) proceeding, at which the custodial parent was not present, the noncustodial parent relying on a res judicata defense was required to prove with certainty that the foreign judgment covered the entire period for which the arrearage was sought. Gregory v. Gregory, 803 S.W.2d 242, 1990 Tenn. App. LEXIS 770 (Tenn. Ct. App. 1990).

Judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c), which dismissed a complaint brought pursuant to 42 U.S.C. § 1983 by property owners, a landfill operator, and a metal company, was proper, where the complaint alleged that various county committees and officials thereon had violated plaintiffs' substantive due process and equal protection rights by not approving their proposed landfill expansion in order to comply with a changed Tennessee law; a state court proceeding had previously resulted in a judgment finding that plaintiffs' same rights had been violated but it had declined to offer relief, and the federal action was based on the same facts and claims but sought monetary damages, and accordingly, res judicata barred the action pursuant to Fed. R. Civ. P. 8(c) and Tenn. R. Civ. P. 8.03. Hutcherson v. Lauderdale County, 326 F.3d 747, 2003 FED App. 109P, 2003 U.S. App. LEXIS 6717 (6th Cir. Tenn. 2003).

13. —Set-off.

Set-off was not an affirmative defense in a worker's compensation case, where the employer sought to show that payments were awarded for a period in excess of the period of disability, and evidence should have been admitted on the set-off claim without requiring amendment of pleadings. Melton v. Firestone Tire & Rubber Co., 625 S.W.2d 713, 1981 Tenn. LEXIS 516 (Tenn. 1981).

14. Comparative Fault.

Tenn. R. Civ. P. 8.03 contemplates that, at the pleading stage, either the identity or a description of another potential tortfeasor is sufficient to initiate discovery. Brown v. Wal-Mart Discount Cities, 12 S.W.3d 785, 2000 Tenn. LEXIS 53 (Tenn. 2000).

Defendant may not attribute fault to a nonparty who is not identified sufficiently to allow the plaintiff to plead and serve process on such person pursuant to T.C.A. § 20-1-119, even if the defendant establishes the nonparty's existence by clear and convincing evidence. Brown v. Wal-Mart Discount Cities, 12 S.W.3d 785, 2000 Tenn. LEXIS 53 (Tenn. 2000).

15. Alternative Pleadings.

Defendant's answer setting forth affirmative defenses based on comparative negligence principles could not be used to estop the defendant from denying that a third party was the cause of the injuries since an alternative pleading may not be used as an admission. Worley v. Weigel's, Inc., 919 S.W.2d 589, 1996 Tenn. LEXIS 188 (Tenn. 1996), rehearing denied, — S.W.2d —, 1996 Tenn. LEXIS 255 (Tenn. 1996).

Wife alleged, in her counter-complaint, in the alternative, that the husband was guilty of inappropriate marital conduct in that he was attempting to disavow the marital dissolution agreement and asked for an equitable division of property; the actions of the wife of which the husband complained of were authorized under Tenn. R. Civ. P. 8.05(2); alternative pleadings were expressly permitted, regardless of consistency, and the wife was not estopped from seeking to enforce the agreement simply by the fact that she asked for, in the alternative, an equitable division of the marital property. Barnes v. Barnes, 193 S.W.3d 495, 2006 Tenn. LEXIS 428 (Tenn. 2006).

16. Implied Waiver or Equitable Estoppel.

Conclusory allegations were not sufficient to meet the requirements of Tenn. R. Civ. P. 8.03 for pleading implied waiver or equitable estoppel. ACG, Inc. v. Southeast Elevator, 912 S.W.2d 163, 1995 Tenn. App. LEXIS 452 (Tenn. Ct. App. 1995), appeal denied, — S.W.2d —, 1995 Tenn. LEXIS 635 (Tenn. Oct. 30, 1995).

17. —Attack on Notice.

Attack on the notice given to sureties under surety bond agreements was an affirmative defense which was affirmatively pleaded and, as such, the burden was on the pleader to prove same. Union Planters Corp. v. Harwell, 578 S.W.2d 87, 1978 Tenn. App. LEXIS 277 (Tenn. Ct. App. 1978).

18. Failure to Answer.

Where defendant in divorce suit insisted that plaintiff's failure to answer counter complaint resulted in admission of fact alleged, court held that rule is not interpreted to mean that party can go to trial without calling to attention of trial court the complete absence of necessary pleadings, and where defendant did not make application for default judgment, it was waived. Edwards v. Edwards, 501 S.W.2d 283, 1973 Tenn. App. LEXIS 312 (Tenn. Ct. App. 1973).

A plaintiff will not be heard to assert for the first time post-trial that defendant's failure to file a written answer should be taken as an admission. Smith v. Smith, 643 S.W.2d 320, 1982 Tenn. LEXIS 367 (Tenn. 1982).

19. Pleadings as Stipulations.

Facts confessed in pleadings are equivalent to a stipulation which the trial court is not at liberty to ignore. John P. Saad & Sons, Inc. v. Nashville Thermal Transfer Corp., 642 S.W.2d 151, 1982 Tenn. App. LEXIS 425 (Tenn. Ct. App. 1982).

20. Extrajudicial Admissions.

A party's extrajudicial admissions contained in a pleading filed in another action are not hearsay when they are introduced against the party. Pankow v. Mitchell, 737 S.W.2d 293, 1987 Tenn. App. LEXIS 2776 (Tenn. Ct. App. 1987).

21. Pro Se Litigants.

Pro se litigants are entitled of the same liberality of construction with regard to their pleadings that Tenn. R. Civ. P. 1, 8.05 and 8.06 afford any other litigant. Irvin v. Clarksville, 767 S.W.2d 649, 1988 Tenn. App. LEXIS 610 (Tenn. Ct. App. 1988).

22. Joinder.

Where separate independent negligent acts of more than one tortfeasor combine to cause single, indivisible injury, all tortfeasors must be joined in same action unless joinder is specifically prohibited by law. Samuelson v. McMurtry, 962 S.W.2d 473, 1998 Tenn. LEXIS 61 (Tenn. 1998).

RULE 9

PLEADING SPECIAL MATTERS

NOTES TO DECISIONS

1. Dismissal of Action.

Mother's conspiracy to commit fraud claim based on a revoked adoption failed because (1) the claim was not recognized in Tennessee as a stand-alone claim, and (2) the claim was not pled with the required specificity. Taylor v. Promise, — S.W.3d —, 2019 Tenn. App. LEXIS 51 (Tenn. Ct. App. Jan. 31, 2019), appeal denied, Taylor v. Miriam's Promise, — S.W.3d —, 2019 Tenn. LEXIS 228 (Tenn. June 20, 2019).

9.01. Capacity. It is not necessary to aver the capacity of a party to sue or be sued or the authority of a party to sue or be sued in a representative capacity or the legal existence of an organized association of persons that is made a party. When a party desires to raise an issue as to the legal existence of any party or the capacity of any party to sue or be sued or the authority of a party to sue or to be sued in a representative capacity, he or she shall do so by specific negative averment, which shall include such supporting particulars as are peculiarly within the pleader's knowledge.

9.02. Fraud, Mistake, Condition of the Mind. In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.

NOTES TO DECISIONS

Analysis

1. Dismissal of Action.
2. Waiver.
3. Insufficient Claim.
4. Claim Sufficient.

1. Dismissal of Action.

Partnerships' tort claims against a law firm, an attorney's professional limited liability company (PLLC), and a title company that sounded in tort were not sufficiently pleaded under Tenn. R. Civ. P. 8.01 or, where they sounded in fraud, were not pleaded with particularity as required by Tenn. R. Civ. P. 9.02. However, their complaint did sufficiently plead a cause of action for aiding and abetting the breach of a fiduciary duty against a title company, the law firm, an attorney, and the attorney's PLLC; to the extent that the alleged aiding and abetting was the result of a plan or design by them, conspiracy also may have lied for that tort, and the complaint sufficiently pleaded causes of action for misappropriation or conversion and conspiracy against the attorney, individually, but not against the law firm, the title company,

or the attorney's PLLC due to lack of particularity in the pleadings as to those parties. PNC Multifamily Capital Institutional Fund XXVI Ltd. P'ship v. Bluff City Cmty. Dev. Corp., 387 S.W.3d 525, 2012 Tenn. App. LEXIS 288 (Tenn. Ct. App. May 4, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 680 (Tenn. Sept. 19, 2012).

Chancery court properly dismissed a pro se mortgagor's fraud complaint because the complaint contained no allegations particularly stating that any of the mortgagees knowingly made a false representation of material fact that was relied on by the mortgagor to his detriment, and, as such the mortgagor failed to comply with Tenn. R. Civ. P. 9.02; the complaint contained factual allegations against the mortgagees surrounding the foreclosure of the mortgagor's home. Diggs v. Lasalle Nat'l Bank Ass'n, 387 S.W.3d 559, 2012 Tenn. App. LEXIS 347 (Tenn. Ct. App. May 30, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 763 (Tenn. Oct. 17, 2012).

2. Waiver.

Because purchasers failed to specifically allege fraud, and they failed to show that the issue was tried by the express or implied consent of the parties, the issue was waived. Mid-South Indus., Inc. v. Martin Mach. & Tool, Inc., 342 S.W.3d 19, 2010 Tenn. App. LEXIS 208 (Tenn. Ct. App. Mar. 19, 2010), appeal denied, Mid-South Indus. v. Martin Mach. & Tool, Inc., — S.W.3d —, 2010 Tenn. LEXIS 976 (Tenn. Oct. 12, 2010).

3. Insufficient Claim.

Since plaintiff failed to state the circumstances constituting fraudulent concealment with particularity, as required by Tenn. R. Civ. P. 9.02, plaintiff could not show that defendant's fraudulent misrepresentation/concealment tolled the statute of repose in T.C.A. § 28-3-202. Counts Co. v. Praters, Inc., 392 S.W.3d 80, 2012 Tenn. App. LEXIS 426 (Tenn. Ct. App. June 22, 2012), appeal denied, Counts Co., LLC v. Praters, Inc., — S.W.3d —, 2012 Tenn. LEXIS 776 (Tenn. Oct. 17, 2012).

Creditors seeking a determination of nondischargeability on the basis of false representation or actual fraud had to plead fraud with specificity, as they were also required to do under Tennessee law in a civil suit against debtor for intentional misrepresentation. Bankruptcy court would not grant collateral estoppel effect to a state court default judgment, as creditors' civil warrant failed the test for specificity because it did not state whether the claim was for negligent or intentional misrepresentation, creditors did not offer any proof to establish intent, and the default judgment did not allege or aver intent or provide any findings of fact or conclusions of law regarding intent. Vinsant v. Vinsant, 539 B.R. 351, 2015 Bankr. LEXIS 3403 (Bankr. E.D. Tenn. Oct. 7, 2015).

Church failed to state an actionable claim for fraud because it did not identify in its complaint any intentional misrepresentation of a material fact that a lending institution made to it; the church failed to assert that any misrepresentation by the lending institution "related to an existing or past fact," as it had to in order to constitute an element of fraud. Mount Hopewell Missionary Baptist Church v. Found. Capital Res., — S.W.3d —, 2021 Tenn. App. LEXIS 39 (Tenn. Ct. App. Feb. 4, 2021).

4. Claim Sufficient.

Party complied with the rule by setting forth the circumstances constituting fraud with sufficient particularity to survive a motion for summary judgment. Webster v. Walker, — S.W.3d —, 2018 Tenn. App. LEXIS 545 (Tenn. Ct. App. Sept. 18, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 79 (Tenn. Jan. 16, 2019).

9.03. Conditions Precedent. In pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. A denial of performance or occurrence shall be made specifically and with particularity.

9.04. Official Document or Act. In pleading an official document or official act it is sufficient to aver that the document was issued or the act done in compliance with law.

9.05. Judgment. In pleading a judgment or decision of a domestic or foreign court, judicial or quasi-judicial tribunal, or of a board of officers, it is sufficient to aver the judgment or decision without setting forth matters showing jurisdiction to render it.

9.06. Time and Place. For the purpose of testing the sufficiency of a pleading, averments of time and place are material, and shall be considered like all other averments of material matter.

9.07. Special Damage. When items of special damage are claimed, they shall be specifically stated.

Advisory Commission Comments. Rule 9 sets forth rules governing the pleading of several specific matters about which questions might arise. The Rule is not intended to create exceptions to the principles set out in Rule 8, but is rather an exemplification of those principles in specific situations. The requirement in Rule 9.02 — in averments of fraud or mistake the circumstances constituting fraud or mistake must be set forth with particularity — is not intended to require lengthy recital of detail. Rather, the Rule means only that general allegations of fraud and mistake are insufficient; the pleader is required to particularize, but by the "short and plain" statement required by Rule 8.01.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 103, 161, 162, 167, 386, 407, 408, 544.

Pritchard on Wills and Administration of Estates (4th ed., Phillips and Robinson), § 745.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-9.01-1, 1-9.02-1 — 1-9.02-3, 1-9.02-5, 1-9.03-1, 1-9.03-2, 1-9.07-1, 1-10.01-5, 1-12.02-7.

Tennessee Jurisprudence. 9 Tenn. Juris., Damages, § 40; 9 Tenn. Juris., Demurrers and Motions to Dismiss, § 22; 11 Tenn. Juris., Equity, §§ 7, 99; 15 Tenn. Juris., Injunctions, § 51; 18 Tenn. Juris., Lost Instruments and Records, § 3; 20 Tenn. Juris., Pleading, §§ 6, 7, 10; 22 Tenn. Juris., Specific Performance, § 18.

Law Reviews. A Survey of Civil Procedure in Tennessee — 1977, II. Selecting a Proper Forum (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 273.

NOTES TO DECISIONS

Analysis

1. Capacity.
2. Particularity of Pleading.
3. Fraud.
4. Sufficiency of Claims.
5. Special Damages.
6. Conditions Precedent.

1. Capacity.

Failure of defendants to make "special negative averment" of plaintiff's authority to sue by motion or answer constituted a waiver of the objection. Reeves v. Perkins, 509 S.W.2d 233, 1973 Tenn. App. LEXIS 316 (Tenn. Ct. App. 1973).

"Capacity," as used in Tenn. R. Civ. P. 9.01, relates to a party's personal or official right to litigate the issues presented by the pleadings and is governed by Tenn. R. Civ. P. 17.02 and 17.03; "standing," on the other hand, is a judge-made doctrine used to refuse to determine the merits of a controversy where the party advancing it is not properly situated to prosecute the action, and an issue of standing is raised by specific denial or defense in the answer or responsive pleading or by motion under Tenn. R. Civ. P. 12. Knierim v. Leatherwood, 542 S.W.2d 806, 1976 Tenn. LEXIS 521 (Tenn. 1976).

Tenn. R. Civ. P. 9 is not a motion rule; therefore, if a defendant conceives that the plaintiff does not have capacity, authority or legal existence, defendant could plead this defect in his responsive pleading by specific negative averment which does not constitute an affirmative defense under Tenn. R. Civ. P. 8.03. Knierim v. Leatherwood, 542 S.W.2d 806, 1976 Tenn. LEXIS 521 (Tenn. 1976).

Defendant's answer asserting that the complaint failed to state a claim upon which relief could be granted, denying subject matter jurisdiction as well as denying that process was properly issued and executed, did not meet Tenn. R. Civ. P. 9.01's requirement of a specific negative averment with supporting particulars. Goss v. Hutchins, 751 S.W.2d 821, 1988 Tenn. LEXIS 67 (Tenn. 1988).

Absent a showing of undue prejudice to the plaintiffs, the trial court did not abuse its discretion in allowing defendants to amend their answer to raise the defense of lack of capacity on the first day of trial, three and one half years after the defendants' initial answer. Kemmons Wilson, Inc. v. Allied Bank of Texas, 836 S.W.2d 104, 1992 Tenn. App. LEXIS 10 (Tenn. Ct. App. 1992).

2. Particularity of Pleading.

Tenn. R. Civ. P. 7.02 and 9.02, requiring particularity of pleading, are mandatory as a prerequisite to invoking the jurisdiction of the trial judge to exercise his discretion in granting or refusing the extraordinary relief of disturbing the finality of a judgment on any of the grounds authorized in Tenn. R. Civ. P. 60.02(1).

Hopkins v. Hopkins, 572 S.W.2d 639, 1978 Tenn. LEXIS 655 (Tenn. 1978).

The trial court did not err in denying relief under Tenn. R. Civ. P. 60.02 to correct a final divorce decree which did not mention an award to the wife of the husband's interest in certain real and personal property which the wife claimed she received at the divorce hearing wherein the pleading filed and at the hearing thereon, the wife failed to explain or justify the failure to include in the final decree presented 16 days after the divorce hearing, vestiture of the property alleged to have been awarded to her, and the failure to discover that omission within 30 days following entry of the decree, during which time the trial judge retained control. Hopkins v. Hopkins, 572 S.W.2d 639, 1978 Tenn. LEXIS 655 (Tenn. 1978).

All pleadings must be construed so as to do substantial justice, and that in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity and that malice, intent, knowledge, and other conditions of the mind may be averred generally. Ezell v. Graves, 807 S.W.2d 700, 1990 Tenn. App. LEXIS 746 (Tenn. Ct. App. 1990).

Storage companies' conspiracy to commit constructive fraud claim against a bank was properly dismissed where the complaint failed to state with particularity facts sufficient to establish a legal or equitable duty to the storage companies or a breach of a legal or equitable duty. Kincaid v. Southtrust Bank, 221 S.W.3d 32, 2006 Tenn. App. LEXIS 711 (Tenn. Ct. App. 2006), appeal denied, Kincaid v. Southtrust Bank, — S.W.3d —, 2007 Tenn. LEXIS 166 (Tenn. 2007).

3. Fraud.

Plaintiffs' complaint alleged a state of facts and a fraudulent "condition of mind" that produced a result detrimental to them and beneficial to defendants, all with sufficient particularity to state a cause of action sounding in fraud. Petty v. Call, 599 S.W.2d 791, 1980 Tenn. LEXIS 457 (Tenn. 1980).

Complaint need not actually employ the word "fraud," as fraud is a legal conclusion drawn from facts. Sullivant v. Americana Homes, Inc., 605 S.W.2d 246, 1980 Tenn. App. LEXIS 381 (Tenn. Ct. App. 1980).

Complaint sufficiently charged fraud where it charged misrepresentation, deceit, and concealment and minimally set forth the facts as required by Tenn. R. Civ. P. 9. Sullivant v. Americana Homes, Inc., 605 S.W.2d 246, 1980 Tenn. App. LEXIS 381 (Tenn. Ct. App. 1980).

Where plaintiffs' pleading stated that the defendants alleged themselves to be the owners of land belonging to the plaintiffs, that the defendants never spoke to the plaintiffs or told them they were going to advertise the land for sale, that the defendants' deed was champertous and declared void, and as a result of the defendants' libel of title that plaintiffs had been damaged, plaintiffs' complaint was sufficient to put defendants on notice of what was being claimed against them. Ezell v. Graves, 807 S.W.2d 700, 1990 Tenn. App. LEXIS 746 (Tenn. Ct. App. 1990).

In an action for fraud and negligent misrepresentation in the sale of municipal bonds to banks, the complaint complied with Tenn. R. Civ. P. 9 where it specifically identified the time and place of each alleged false representation, and identified the manner in which each representation was deemed to have been fraudulent. City State Bank v. Dean Witter Reynolds, 948 S.W.2d 729, 1996 Tenn. App. LEXIS 659 (Tenn. Ct. App. 1996), rehearing denied, — S.W.2d —, 1996 Tenn. App. LEXIS 753 (Tenn. Ct. App. 1996).

Where a general contractor and a surety sued a bank for fraud in connection with the execution of a performance bond and subordination agreement, the trial court dismissed the fraud claim because that claim was not pleaded with sufficient particularity as required by Tenn. R. Civ. P. 9. Smith Mech. Contrs., Inc. v. Premier Hotel Dev. Group, 210 S.W.3d 557, 2006 Tenn. App. LEXIS 468 (Tenn. Ct. App. 2006), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 1166 (Tenn. Dec. 18, 2006).

4. Sufficiency of Claims.

Despite Tenn. R. Civ. P. 9.02's particularity requirements, the sufficiency of claims under state consumer protection acts must be determined in light of Tenn. R. Civ. P. 8.01's liberal pleading standards. Harvey v. Ford Motor Credit Co., 8 S.W.3d 273, 1999 Tenn. App. LEXIS 314 (Tenn. Ct. App. 1999), review or rehearing denied, — S.W.3d —, 1999 Tenn. App. LEXIS 448 (Tenn. Ct. App. 1999), review or rehearing denied, — S.W.3d —, 1999 Tenn. LEXIS 669 (Tenn. 1999).

Claim for attorney's fees under the Tennessee securities act of 1980 was sufficiently pled because a seller of unregistered securities had notice via the complaint that investors were seeking to recover attorney's fees, even if the basis for recovery changed. Hardcastle v. Harris, 170 S.W.3d 67, 2004 Tenn. App. LEXIS 827 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2005 Tenn. LEXIS 500 (Tenn. May 23, 2005).

5. Special Damages.

Counsel fees are not special damages within the purview of Tenn. R. Civ. P. 9.07 in cases covered by T.C.A. § 36-5-103. Deas v. Deas, 774 S.W.2d 167, 1989 Tenn. LEXIS 376 (Tenn. 1989).

Attorneys' fees are deemed to be special damages, and must be specially pleaded pursuant to Tenn. R. Civ. P. 9.07. Cross v. McCurry, 859 S.W.2d 349, 1993 Tenn. App. LEXIS 335 (Tenn. Ct. App. 1993).

In a case involving a dispute regarding the fate of specific bequests in will, the court rejected the heir's argument that the beneficiary was not entitled to have her attorney fees paid by the estate because she did not include a specific request for attorney's fees in her answer as required by Tenn. R. Civ. P. 9.07; while including a specific prayer for attorney fees in an answer was a prudent practice, the beneficiary's pretrial brief clearly put both the estate and all other parties on notice that she was seeking to have her attorney fees paid by the estate. In re Estate of Greenamyre, 219 S.W.3d 877, 2005 Tenn. App. LEXIS 766 (Tenn. Ct. App. 2005), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 281 (Tenn. 2007).

6. Conditions Precedent.

Nonperformance of a condition precedent is an affirmative defense that must be pled, and if it is not properly raised in the trial court, it will not be considered on appeal. Harlan v. Hardaway, 796 S.W.2d 953, 1990 Tenn. App. LEXIS 344 (Tenn. Ct. App. 1990).

Tenn. R. Civ. P. 9 does not place the burden of proof upon the defendant to establish the nonoccurrence of a condition precedent but rather, once the defendant has put the issue in contest, the burden of proof rests with the plaintiff; if the defendant doubts the veracity of the plaintiff's allegation, in whole or in part, then the defendant may deny specifically and with particularity that the preconditions have not been fulfilled. First Tenn. Bank Nat'l Ass'n v. Barreto, 268 F.3d 319, 2001 FED App. 360P, 2001 U.S. App. LEXIS 21581 (6th Cir. Tenn. 2001).

RULE 9A

PETITION FOR TERMINATION OF PARENTAL RIGHTS; CONTENT OF PETITION

In addition to meeting all other applicable rules governing the filing of pleadings, any complaint or petition seeking a termination of parental rights shall contain the following notice: "Any appeal of the trial court's final disposition of the complaint or petition for termination of parental rights will be governed by the provisions of Rule 8A, Tennessee Rules of Appellate Procedure, which imposes special time limitations for the filing of a transcript or statement of the evidence, the completion and transmission of the record on appeal, and the filing of briefs in the appellate court, as well as other special provisions for expediting the appeal. All parties must review Rule 8A, Tenn. R. App. P., for information concerning the special provisions that apply to any appeal of this case." [As added by order entered January 15, 2004, effective July 1, 2004.]

Compiler's Notes. The adoption of this rule, as promulgated and adopted by the Supreme Court in its order dated January 15, 2004, was ratified and approved by 2004 House Resolution 242 and Senate Resolution 120. The order promulgating the adoption of this rule provided that it take effect July 1, 2004.

RULE 10

FORM OF PLEADINGS

10.01. Caption — Names of Parties. Every pleading shall contain a caption setting forth the name of the court and county wherein the action is filed or is pending, the title of the action, the file number, and a designation as in Rule 7.01. In the complaint the title of the action shall include the names of all the parties, but in other pleadings it is sufficient to state the name of the first party on each side with an appropriate indication of other parties.

10.02. Paragraphs — Separate Statements. All averments of claim or defense shall be made in numbered paragraphs, contents of each of which shall be limited as far as practicable to a statement of a single set of circumstances; and a paragraph may be referred to by number in all succeeding pleadings. Each claim founded upon a separate transaction or occurrence and each defense other than denials shall be stated in a separate count or defense whenever a separation facilitates the clear presentation of the matters set forth.

10.03. Exhibits. Whenever a claim or defense is founded upon a written instrument other than a policy of insurance, a copy of such instrument or the pertinent parts thereof shall be attached to the pleading as an exhibit unless the instrument is (1) a matter of public record in the county in which the action is commenced and its location in the record is set forth in the pleading; (2) in the possession of the adverse party and this fact is stated in the pleading; (3) inaccessible to the pleader or is of such nature that attaching the instrument would be unnecessary or impracticable and this fact is stated in the pleading, together with the reason therefor. Every exhibit so attached or referred to under (1) and (2) shall be a part of the pleading for all purposes.

NOTES TO DECISIONS

Analysis

1. Failure to Attach.
2. Applicability.
3. Construction.

1. Failure to Attach.

Counsel expressed concern about disclosing a juvenile court record, but such records were open to inspection with permission, and counsel should have sought permission; the record should have been supplemented and the procedure for filing the record should have been complied with by counsel. Ellithorpe v. Weismark, 479 S.W.3d 818, 2015 Tenn. LEXIS 827 (Tenn. Oct. 8, 2015).

Trial court did not err by refusing to consider the homeowners' association's articles of incorporation and bylaws as evidence of breach of contract when considering the association's motion for summary judgment because neither amended complaint directly mentioned a written contract or the association's articles of incorporation and bylaws and the homeowners' proof of the articles of incorporation and bylaws materially varied from the allegations made in their pleading. Tolliver v. Tellico Vill. Prop. Owners Ass'n, 579 S.W.3d 8, 2019 Tenn. App. LEXIS 6 (Tenn. Ct. App. Jan. 7, 2019).

Although a former graduate student's breach of contract claim against a private university was based on the university's handbook and guide, the student failed to attach either document as an exhibit to the complaint as required by the procedural rules. Under these narrow circumstances, the trial court properly considered the guide as part of the pleadings when the university filed a motion to dismiss for failure to state a claim for relief. Rice v. Belmont Univ., — S.W.3d —, 2020 Tenn. App. LEXIS 253 (Tenn. Ct. App. May 29, 2020).

Appellant did not attach a copy of his employment contract to his complaint, but appellee did, and as part of appellee's defense was based on the contract and appellant filed a copy of the contract with his response to the motion to dismiss, the court reviewed the contract's provisions as part of the pleadings. Parker v. ABC Techs., Inc., — S.W.3d —, 2021 Tenn. App. LEXIS 65 (Tenn. Ct. App. Feb. 25, 2021).

2. Applicability.

Plaintiff attached to his complaint as an exhibit the police report concerning the investigation pursuant to the statute, and the trial court did not err by considering the reference in the report to the statute, as the report was a part of the complaint for purposes of the motion to dismiss. Pagliara v. Moses, 605 S.W.3d 619, 2020 Tenn. App. LEXIS 71 (Tenn. Ct. App. Feb. 20, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 331 (Tenn. June 6, 2020).

Trial court's grant of judgment on the pleadings concerning a former client's legal malpractice claims was predicated in part on the client's waiver of any conflict of interest in the signed engagement letter. Because the client's former legal counsel attached the engagement letter to their answer filed in the matter, the engagement letter became a part of that pleading and was properly considered by the trial court in its analysis of counsel's motion for

judgment on the pleadings. Culpepper v. Baker, — S.W.3d —, 2020 Tenn. App. LEXIS 460 (Tenn. Ct. App. Oct. 16, 2020).

3. Construction.

Under the rule, parties are required to attach a copy of written instruments that form the bases for their claims or defenses, absent certain circumstances, and a copy of a written instrument attached to a pleading pursuant to the provisions of the rule becomes a part of the pleading itself. Parker v. ABC Techs., Inc., — S.W.3d —, 2021 Tenn. App. LEXIS 65 (Tenn. Ct. App. Feb. 25, 2021).

10.04. Adoption by Reference. Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion.

Advisory Commission Comments. 10.02: Rule 10.02 sets out a technique for achieving clarity and simplicity in pleading. The requirements as to separate paragraphs and counts are qualified by considerations of practicality and clarity. Thus, each claim founded upon a separate transaction is not absolutely required to be set out in a separate count unless the separation facilitates the clear presentation of the matters set forth.

10.03: Rule 10.03 requires that, when an action or defense rests upon a written instrument, the instrument be made an exhibit to the pleading and become a part thereof. The exceptions set out in Rule 10.03 cover situations where the instrument is not available to the pleader or the inconvenience of exhibition outweighs the value thereof.

10.04: This Rule is designed to remove the necessity for repeating material already set out in the same or a former pleading.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 65, 102, 103, 152, 169, 414, 451, 473, 483, 503, 504, 633.

Pritchard on Wills and Administration of Estates (4th ed., Phillips and Robinson), §§ 699, 745.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-7-3, 1-8-1, 1-10.01-1, 1-10.02-1, 1-10.03-1, 1-10.04-1.

Tennessee Jurisprudence. 1 Tenn. Juris., Abatement, Survival and Revival, § 20; 2 Tenn. Juris., Appeal and Error, § 87; 11 Tenn. Juris., Equity, § 48; 15 Tenn. Juris., Injunctions, § 51; 21 Tenn. Juris., Profert and Oyer, §§ 1, 2; 22 Tenn. Juris., Specific Performance, § 18.

Law Reviews. Civil Procedure — Doe v. Frank: Determining the Circumstances Under Which a Plaintiff May Proceed Under a Fictitious Name, 23 Mem. St. U.L. Rev. 881 (1993).

Service of Process Upon Foreign Defendants Under the Hague Convention (Michael L. Silhol), 28 No. 5 Tenn. B.J. 23 (1992).

The Tennessee Court System — Circuit Court (Frederic S. Le Clercq), 8 Mem. St. U.L. Rev. 241.

Attorney General Opinions. Unnamed legislators not parties in suit against executive branch, OAG 98-025 (1/26/98).

NOTES TO DECISIONS

Analysis

1. Caption.
2. Exhibits.

1. Caption.

Although Tenn. R. Civ. P. 10.01 requires the caption of a complaint to name all parties, this is merely a technical requirement. The caption requirement is merely for identification purposes, and does not control who is a party in the action; the issue of who is a proper party defendant must be determined from the allegations of the complaint. Goss v. Hutchins, 751 S.W.2d 821, 1988 Tenn. LEXIS 67 (Tenn. 1988).

2. Exhibits.

Documents which were made exhibits to the complaint were part of the technical record and could be considered by Court of Appeals in review de novo of decision in chancery court. Cousins Properties of Tennessee, Inc. v. Karr, 526 S.W.2d 498, 1975 Tenn. App. LEXIS 177 (Tenn. Ct. App. 1975).

Where plaintiff was suing defendant for a breach of contract, the contract documents and specifications represented the foundation of the suit, and their provisions were incorporated into and became part of the pleadings and could properly be relied upon by both parties, however, certain letters which the plaintiff sought to attach to the complaint were stricken by the trial judge because the facts which they purported to show were nowhere stated in the complaint nor were these the documents upon which the claim was founded. W & O Constr. Co. v. Smithville, 557 S.W.2d 920, 1977 Tenn. LEXIS 679 (Tenn. 1977).

Policy of insurance, not having been exhibited to the complaint itself, did not become a part of the complaint pursuant to Tenn. R. Civ. P. 10.03; thus, since the policy of insurance at issue first appeared in the case as an exhibit to the motion to dismiss, the provisions of Tenn. R.

Civ. P. 12.02(6) converted the motion to dismiss at that time to a motion for summary judgment under Tenn. R. Civ. P. 56. Brick Church Transmission, Inc. v. S. Pilot Ins. Co., 140 S.W.3d 324, 2003 Tenn. App. LEXIS 829 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 392 (Tenn. May 10, 2004).

RULE 11

SIGNING OF PLEADINGS, MOTIONS, AND OTHER PAPERS; REPRESENTATIONS TO COURT; SANCTIONS

NOTES TO DECISIONS

1. Abuse of Discretion.

Trial court did not abuse its discretion in awarding attorneys' fees to a party because the court did not award the party attorney's fees solely because the party was the prevailing party on a motion. The court found that the award of attorney's fees was warranted, based on the circumstances. Coffey v. Coffey, 578 S.W.3d 10, 2018 Tenn. App. LEXIS 552 (Tenn. Ct. App. Sept. 20, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 136 (Tenn. Feb. 20, 2019).

11.01. [Current rule. See Proposed rule and compiler's notes.] Signature. (a) Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state the signer's address, telephone number, and Tennessee Board of Professional Responsibility number, if any. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Appearance of Counsel and Notification by Counsel Subject to Limited Scope Representation. An attorney providing limited scope representation to an otherwise unrepresented party shall file at the beginning of the representation an initial notice of limited scope representation with the court, simply stating that the representation is subject to a written limited scope representation agreement without disclosing the terms of the agreement. In addition to the initial notice of limited scope representation, when provided notice by another party, attorney or the court of a motion, pleading, discovery, hearing or other proceeding that is outside of the scope of the services provided pursuant to the limited scope representation agreement, an attorney shall promptly file a notice of limited appearance that the attorney does not represent the otherwise unrepresented party for purposes of the motion, pleading, discovery, hearing or other proceeding. The notice of limited appearance shall simply state that the limited scope representation does not include representation for purposes of the motion, pleading, discovery, hearing or other proceeding noticed and shall not otherwise disclose the terms of the limited scope representation agreement. The notice of limited appearance shall provide the otherwise unrepresented client with the deadline(s), if any, for responding to the motion, pleading, discovery, hearing or other proceeding and shall state the date, place and time of any hearing or other proceeding. If an initial notice of limited scope representation or a notice of limited appearance is filed, service shall be made as provided in Rule 5.02.

(c) Withdrawal of Counsel Upon Completion of a Limited Scope

REPRESENTATION. Upon the filing of a notice of completion of limited scope representation that is accompanied by a declaration from the attorney indicating that the attorney's obligations under a limited scope representation agreement have been satisfied, and that the attorney provided the otherwise unrepresented person at least fourteen (14) days advance written notice of the filing of notice of completion of limited scope representation, the attorney shall have withdrawn from representation in the case. [As amended by order entered January 26, 1999, effective July 1, 1999; and by order filed January 13, 2012, effective July 1, 2012.]

Advisory Commission Comments [2012]. Rule 11.01 is amended to add new paragraphs (b) and (c), concerning an attorney's limited scope representation of a client. An attorney's obligations under this Rule of Civil Procedure are also governed by Tenn. Sup. Ct. R. 8, RPC 1.2(c), which states: "A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent, preferably in writing." *See also* Tenn. Sup. Ct. R. 8, RPC 1.2(c), Comments [6] – [8]. Note, however, that paragraph (b) of this Rule goes further than RPC 1.2(c) and requires that an agreement for limited scope representation, as it relates to a proceeding governed by this Rule, must be in writing.

Nothing in this rule prohibits an attorney providing limited scope representation from withdrawing with leave of the court prior to completion of the terms set forth in the limited scope representation agreement.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 31, 2003, was ratified and approved by 2003 House Resolution 21 and Senate Resolution 8. The order promulgating the 2003 amendment of this rule provided that it take effect on July 1, 2003.

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 13, 2012, was ratified and approved by 2012 House Resolution 193 and Senate Resolution 78. The order promulgating the 2012 amendment of this rule provided that it take effect on July 1, 2012.

In its order filed August 27, 2015, the Supreme Court provided: "The Advisory Commission on the Rules of Practice and Procedure annually presents recommendations to the Court to amend the Tennessee Rules of Appellate, Civil, Criminal, and Juvenile Procedure and the Tennessee Rules of Evidence. With its meeting on August 14, 2015, the Advisory Commission completed its 2014-2015 term, and the Commission thereafter transmitted its recommendations to the Court."

"The court hereby publishes the Advisory Commission's recommended amendments set out in the two Appendices to this order. Appendix I sets out the proposed amendments tot he Rules of Appellate, Civil, and Criminal Procedure. Appendix II sets out a proposed comprehensive revision of the Rules of Juvenile Procedure, which, if adopted, will replace in its entirety the current version of the Rules of Juvenile Procedure."

"The court hereby solicits written comments on the proposed amendments from the bench, the bar, and the public. The deadline for submitting written comments is Wednesday, November 25, 2015. Written comments may either be submitted by email to appellatecourtclerk@tncourts.gov or by mail addressed to: James Hivner, Clerk, Re: 2016 Rules Package, 100 Supreme Court Building, 401 7th Avenue North, Nashville, TN 37219-1407 and should reference the docket number set out above [No. ADM2015-01631]."

The proposed amendment to Tennessee Rules of Civil Procedure, Rule 11.01, promulgated by the Supreme Court in its order dated August 27, 2015, in (a), would add the following sentence preceding the last sentence: "A pleading, written motion, or other paper shall be considered signed only if it meets the signature requirement for filing purposes set forth in Rule 5.06."; and would add the following 2016 Advisory Commission Comments: "Advisory Commission Comment [2016]. Subdivision (a) is amended by adding the fourth sentence, which specifies that a signature on a pleading, written motion, or other paper must meet the signature requirement for filing purposes under Rule 5.06."

Workers' Compensation Appeals Board Decisions. After filing a petition for benefits identifying the deceased worker and the existence of a dependent spouse, the attorney of record took no further action on the claim. An individual identified as the decedent's niece later participated in a show cause hearing and requested additional time to file a request for a hearing. That request was granted, and the niece filed a request for an expedited hearing. The employer responded by filing a motion to dismiss, asserting that the niece is not a member of any class of potential dependents, that the niece is not the legal representative of the decedent's estate, and that she has no standing to bring a claim for death benefits. The trial court denied the employer's motion to dismiss,

determining the motion should be treated as a motion for summary judgment because the employer relied on the niece's affidavit that was filed in support of the request for an expedited hearing. The employer has appealed. In the context of the appeal as presented, however, the Board was unable to reach the merits of the issues because: (1) the attorney filing the petition for benefits failed to file a motion to withdraw and; (2) neither the parties nor the court addressed how or why the niece was added as a party. There was no motion to withdraw as counsel, no motion to substitute parties or add a party, and no order explaining the addition of the niece as a party or a judicially-appointed representative of the estate of the decedent. In addition, a non-party who is not an attorney may not represent an injured worker, a surviving spouse, or any other litigant in a workers' compensation case. Filings made by a person purportedly representing the estate of a deceased worker in a pro se capacity cannot be considered until the court has approved the withdrawal of the attorney of record and added the judicially-designated representative of the estate as a party. Accordingly, the trial court's order denying the employer's motion to dismiss is vacated. Ayers v. Smith & Nephew, Inc., 2020 TN Wrk Comp App Bd LEXIS 38.

NOTES TO DECISIONS

Analysis

1. Miscellaneous.
2. Signature compliant.

1. Miscellaneous.

Trust's appeal was dismissed for lack of jurisdiction where the notice of appeal was signed the non-attorney trustee, and thus, under Tenn. R. Civ. P. 11.01, it was insufficient to initiate an appeal on behalf of the trust. Elm Children's Educ. Trust v. Wells Fargo Bank, N.A., 468 S.W.3d 529, 2014 Tenn. App. LEXIS 821 (Tenn. Ct. App. Dec. 17, 2014), appeal denied, — S.W.3d —, 2015 Tenn. LEXIS 427 (Tenn. May 14, 2015).

Husband's motion and notice were in compliance with signature requirements; although not signed by him, these documents were signed by his attorney and included his Board of Professional Responsibility number, address, and phone number. Tenn. R. Civ. P. 11.01(a) requires nothing further. Holleman v. Holleman, — S.W.3d —, 2020 Tenn. App. LEXIS 293 (Tenn. Ct. App. June 25, 2020).

2. Signature compliant.

Attorney's signature on a complaint was in compliance with the requirements under the Tennessee Rules of Civil Procedure because the complaint contained a signature bearing the attorney's name, as well as the attorney's identifying information, as the attorney directed another attorney at the attorney's law firm to sign the attorney's name to the complaint on the attorney's behalf and with the attorney's permission. Smith v. Gonzalez, — S.W.3d —, 2021 Tenn. App. LEXIS 132 (Tenn. Ct. App. Apr. 1, 2021).

11.01. [Proposed rule. See Current rule and compiler's notes.] Signature. (a) Every pleading, written motion, and other paper shall be signed by at least one attorney of record in the attorney's individual name, or, if the party is not represented by an attorney, shall be signed by the party. Each paper shall state, to the extent available, the signer's address, telephone number, e-mail address, and Tennessee Board of Professional Responsibility number. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. An unsigned paper shall be stricken unless omission of the signature is corrected promptly after being called to the attention of the attorney or party.

(b) Appearance of Counsel and Notification by Counsel Subject to Limited Scope Representation. An attorney providing limited scope representation to an otherwise unrepresented party shall file at the beginning of the representation an initial notice of limited scope representation with the court, simply stating that the representation is subject to a written limited scope representation agreement without disclosing the terms of the agreement. In addition to the initial notice of limited scope representation, when provided notice by another party, attorney or the court of a motion, pleading, discovery, hearing or other proceeding that is outside of the scope of the services provided pursuant to the

limited scope representation agreement, an attorney shall promptly file a notice of limited appearance that the attorney does not represent the otherwise unrepresented party for purposes of the motion, pleading, discovery, hearing or other proceeding. The notice of limited appearance shall simply state that the limited scope representation does not include representation for purposes of the motion, pleading, discovery, hearing or other proceeding noticed and shall not otherwise disclose the terms of the limited scope representation agreement. The notice of limited appearance shall provide the otherwise unrepresented client with the deadline(s), if any, for responding to the motion, pleading, discovery, hearing or other proceeding and shall state the date, place and time of any hearing or other proceeding. If an initial notice of limited scope representation or a notice of limited appearance is filed, service shall be made as provided in Rule 5.02.

(c) Withdrawal of Counsel Upon Completion of a Limited Scope Representation. Upon the filing of a notice of completion of limited scope representation that is accompanied by a declaration from the attorney indicating that the attorney's obligations under a limited scope representation agreement have been satisfied, and that the attorney provided the otherwise unrepresented person at least fourteen (14) days advance written notice of the filing of notice of completion of limited scope representation, the attorney shall have withdrawn from representation in the case. [As amended by order entered January 26, 1999, effective July 1, 1999; by order filed January 13, 2012, effective July 1, 2012; and by order filed December 3, 2020, effective July 1, 2021.]

Advisory Commission Comments [2012]. Rule 11.01 is amended to add new paragraphs (b) and (c), concerning an attorney's limited scope representation of a client. An attorney's obligations under this Rule of Civil Procedure are also governed by Tenn. Sup. Ct. R. 8, RPC 1.2(c), which states: "A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent, preferably in writing." *See also* Tenn. Sup. Ct. R. 8, RPC 1.2(c), Comments [6] – [8]. Note, however, that paragraph (b) of this Rule goes further than RPC 1.2(c) and requires that an agreement for limited scope representation, as it relates to a proceeding governed by this Rule, must be in writing.

Nothing in this rule prohibits an attorney providing limited scope representation from withdrawing with leave of the court prior to completion of the terms set forth in the limited scope representation agreement.

Advisory Commission Comments [2021]. Rule 11.01(a) is amended to require that every pleading, written motion, and other paper shall include the signer's email address. Providing an e-mail address is useful but does not of itself signify consent to filing or service by e-mail.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 31, 2003, was ratified and approved by 2003 House Resolution 21 and Senate Resolution 8. The order promulgating the 2003 amendment of this rule provided that it take effect on July 1, 2003.

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 13, 2012, was ratified and approved by 2012 House Resolution 193 and Senate Resolution 78. The order promulgating the 2012 amendment of this rule provided that it take effect on July 1, 2012.

In its order filed August 27, 2015, the Supreme Court provided: "The Advisory Commission on the Rules of Practice and Procedure annually presents recommendations to the Court to amend the Tennessee Rules of Appellate, Civil, Criminal, and Juvenile Procedure and the Tennessee Rules of Evidence. With its meeting on August 14, 2015, the Advisory Commission completed its 2014-2015 term, and the Commission thereafter transmitted its recommendations to the Court."

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The proposed amendment to Tennessee Rules of Civil Procedure, Rule 11.01, promulgated by the Supreme Court in its order dated August 27, 2015, in (a), would add the following sentence preceding the last sentence: "A pleading, written motion, or other paper shall be considered signed only if it meets the signature requirement for filing purposes set forth in Rule 5.06."; and would add the following 2016 Advisory Commission Comments: "Advisory Commission Comment [2016]. Subdivision (a) is amended by adding the fourth sentence, which specifies that a signature on a pleading, written motion, or other paper must meet the signature requirement for filing purposes under Rule 5.06."

In its order filed December 3, 2020, the Supreme Court adopted the amendment to this rule, effective July 1, 2021, subject to approval by resolution of the General Assembly.

The amendment of Rule 11, which amended subdivision 11.01 and added the [2021] Advisory Comments, as promulgated and adopted by the Supreme Court in its order dated December 3, 2020 was ratified and approved by 2021 House Resolution 21 and Senate Resolution 19. The order promulgating the amendment of subdivision 11.01 and the addition of the [2021] Advisory Comments, provided that it take effect July 1, 2021.

Workers' Compensation Appeals Board Decisions. After filing a petition for benefits identifying the deceased worker and the existence of a dependent spouse, the attorney of record took no further action on the claim. An individual identified as the decedent's niece later participated in a show cause hearing and requested additional time to file a request for a hearing. That request was granted, and the niece filed a request for an expedited hearing. The employer responded by filing a motion to dismiss, asserting that the niece is not a member of any class of potential dependents, that the niece is not the legal representative of the decedent's estate, and that she has no standing to bring a claim for death benefits. The trial court denied the employer's motion to dismiss, determining the motion should be treated as a motion for summary judgment because the employer relied on the niece's affidavit that was filed in support of the request for an expedited hearing. The employer has appealed. In the context of the appeal as presented, however, the Board was unable to reach the merits of the issues because: (1) the attorney filing the petition for benefits failed to file a motion to withdraw and; (2) neither the parties nor the court addressed how or why the niece was added as a party. There was no motion to withdraw as counsel, no motion to substitute parties or add a party, and no order explaining the addition of the niece as a party or a judicially-appointed representative of the estate of the decedent. In addition, a non-party who is not an attorney may not represent an injured worker, a surviving spouse, or any other litigant in a workers' compensation case. Filings made by a person purportedly representing the estate of a deceased worker in a pro se capacity cannot be considered until the court has approved the withdrawal of the attorney of record and added the judicially-designated representative of the estate as a party. Accordingly, the trial court's order denying the employer's motion to dismiss is vacated. Ayers v. Smith & Nephew, Inc., 2020 TN Wrk Comp App Bd LEXIS 38.

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Husband's motion and notice were in compliance with signature requirements; although not signed by him, these documents were signed by his attorney and included his Board of Professional Responsibility number, address, and phone number. Tenn. R. Civ. P. 11.01(a) requires nothing further. Holleman v. Holleman, — S.W.3d —, 2020 Tenn. App. LEXIS 293 (Tenn. Ct. App. June 25, 2020).

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Attorney's signature on a complaint was in compliance with the requirements under the Tennessee Rules of Civil Procedure because the complaint contained a signature bearing the attorney's name, as well as the attorney's identifying information, as the attorney directed another attorney at the attorney's law firm to

sign the attorney's name to the complaint on the attorney's behalf and with the attorney's permission. Smith v. Gonzalez, — S.W.3d —, 2021 Tenn. App. LEXIS 132 (Tenn. Ct. App. Apr. 1, 2021).

11.02. Representations to Court. By presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, —

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denial of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

NOTES TO DECISIONS

Analysis

1. Sanctions Not Imposed.
2. Abuse of Discretion.
3. Due Diligence.
4. Sanctions Proper.

1. Sanctions Not Imposed.

Trial court did not abuse its discretion by failing to award defendants sanctions under this rule and Tenn. R. Civ. P. 11.03 because there was no indication that defendants complied with Rule 11.03's safe harbor provision, as nothing in the record showed that they served plaintiff with their motion for sanctions prior to filing their request with the trial court and the sanctions were requested concurrent with their opposition to plaintiff's nonsuit. Ewan v. Hardison Law Firm, 465 S.W.3d 124, 2014 Tenn. App. LEXIS 456 (Tenn. Ct. App. July 31, 2014).

2. Abuse of Discretion.

Trial court did not abuse its discretion when it denied the bank's first motion for sanctions under Tenn. R. Civ. P. 11.02 against the clerk's counsel's law firm and its attorneys because the clerk's motion to confirm was neither unnecessary nor meritless where after the appellate court remanded the case following the first appeal, the clerk filed the motion to confirm to place the relevant issues squarely before the trial court in order to resolve the immunity issue and to obtain disbursement of his fee. Marra v. Bank of N.Y., 310 S.W.3d 329, 2009 Tenn. App. LEXIS 529 (Tenn. Ct. App. Aug. 4, 2009), rehearing denied, 310 S.W.3d 329, 2009 Tenn. App. LEXIS 909 (Tenn. Ct. App. 2009), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 214 (Tenn. Feb. 22, 2010).

Trial court abused its discretion when it granted the clerk's Tenn. R. Civ. P. 11.02 motion for sanctions and awarded appellate attorney's fees to the clerk for the trustee's filing of pleadings in connection with the first appeal because the clerk's motion for sanctions was in essence a motion for appellate attorney's fees pursuant to T.C.A. § 27-1-122 for the filing of a frivolous appeal. Under § 27-1-122, the decision on whether to award damages for the filing of a frivolous appeal rested solely in the discretion of the appellate court, and it was improper for the trial court to essentially grant appellate attorney's fees to the clerk under Tenn. R. Civ. P. 11.02. Marra v. Bank of N.Y., 310 S.W.3d 329, 2009 Tenn. App. LEXIS 529 (Tenn. Ct. App. Aug. 4, 2009), rehearing denied, 310 S.W.3d 329, 2009 Tenn. App. LEXIS 909 (Tenn. Ct. App. 2009), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 214 (Tenn. Feb. 22, 2010).

Trial court did not abuse its discretion when it denied the bank's second motion for sanctions against the clerk's law firm and its attorneys because Tenn. R. Civ. P. 11.02 sanctions were not justified simply because the offending motion turns out to be nonmeritorious. Marra v. Bank of N.Y., 310 S.W.3d 329, 2009 Tenn. App. LEXIS 529 (Tenn. Ct. App. Aug. 4, 2009), rehearing denied, 310 S.W.3d 329, 2009 Tenn. App. LEXIS 909 (Tenn. Ct. App. 2009), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 214 (Tenn. Feb. 22, 2010).

3. Due Diligence.

Requiring a plaintiff in a medical malpractice action to conduct a due diligence inquiry prior to filing a complaint was not in conflict with the Tennessee Rules of Civil Procedure adopted by the Supreme Court of Tennessee. In fact, requiring the plaintiff to exercise due diligence prior to the filing of the complaint was entirely consistent with Tenn. R. Civ. P. 11.02. Jackson v. HCA Health Servs. of Tenn., Inc., 383 S.W.3d 497, 2012 Tenn. App. LEXIS 250 (Tenn. Ct. App. Apr. 18, 2012), appeal denied, Jackson v. HCA Health Servs. of Tenn., — S.W.3d —, 2012 Tenn. LEXIS 585 (Tenn. Aug. 16, 2012).

4. Sanctions Proper.

Amount of the sanction, close to $10,000 in attorney fees, was within the realm of reasonableness and did not constitute an abuse of discretion. Parvin v. Newman, 518 S.W.3d 298, 2016 Tenn. App. LEXIS 945 (Tenn. Ct. App. Dec. 9, 2016).

Trial court did not abuse its discretion by assessing a sanction against the husband's counsel upon finding no good faith basis for counsel to have believed the abuse of process claim was viable; a reasonable pre-filing investigation, together with reasonable research into existing law, would have demonstrated that a defense of res judicata was bound to prevail, and counsel's good faith defense was unavailing. Parvin v. Newman, 518 S.W.3d 298, 2016 Tenn. App. LEXIS 945 (Tenn. Ct. App. Dec. 9, 2016).

Trial court did not abuse its discretion in granting the motion for sanctions, as there were three separate instances of petitioner's dishonesty and he filed the action for an improper purpose. In re Willard R. Sparks Revocable Trust 2004, — S.W.3d —, 2018 Tenn. App. LEXIS 746 (Tenn. Ct. App. Dec. 20, 2018), appeal denied, In re Willard R. Sparks Trust 2004, — S.W.3d —, 2019 Tenn. LEXIS 256 (Tenn. June 21, 2019).

Trial court did not abuse its discretion in awarding a bank sanctions because a limited liability company was warned that its claim under the federal Right to Financial Privacy Act was legally infirm and had no basis. Nationwide Invs., LLC v. Pinnacle Bank, — S.W.3d —, 2019 Tenn. App. LEXIS 458 (Tenn. Ct. App. Sept. 16, 2019), appeal denied, Nationwide Invs. LLC v. Pinnacle Bank, — S.W.3d —, 2020 Tenn. LEXIS 131 (Tenn. Feb. 19, 2020).

Sanctions were warranted because there was no legal basis for filing a lien to secure the quantum meruit claim and thereby requiring the estate to seek a court order requiring appellant to release the lien as the quantum meruit claim appellant asserted was for services rendered in a life insurance proceeds matter that had nothing to do with the property she alleged was hers based on a quitclaim deed; the insurance matter was not a right of action to which an attorney's lien would apply; and, to the extent appellant sought payment for services rendered in representing the decedent, her mother, in the life insurance matter, she should have done so as a creditor of the estate. In re Estate of Lloyd, — S.W.3d —, 2020 Tenn. App. LEXIS 6 (Tenn. Ct. App. Jan. 8, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 380 (Tenn. June 3, 2020).

11.03. Sanctions. If, after notice and a reasonable opportunity to respond, the court determines that subdivision 11.02 has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision 11.02 or are responsible for the violation.

(1) How Initiated.

(a) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision 11.02. It shall be served as provided in Rule 5, but shall not be filed with or presented to the court unless, within 21 days after service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected. If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

(b) On Court's Initiative. On its own initiative, the court may enter an order describing the specific conduct that appears to violate subdivision 11.02 and directing an attorney, law firm, or party to show cause why it has not violated

subdivision 11.02 with respect thereto.

(2) Nature of Sanctions; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated. Subject to the limitations in subparagraphs (a) and (b), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorneys' fees and other expenses incurred as a direct result of the violation.

(a) Monetary sanctions may not be awarded against a represented party for a violation of subdivision 11.02(2).

(b) Monetary sanctions may not be awarded on the court's initiative unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party which is, or whose attorneys are, to be sanctioned.

(3) Order. When imposing sanctions, the court shall describe the conduct determined to constitute a violation of this rule and explain the basis for the sanction imposed. [As amended by order entered January 31, 2003, effective July 1, 2003.]

NOTES TO DECISIONS

Analysis

1. Applicability.
2. Sanctions Inappropriate.
3. Attorney Fees.
4. Sanctions Appropriate.

1. Applicability.

In light of the alternative remedies if an attorney exceeds the bounds of permissible conduct, coupled with the limitations the supreme court of Tennessee has placed on the absolute litigation privilege itself, the court is satisfied that the privilege cannot be exploited as an opportunity to defame with impunity. Simpson Strong-Tie Co. v. Stewart, 232 S.W.3d 18, 2007 Tenn. LEXIS 654 (Tenn. Aug. 20, 2007).

2. Sanctions Inappropriate.

Trial court did not abuse its discretion by failing to award defendants sanctions under this rule and Tenn. R. Civ. P. 11.02 because there was no indication that defendants complied with this rule's safe harbor provision, as nothing in the record showed that they served plaintiff with their motion for sanctions prior to filing their request with the trial court and the sanctions were requested concurrent with their opposition to plaintiff's nonsuit. Ewan v. Hardison Law Firm, 465 S.W.3d 124, 2014 Tenn. App. LEXIS 456 (Tenn. Ct. App. July 31, 2014).

Trial court abused its discretion in awarding attorney's fees to appellant when the hospital made a non-frivolous motion, which was granted by the trial court, and appellant failed to comply with the mandatory safe harbor provision. Terry v. Jackson-Madison Cty. Gen. Hosp. Dist., 572 S.W.3d 324, 2018 Tenn. App. LEXIS 372 (2018).

Trial court did not abuse its discretion by denying appellant's motions for sanctions because of appellant's failure to serve the motion upon the opposing party at least 21 days before filing the motion with the court, the lack of factual support for appellant's motions for sanctions, and the mootness of the opposing parties' motion to dismiss in light of appellant's filing of an amended petition. Gentry v. Casada, — S.W.3d —, 2020 Tenn. App. LEXIS 416 (Tenn. Ct. App. Sept. 17, 2020).

3. Attorney Fees.

Trial court did not abuse its discretion in awarding a portion of attorney fees in the amount of $200,000 to serve as a deterrent; although it was argued that the trust was entitled to the full amount of its fees, $1.9 million, including those incurred in presenting the motion for sanctions, the trial court determined that such a generous award was unnecessary to deter the conduct especially considering that petitioner was a one-third trust beneficiary and in effect had already paid one-third of the requested fee. In re Willard R. Sparks Revocable Trust 2004, — S.W.3d —, 2018 Tenn. App. LEXIS 746 (Tenn. Ct. App. Dec. 20, 2018), appeal denied, In re Willard R. Sparks Trust 2004, — S.W.3d —, 2019 Tenn. LEXIS 256 (Tenn. June 21, 2019).

Trial court did not abuse its discretion in declining to award attorney's fees under the statute in light of its existing award under

Tenn. R. Civ. P. 11.03. In re Willard R. Sparks Revocable Trust 2004, — S.W.3d —, 2018 Tenn. App. LEXIS 746 (Tenn. Ct. App. Dec. 20, 2018), appeal denied, In re Willard R. Sparks Trust 2004, — S.W.3d —, 2019 Tenn. LEXIS 256 (Tenn. June 21, 2019).

4. Sanctions Appropriate.

Trial court did not err in entering a show cause order and in ordering sanctions against plaintiff, who failed to address either of the trial court's findings of a violation of the rule. McMillin v. Realty Execs. Assocs., — S.W.3d —, 2019 Tenn. App. LEXIS 179 (Tenn. Ct. App. Apr. 12, 2019), appeal denied, McMillin v. Realty Execs. Assocs., — S.W.3d —, 2019 Tenn. LEXIS 406 (Tenn. Aug. 15, 2019).

Trial court did not abuse its discretion in awarding a bank sanctions because a limited liability company was warned that its claim under the federal Right to Financial Privacy Act was legally infirm and had no basis. Nationwide Invs., LLC v. Pinnacle Bank, — S.W.3d —, 2019 Tenn. App. LEXIS 458 (Tenn. Ct. App. Sept. 16, 2019), appeal denied, Nationwide Invs. LLC v. Pinnacle Bank, — S.W.3d —, 2020 Tenn. LEXIS 131 (Tenn. Feb. 19, 2020).

Sanctions were warranted because there was no legal basis for filing a lien to secure the quantum meruit claim and thereby requiring the estate to seek a court order requiring appellant to release the lien as the quantum meruit claim appellant asserted was for services rendered in a life insurance proceeds matter that had nothing to do with the property she alleged was hers based on a quitclaim deed; the insurance matter was not a right of action to which an attorney's lien would apply; and, to the extent appellant sought payment for services rendered in representing the decedent, her mother, in the life insurance matter, she should have done so as a creditor of the estate. In re Estate of Lloyd, — S.W.3d —, 2020 Tenn. App. LEXIS 6 (Tenn. Ct. App. Jan. 8, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 380 (Tenn. June 3, 2020).

11.04. Inapplicability to Discovery. Subdivisions 11.01 through 11.03 of this rule do not apply to disclosures and discovery requests, responses, objections, and motions that are subject to the provisions of Rules 26 through 37. [As amended by order entered January 29, 1987, effective August 1, 1987; and by order filed February 1, 1995, effective July 1, 1995.]

Advisory Commission Comments. Rule 11 makes it an absolute requirement that the attorney, if any, sign, and makes the signature, in effect, the attorney's statement that the pleading is filed in good faith. Rule 11 does not abrogate statutes which require that pleadings be verified or accompanied by affidavit.

The [1987] revision includes motions and "other papers" as well as pleadings. Significantly, an attorney's belief that a court filing is well founded must be a belief "formed after reasonable inquiry." The amended wording therefore imposes an objective reasonable lawyer standard of inquiry. What inquiry is reasonable, of course, necessarily must depend on particular facts. If a client retains a lawyer on the eve of expiration of a statute of limitations, a reasonable inquiry must be performed in view of the exigencies of the situation. [1987.]

Advisory Commission Comments [1995]. Amended Rule 11 tracks the current federal version. Sanctions no longer are mandatory, and non-monetary sanctions are encouraged. The 21-day safe harbor provision allows otherwise sanctionable papers to be withdrawn, thereby escaping sanctions.

Tennessee courts have not seen the widespread abuse of sanctions law experienced by federal courts under the previous rule. *See Andrews v. Bible*, 812 S.W.2d 284 (Tenn. 1991). Nonetheless, the amended language should prevent potential future abuse.

Advisory Commission Comments [1999]. **11.01:** A lawyer must place his or her Board of Professional Responsibility number on court papers.

Advisory Commission Comments [2003]. A spelling error is corrected in Rule 11.03(2); there is no substantive change.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 31, 2003, was ratified and approved by 2003 House Resolution 21 and Senate Resolution 8. The order promulgating the 2003 amendment of this rule provided that it take effect on July 1, 2003.

Cross-References. Actions against construction design professionals, T.C.A. § 50-6-120.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 41, 53, 106-108, 170, 176, 561, 647.

Pritchard on Wills and Administration of Estates (4th ed., Phillips and Robinson), §§ 745, 880.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-7-3, 1-11-1.

Tennessee Jurisprudence. 1 Tenn. Juris., Abatement, Survival and Revival, §§ 18, 21; 1 Tenn. Juris., Agency, § 57; 1 Tenn. Juris., Amendments, § 14; 2 Tenn. Juris., Appeal and Error, § 87; 11 Tenn. Juris., Equity, §§ 48; 15 Tenn. Juris., Injunctions, § 47; 16 Tenn. Juris.,

Interpleader, § 4; 20 Tenn. Juris., Pleading, §§ 8, 21; 22 Tenn. Juris., Specific Performance, § 18.

Law Reviews. A Survey of Civil Procedure in Tennessee — 1977, IV. Pretrial Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 308.

Civil Procedure — Andrews v. Bible: Tennessee Rule of Civil Procedure 11 Is Inapplicable to Failure to Supplement: Should the Language of Rule 11 Be Amended?, 23 Mem. St. U.L. Rev. 701 (1993).

New Procedure Amendments (Donald F. Paine), 31 No. 4 Tenn. B.J. 5 (1995).

New Rules! (Donald F. Paine), 35 No. 8 Tenn. B.J. 32 (1999).

Sanctions For Discovery Abuse (Donald F. Paine), 27 No. 6 Tenn. B.J. (1991).

The Emerging State Law of Sanctions (Lucian T. Pera), 28 No. 1 Tenn. B.J. 24 (1992).

NOTES TO DECISIONS

Analysis

1. Applicability.
2. Good Faith Litigation.
3. Failure to Allege Pertinent Facts.
4. Ability to Pay.
5. Sanctions.
6. Allocation of Sanction.
7. Scope of Duty of Signer.
8. Corporate Actions.

1. Applicability.

Tenn. R. Civ. P. 11 does not apply to the appellate courts. Hood v. Roadtec, Inc., 785 S.W.2d 359, 1989 Tenn. App. LEXIS 468 (Tenn. Ct. App. 1989), rehearing denied, — S.W.2d —, 1989 Tenn. App. LEXIS 562 (Tenn. Ct. App. Aug. 18, 1989).

After a complaint was dismissed for failure to state a claim, the subsequent filing of that claim as an amendment to another complaint was barred by res judicata, and the imposition of sanctions against the attorney filing the subsequent claim was proper. Boyd v. Prime Focus, Inc., 83 S.W.3d 761, 2001 Tenn. App. LEXIS 885 (Tenn. Ct. App. 2001), rehearing denied, — S.W.3d —, 2002 Tenn. App. LEXIS 50 (Tenn. Ct. App. 2002).

In a lessor's action to recover unpaid rent against a lessee, where the lessee failed to make a separate motion for sanctions as required by Tenn. R. Civ. P. 11.03 and failed to serve a copy of the motion upon the lessor as provided in Tenn. R. Civ. P. 5, the lessee was not entitled to recover attorney fees as sanctions; the procedures set forth in Tenn. R. Civ. P. 11.03 are clearly and unambiguously written, and are couched in mandatory terms. Mitrano v. Houser, 240 S.W.3d 854, 2007 Tenn. App. LEXIS 312 (Tenn. Ct. App. May 16, 2007), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 854 (Tenn. Sept. 17, 2007).

2. Good Faith Litigation.

The oath of an attorney under which he is permitted to practice law in this state as well as the ethical provisions of Tenn. R. Civ. P. 11 require that no attorney engage in harassing or unconscionable litigation. Mitchell v. Carmichael, 522 S.W.2d 869, 1975 Tenn. LEXIS 727 (Tenn. 1975).

3. Failure to Allege Pertinent Facts.

Pleading that withholds facts, known to the pleader, that are pertinent to a prayer for extraordinary ex parte relief involving the discretion of the trial judge, is not well grounded in fact, and can constitute a violation of Tenn. R. Civ. P. 11. Con-Tech, Inc. v. Sparks, 798 S.W.2d 250, 1990 Tenn. App. LEXIS 463 (Tenn. Ct. App. 1990).

Failure by plaintiffs and their counsel to disclose that judgment upon which pleading on attachment was based had been appealed amounted to a violation of Tenn. R. Civ. P. 11. Con-Tech, Inc. v. Sparks, 798 S.W.2d 250, 1990 Tenn. App. LEXIS 463 (Tenn. Ct. App. 1990).

4. Ability to Pay.

The ability of the sanctioned party to pay an award is not a necessary element of proof in a case arising under Tenn. R. Civ. P. 11. Con-Tech, Inc. v. Sparks, 798 S.W.2d 250, 1990 Tenn. App. LEXIS 463 (Tenn. Ct. App. 1990).

5. Sanctions.

The chancellor did not abuse his discretion in failing to grant Tenn. R. Civ. P. 11's sanctions. Krug v. Krug, 838 S.W.2d 197, 1992 Tenn. App. LEXIS 70 (Tenn. Ct. App. 1992), rehearing denied, — S.W.2d —, 1992 Tenn. App. LEXIS 212 (Tenn. Ct. App. Feb. 28, 1992).

Tenn. R. Civ. P. 11's sanctions should not be imposed in a case where the decisive issue is one of first impression. Bell v. Bell, 896 S.W.2d 559, 1994 Tenn. App. LEXIS 734 (Tenn. Ct. App. 1994).

The amount of a sanction must be supported by proof in the record as to the basis for the trial court's determination. Wright v. Quillen, 909 S.W.2d 804, 1995 Tenn. App. LEXIS 195 (Tenn. Ct. App. 1995).

Attorneys risk sanctions under Tenn. R. Civ. P. 11 for filing unjustified or improper contempt applications. Wilson v. Wilson, 984 S.W.2d 898, 1998 Tenn. LEXIS 744 (Tenn. 1998), rehearing denied, — S.W.3d —, 1999 Tenn. LEXIS 32 (Tenn. Jan. 19, 1999), cert. denied, Oakley v. Wilson, 528 U.S. 822, 120 S. Ct. 68, 145 L. Ed. 2d 59, 1999 U.S. LEXIS 5077 (1999).

Tenn. R. Civ. P. 11 sanctions were justified against both the seller of real estate who made third party claims against bank lending the purchase price to the buyer, and the bank's attorney alleging negligent misrepresentation and inducement of breach of contract. The claims were without merit or sound legal or factual basis and the seller cited no law in his pleadings to support his claims. McGaugh v. Galbreath, 996 S.W.2d 186, 1998 Tenn. App. LEXIS 518 (Tenn. Ct. App. 1998), review or rehearing denied, — S.W.2d —, 1998 Tenn. App. LEXIS 721 (Tenn. Ct. App. Oct. 29, 1998).

Incarceration is not an available sanction under Tenn. R. Civ. P. 11. Taylor v. Bowers, 37 S.W.3d 898, 2001 Tenn. LEXIS 113 (Tenn. 2001).

Where a citizen sued the governor and several other state officials, asserting the governor violated Tenn. Const. art. X, § 3, by serving "meat and drink" in exchange for votes, the complaint was nearly factually identical to a prior case the citizen had filed, and failed to appeal the adverse decision; the complaint at issue was signed subsequent to the dismissal of the prior case, making the citizen's belief that the complaint was "well-grounded in both fact and law" an unreasonable one, and sanctions were proper. Hooker v. Sundquist, 107 S.W.3d 532, 2002 Tenn. App. LEXIS 890 (Tenn. Ct. App. 2002).

Delinquent taxpayer was not permitted to escape a federal tax lien imposed on his property by deeding the property to a trust. The taxpayer was sanctioned and ordered to pay attorney's fees under Tenn. R. Civ. P. 11 for bringing unwarranted motions to quiet title and to set aside the tax liens. Stigall v. Lyle, 119 S.W.3d 701, 2003 Tenn. App. LEXIS 89 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 773 (Tenn. Sept. 2, 2003).

Where an individual repeatedly filed a series of lawsuits asserting violations of the state constitution, challenging the practice of serving meat and drink at political fund raisers, the sanction imposed by the trial court, whereby a special master was to review any suits filed by the individual for two years, was appropriately narrowly tailored and short in duration, effectively curbing for a defined period of time any repetitive or frivolous lawsuits filed by the individual, and was fully warranted given his undisputed history of filing such lawsuits. Hooker v. Sundquist, 150 S.W.3d 406, 2004 Tenn. App. LEXIS 270 (Tenn. Ct. App. 2004), rehearing denied, — S.W.3d —, 2004 Tenn. App. LEXIS 437 (Tenn. Ct. App. July 6, 2004).

In an action brought by plaintiff against defendants for damages sustained in an automobile accident, the trial court did not abuse its discretion in ordering plaintiff to pay defendants $356 in sanctions for discovery abuse even though defendants did not file a motion requesting such sanctions; plaintiff was given ample opportunity to show cause why sanctions should not have been imposed on him in accordance with Tenn. R. Civ. P. 11.03(1)(b). Marshall v. Cintas Corp., 255 S.W.3d 60, 2007 Tenn. App. LEXIS 640 (Tenn. Ct. App. Oct. 17, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 302 (Tenn. Apr. 14, 2008).

Where patient's medical malpractice suit against doctor was dismissed upon summary judgment, patient's filing of a separate breach of contract claim was barred by the doctrine of res judicata; however, it did not constitute sanctionable conduct in violation of Tenn. R. Civ. P. 11.02, and circuit court erred by awarding attorney fees to doctor under Tenn. R. Civ. P. 11.03. Brown v. Shappley, 290 S.W.3d 197, 2008 Tenn. App. LEXIS 600 (Tenn. Ct. App. Oct. 9, 2008), appeal denied, — S.W.3d —, 2009 Tenn. LEXIS 164 (Tenn. Mar. 23, 2009).

6. Allocation of Sanction.

Judgment against the plaintiffs and their attorney jointly was proper where the complaint was signed by the attorney and one party, who also signed as a representative of the other plaintiff. Con-Tech, Inc. v. Sparks, 798 S.W.2d 250, 1990 Tenn. App. LEXIS 463 (Tenn. Ct. App. 1990).

Because there was no authority, other than Tenn. R. Civ. P. 11, for awarding attorney fees as a sanction, and because there was no indication that the procedure required by Rule 11 was followed by the chancery court, the award of $56,850.00 in attorney fees as a sanction was vacated, and the issue was remanded to the trial court for further proceedings for the purpose of considering whether Rule 11 sanctions against the lender were merited. Fossett v. Gray, 173 S.W.3d 742, 2004 Tenn. App. LEXIS 602 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2005 Tenn. LEXIS 273 (Tenn. Mar. 21, 2005).

7. Scope of Duty of Signer.

Tenn. R. Civ. P. 11 does not impose a continuing obligation on the signer to update, correct or withdraw any pleading, motion or other paper which satisfied pertinent requirements when signed. Andrews v. Bible, 812 S.W.2d 284, 1991 Tenn. LEXIS 243 (Tenn. 1991), superseded by statute as stated in, Evans v. Evans, — S.W.3d —, 2010 Tenn. App. LEXIS 588 (Tenn. Ct. App. Sept. 22, 2010).

The test to be applied in deciding whether an attorney's conduct is sanctionable, is one of objective reasonableness under all the circumstances, and the reasonableness of the attorney's belief must be assessed in light of the circumstances existing at the time the document in question was signed. Krug v. Krug, 838 S.W.2d 197, 1992 Tenn. App. LEXIS 70 (Tenn. Ct. App. 1992), rehearing denied, — S.W.2d —, 1992 Tenn. App. LEXIS 212 (Tenn. Ct. App. Feb. 28, 1992).

8. Corporate Actions.

A corporate complaint signed by its nonlawyer president was invalid since it did not meet the requirement of Tenn. R. Civ. P. 11, that it be signed by an attorney of record or the party, and the defect in the filing was not cured by the subsequent filing of a notice of appearance by the corporation's attorney. Old Hickory Eng'g & Mach. Co. v. Henry, 937 S.W.2d 782, 1996 Tenn. LEXIS 515 (Tenn. 1996).

RULE 12

DEFENSES AND OBJECTIONS: WHEN AND HOW PRESENTED: BY PLEADING OR MOTION: MOTION FOR JUDGMENT ON PLEADINGS

12.01. When Presented. A defendant shall serve an answer within thirty (30) days after the service of the summons and complaint upon him. A party served with a pleading stating a cross-claim against such party shall serve an answer thereto within thirty (30) days after the service upon him or her. The plaintiff shall serve a reply to a counterclaim in the answer within thirty (30) days after service of the answer, or, if a reply is ordered by the court, within thirty (30) days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows, unless a different time is fixed by order of the court: (1) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within fifteen (15) days after notice of the court's action; (2) if the court grants a motion for a more definite statement the responsive pleading shall be served within fifteen (15) days after the service of the more definite statement. [As amended by order entered January 26, 1999, effective July 1, 1999.]

12.02. How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion in writing: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19, and (8) specific negative averments made pursuant to Rule 9.01. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to the claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56. [As amended by order entered January 23, 2001, effective July 1, 2001.]

Law Reviews. Pleading Standard — Webb v. Nashville Area Habitat for Humanity, Inc.: The Enduring Myth of Conley in Tennessee State Courts, 43 U. Mem. L. Rev. 889 (2013).

The Law at Work: Variation in State and Federal Pleading Standards: Webb and Veasy (Edward G. Phillips with Brandon L. Morrow), 49 Tenn. B.J. 26 (2013).

NOTES TO DECISIONS

ANALYSIS

1. Dismissal Proper.
2. Dismissal Improper.
3. Waiver of Defense.
4. Notice Pleading Standard.
5. Practice and Procedure.

1. Dismissal Proper.

Finding against the deceased patient's spouse in a medical malpractice action was appropriate because none of the employees who accepted service were agents authorized by appointment to receive service of process on behalf of either the corporation or the individual physician. Because the spouse never effectively served the physician or the corporation with process and because the corporation and physician did not waive that defense, the one-year statute of limitations for malpractice actions had run, Tenn. R. Civ. P. 12.02(5). Hall v. Haynes, 319 S.W.3d 564, 2010 Tenn. LEXIS 684 (Tenn. Aug. 26, 2010).

Trial court did not err in dismissing a landowner who had transferred the property that was the subject of a proposed development from a lawsuit brought by a neighbor under either Tenn. R. Civ. P. 12.02(6) or under Tenn. R. Civ. P. 21, because the landowner had lost any control over the property to his successor in interest; any claim for injunctive relief against the prior owner was moot. Steppach v. Thomas, 346 S.W.3d 488, 2011 Tenn. App. LEXIS 91 (Tenn. Ct. App. Feb. 28, 2011), appeal denied, — S.W.3d —, 2011 Tenn. LEXIS 736 (Tenn. July 15, 2011).

Trial court properly dismissed a patient's claim of medical battery for failure to state a claim upon which relief could be granted as the patient did not allege in her complaint that the vaginal exam performed by the doctor was not authorized by the patient or that the patient was unaware that the exam was going to be performed. Moses v. Dirghangi, 430 S.W.3d 371, 2013 Tenn. App. LEXIS 661 (Tenn. Ct. App. Oct. 3, 2013), appeal denied, — S.W.3d —, 2014 Tenn. LEXIS 178 (Tenn. Feb. 11, 2014).

Trial court properly denied a judgment debtor's motions to strike and to dismiss and entered a judgment for the creditor in the amount of the claimed debt because the debtor waived the issue of insufficient service of process where the debtor waived the issue of improper service of process by making a general appearance before filing the motion to dismiss, and failing to raise the issue of improper service of process Midland Funding, LLC v. Thuy Chau, — S.W.3d —, 2019 Tenn. App. LEXIS 298 (Tenn. Ct. App. June 14, 2019).

2. Dismissal Improper.

Employee's amended complaint specifically referred to the statute upon which the employee was relying to state a claim of retaliatory discharge, T.C.A. § 50-1-304, and thus comported with Tenn. R. Civ. P. 8.05(1). The amended complaint, while not a model of pleading, provided the employer with sufficient notice of the claims alleged and sufficiently pleaded a legal cause of action. Webb v. Nashville Area Habitat for Humanity, Inc., 346 S.W.3d 422, 2011 Tenn. LEXIS 623 (Tenn. July 21, 2011).

Appellate court erred by dismissing appellant's claims under Tenn. R. Civ. P. 12.02(6) on statute of limitations grounds because it was premature, as the decisions regarding the diocese's alleged fraudulent concealment of its knowledge of and responsibility for the priest's alleged sexual abuse of appellant and appellant's diligence in pursuing his claims against the diocese required further development of the facts through discovery. There was no dispute that appellant's 18th birthday occurred on August 18, 1978 and that in accordance with T.C.A. § 28-1-106 he had one year from that date to file suit; there was also no dispute that appellant did not sue the church diocese until almost 29 years after the statute of limitations would have expired. Redwing v. Catholic Bishop for the Diocese of Memphis, 363 S.W.3d 436, 2012 Tenn. LEXIS 143 (Tenn. Feb. 27, 2012).

Trial court erred in granting defendant's Tenn. R. Civ. P. 12.02(6) motion to dismiss plaintiff property owner's suit alleging a that their property was taken by nuisance-type activity because, although the statute of limitations under T.C.A. § 29-16-124 had expired for the filing of an inverse condemnation proceeding, T.C.A. § 29-16-123(a) afforded the property owners two distinct actions: an action for inverse condemnation or an action for damages resulting from trespass to real property. Windrow v. Middle Tenn. Elec. Mbrshp. Corp., 376 S.W.3d 733, 2012 Tenn. App. LEXIS 143 (Tenn. Ct. App. Mar. 1, 2012).

3. Waiver of Defense.

When a mother sued a railroad and a conductor for wrongful death, the company waived any claim of improper venue because the railroad and conductor could have, but did not, raise such a defense in the trial court. Freeman v. CSX Transp., Inc., 359 S.W.3d 171, 2010 Tenn. App. LEXIS 691 (Tenn. Ct. App. Nov. 3, 2010).

Because appellant failed to raise the issues of insufficient process and service of process in

appellant's answer to appellee's counter-complaint, these defenses were waived. Johnson v. Memphis Guitar Spa, LLC, 600 S.W.3d 348, 2019 Tenn. App. LEXIS 254 (Tenn. Ct. App. May 23, 2019), appeal denied, Johnson v. Memphis Guitar Spa, LLC, — S.W.3d —, 2019 Tenn. LEXIS 464 (Tenn. Sept. 20, 2019).

Notarized affidavit of service indicating that a spouse was personally served by a process server at the spouse's address in India, which was filed in the trial court, created a rebuttable presumption that proper service was achieved in a divorce proceeding. Furthermore, the spouse's failure to recite any facts to support the spouse's argument that service of process was flawed, constituted a waiver of the issue. Singh v. Singh, — S.W.3d —, 2019 Tenn. App. LEXIS 334 (Tenn. Ct. App. July 3, 2019).

The proponents of a purported last will by the decedent failed to question the form the contestants used to contest the will in any of their filings with the probate court, and they never raised a statute of limitations or service of process argument, thus depriving that court of the opportunity to address these issues. Because the proponents failed to raise any of these issues before the probate court, they were precluded from raising them on appeal. In re Estate of Dattel, — S.W.3d —, 2020 Tenn. App. LEXIS 277 (Tenn. Ct. App. June 12, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 555 (Tenn. Oct. 9, 2020).

4. Notice Pleading Standard.

Tennessee Supreme Court declines to adopt the new federal Twombly/Iqbal plausibility pleading standard and adheres to the notice pleading standard. Webb v. Nashville Area Habitat for Humanity, Inc., 346 S.W.3d 422, 2011 Tenn. LEXIS 623 (Tenn. July 21, 2011).

5. Practice and Procedure.

When the defendant raised the issue of personal jurisdiction, the trial court should have followed the procedures applicable to the hearing and disposition of Tenn. R. Civ. P. 12.02(2) motions challenging personal jurisdiction rather than the procedures commonly associated with motions for summary judgment under Tenn. R. Civ. P. 56. The parties and the courts below focused on whether any genuine issue as to any material fact existed and whether either moving party was entitled to judgment as a matter of law; however, instead, the proper question in the case was whether, taking the plaintiff's factual allegations as true and resolving all reasonably disputed facts in the plaintiff's favor, the plaintiff showed, by a preponderance of the evidence, that Tennessee courts could properly exercise jurisdiction over the defendant. State v. NV Sumatra Tobacco Trading Co., 403 S.W.3d 726, 2013 Tenn. LEXIS 335 (Tenn. Mar. 28, 2013).

Trial court on remand was to determine whether a bank in Tennessee was entitled to conduct jurisdictional discovery on a motion to dismiss for lack of personal jurisdiction because the bank presented sufficient facts to establish a colorable claim for the existence of personal jurisdiction as to out-of-state ratings agencies under a conspiracy theory, when the rating agencies rated investment products that were issued and sold by other entities and sold in all fifty states and purchased by the bank. First Cmty. Bank, N.A. v. First Tenn. Bank, 489 S.W.3d 369, 2015 Tenn. LEXIS 1005 (Tenn. Dec. 14, 2015), cert. denied, Fitch Ratings, 136 S. Ct. 2511, 195 L. Ed. 2d 841, 2016 U.S. LEXIS 4094 (U.S. 2016).

Trial court could consider codefendant's answer in ruling on defendant's motion to dismiss as both the complaint and answer were considered pleadings. Deja Vu of Nashville, Inc. v. Brasfield & Gorrie, LLC, — S.W.3d —, 2019 Tenn. App. LEXIS 76 (Tenn. Ct. App. Feb. 8, 2019).

By filing a motion to dismiss, which indicated counsel served as "Attorney for Defendant," counsel for a hospital entered an appearance with the trial court as counsel of record, and the court and the plaintiff were entitled to presume that the attorney had authority to enter an appearance as the hospital's counsel of record. Therefore, the hospital timely filed its motion to dismiss within 30 days of service of the complaint. Cobble v. Erlanger Hosp., — S.W.3d —, 2020 Tenn. App. LEXIS 201 (Tenn. Ct. App. Apr. 30, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 434 (Tenn. July 17, 2020).

Although a former graduate student's breach of contract claim against a private university was based on the university's handbook and guide, the student failed to attach either document as an exhibit to the complaint as required by the procedural rules. Under these narrow circumstances, the trial court properly considered the guide as part of the pleadings when the university filed a motion to dismiss for failure to state a claim for relief. Rice v. Belmont Univ., — S.W.3d —, 2020 Tenn. App. LEXIS 253 (Tenn. Ct. App. May 29, 2020).

When a city, the city's board of zoning appeals, and the individual members of the board of zoning appeals submitted an affidavit of the city codes director with their motion to dismiss a petition for writ of certiorari, the motion to dismiss was not treated as one for summary judgment because the affidavit was not necessary to the disposition of the motion to dismiss, which presented a question of law. Manchester Hotel Hospitality, LLC v. City of Manchester, — S.W.3d —, 2020 Tenn. App. LEXIS 537 (Tenn. Ct. App. Nov. 30, 2020).

Trial court erred in dismissing a former river boat captain's libel claim against a railroad for failure to state a claim because the merits of the case should not have been ruled upon by the trial court without first assessing the personal jurisdiction defense invoked by the railroad as

jurisdiction was a prerequisite to an adjudication on the merits of the case. Vacating of the judgment and remand for consideration of personal jurisdiction defense was appropriate. Checkan v. Southern Towing Co. LLC, — S.W.3d —, 2021 Tenn. App. LEXIS 41 (Tenn. Ct. App. Feb. 5, 2021).

Taken together, T.C.A. § 20-12-119(c)(1) and (c)(3) clarify that when a motion for failure to state a claim is granted, the trial court shall find that attorney's fees are recoverable to the prevailing party; however, the trial court may not proceed past that point inasmuch as the award of attorney's fees is stayed. A trial court's order can be final despite the outstanding issue of recoverable attorney's fees when those fees are awarded by virtue of § 20-12-119(c). Irvin v. Green Wisehomes, LLC, — S.W.3d —, 2021 Tenn. App. LEXIS 63 (Tenn. Ct. App. Feb. 26, 2021).

Although a trial court dismissed an auto accident victim's complaint due to the alleged noncompliance by the victim's attorney with the signature requirement, the trial court, upon its review of the insurer's motion to dismiss for failure to state a claim, considered the victim's affidavit from the attorney who actually signed the original complaint. As such, the matter should have been converted to a motion for summary judgment. Smith v. Gonzalez, — S.W.3d —, 2021 Tenn. App. LEXIS 132 (Tenn. Ct. App. Apr. 1, 2021).

12.03. Motion for Judgment on the Pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

12.04. Preliminary Hearings. On application of any party, the defenses specifically enumerated (1) through (8) in 12.02, whether made in a pleading or by motion, and the motion for judgment mentioned in 12.03 shall be heard and determined before trial unless the court orders that the hearing and determination thereof be deferred until the trial.

12.05. Motion for More Definite Statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within fifteen (15) days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or may make such order as it deems just.

12.06. Motion to Strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within thirty (30) days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading insufficient defense or any redundant, immaterial, impertinent or scandalous matter.

NOTES TO DECISIONS

1. Affirmative Defenses.

For a Tenn. R. Civ. P. 12.02(6) motion to be used as a vehicle to assert an affirmative defense, the applicability of the defense must clearly and unequivocally appear on the face of the complaint; the plaintiff's own allegations in the complaint must show that an affirmative defense exists and that this defense legally

defeats the claim for relief. Jackson v. Smith, 387 S.W.3d 486, 2012 Tenn. LEXIS 812 (Tenn. Nov. 16, 2012).

12.07. Consolidation of Defenses. A party who makes a motion under this rule may join it with the other motions herein provided for and then available to the party. If a party makes a motion under this rule and does not include therein all defenses and objections then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on any of the defenses or objections so omitted, except as provided in 12.08.

12.08. Waiver of Defenses. A party waives all defenses and objections which the party does not present either by motion as hereinbefore provided, or, if the party has made no motion, in the party's answer or reply, or any amendments thereto, (provided, however, the defenses enumerated in 12.02(2), (3), (4) and (5) shall not be raised by amendment), except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, the defense of lack of capacity, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits, and except (2) that, whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. The objection or defense, if made at the trial, shall be disposed of as provided in Rule 15 in the light of any evidence that may have been received. [As amended by order filed January 8, 2009, effective July 1, 2009.]

Advisory Commission Comments. 12.01: Rule 12.01 requires that the defendant serve an answer within 30 days after being served with summons and complaint, and also allows the plaintiff 30 days in which to serve an answer to a counterclaim or a reply if one is required. The Rule does not change Tenn. Code Ann. § 20-2-205 and Tenn. Code Ann. § 20-2-215 which govern the special situation where service is had through the Secretary of State upon the personal representatives of decedents who were nonresidents or residents who were outside the state.

12.02: Rule 12.02 provides that certain matters may be raised as a defense by motion. These matters may, at the option of the pleader, be set out in the answer. Matters reached by motion expressly include those specific negative averments which are required by Rule 9.01 when a party wishes to raise an issue as to the legal existence of any party or the capacity to sue or be sued. The last sentence of the rule allows the parties to present matters outside the pleadings and thus to determine whether or not there exists a genuine issue which requires trial.

12.03: Rule 12.03 provides for the filing of a motion for judgment on the pleadings. It should be noted that if matters outside the pleadings are presented to and not excluded by the court, the motion is converted by Rule 12.03 into a motion for summary judgment and is disposed of in accordance with Rule 56.

12.04: Rule 12.04 allows certain defenses, whether raised by pleading or on motion, and the motion for judgment on the pleadings to be disposed of in advance of trial, upon application of any party, but the judge may defer hearing and determination of these matters until the trial.

12.05: Rule 12.05 provides that, if a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the court on motion may direct a more specific statement. If the court grants the motion, Rule 12.05 establishes a 15-day (or otherwise as fixed by the court) limit within which the vague or ambiguous pleading must be corrected.

12.06: Rule 12.06 provides for striking out insufficient defense, or redundant, immaterial, impertinent or scandalous matter. If a party wishes to make a motion to strike, the party must do so before responding to the objectionable pleading, or if no responsive pleading is permitted, within 30 days after the objectionable pleading is served on the party. No men-

tion of costs is made in Rule 12.06, but under Rule 54.04 the court could tax costs arising from an order to strike against the offending party.

12.07: The pleader has the option originally not to resort to a motion, but to include all the pleader's defenses in the answer. But if the pleader by motion raises any of the defenses which can be thus raised, the pleader must at that time raise all such defenses which are available; if the pleader fails to do so he or she cannot thereafter raise these other defenses by motion. The Rule is designed to prevent seriatim defense by motion, with the consequent delay. Rule 12.07 is subject to the provisions of Rule 12.08 which allows certain defenses to be made even though not consolidated with an earlier motion.

12.08: Rule 12.08 specifies that, in general, defenses not raised by motion or answer are waived, but the waiver does not apply to the defense of lack of jurisdiction over the subject matter and certain other specified defenses relating to statement of legally sufficient claim or defense, or to failure to join necessary parties. The parties cannot by waiver or otherwise confer jurisdiction over the subject matter, and the other exceptions relate to questions which should not be waived; the defects they rely upon can be remedied by amendment if facts permit, and if the facts do not permit an amendment, the defects are of such importance that the defenses based thereon should not be waivable by failure to present them at the earliest opportunity.

Advisory Commission Comments [2001]. This change conforms Rule 12.02(7) to revised Rule 19, under which a party is rarely "indispensable." Rule 19 presently deals with "persons to be joined if feasible." Rule 12.08 remains unchanged, because a late objection based on Rule 19 should be permitted only when a party is truly "indispensable."

Advisory Commission Comments [2009]. Rule 12.08 is amended to state the deadline for raising a defense of lack of capacity under Rule 9.01. This defense is found in Rule 12.02(8) by cross-reference to Rule 9.01. Lack of capacity can be raised as late as at the trial on the merits.

Advisory Commission Comments [2014].

12.02: Effective July 1, 2012, Tennessee Code Annotated Section 20-12-119 was amended to add subsection (c) which authorizes the trial court, under certain circumstances, to award costs and reasonable and necessary attorney's fees to a party who prevails on a motion to dismiss for failure to state a claim upon which relief may be granted. Section 20-12-119(c) requires the party or parties whose claim or claims were dismissed to pay the awarded costs and fees.

Compiler's Notes. The repeal of the Advisory Commission Comments (1997), as promulgated and adopted by the Supreme Court in its order dated January 2, 2007, was ratified and approved by House Resolution 18 and Senate Resolution 11. The order promulgating the amendment of the Advisory Commission Comments provided that it take effect July 1, 2007.

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 8, 2009, was ratified and approved by 2009 House Resolution 15 and Senate Resolution 16. The order promulgating the amendment of this rule provided that it take effect July 1, 2009.

On January 13, 2012, the Supreme Court filed an order adopting amendments to Rule 12 of the Rules of Civil Procedure, effective July 1, 2012, subject to approval by resolutions of the general assembly. The Court withdrew the amendments to Rule 12 of the Rules of Civil Procedure, effective January 13, 2012, *nunc pro tunc*.

The amendment of Rule 12, which added the 2014 Advisory Commission Comments as promulgated and adopted by the Supreme Court in its order dated December 16, 2013, was ratified and approved by House Resolution 155 and Senate Resolution 73. The order promulgating the addition of the 2014 Advisory Commission Comments provided that it take effect July 1, 2014.

Cross-References. Publication of notice to be completed one week before defendant's appearance, T.C.A. § 29-6-144.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 102, 103, 106, 140, 146, 148-150, 159, 161, 162, 166, 176, 177, 197, 334, 341, 510, 560.

Pritchard on Wills and Administration of Estates (4th ed., Phillips and Robinson), §§ 744, 745.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-8.02-1, 1-8.03-15, 1-9.02-1, 1-12.01-1, 1-12.02-1 — 1-12.02-7, 1-12.03-1, 1-12.04-1, 1-12.05-1, 1-12.06-1, 1-12.06-2, 1-17.01-1.

Tennessee Jurisprudence. 1 Tenn. Juris., Abatement, Survival and Revival, §§ 2, 3, 13-17, 19, 23-25; 1 Tenn. Juris., Agency, § 57; 1 Tenn. Juris., Amendments, §§ 2, 13, 15, 18; 3 Tenn. Juris., Appearances, §§ 4, 6, 10; 4 Tenn. Juris., Bankruptcy, § 18; 9 Tenn. Juris., Demurrers and Motions to Dismiss, §§ 2-23; 9 Tenn. Juris., Dismissal, Discontinuance and Nonsuit, §§ 7, 8, 10; 11 Tenn. Juris., Equity, §§ 50, 57; 11 Tenn. Juris., Evidence, § 149; 15 Tenn. Juris., Injunctions, §§ 16, 30, 46; 17 Tenn. Juris., Jurisdiction, §§ 2, 29, 31; 20 Tenn. Juris., Parties, § 11; 20 Tenn. Juris., Pleading, §§ 4, 10-12, 15; 21 Tenn. Juris., Reference and Commissioners, § 12.

Law Reviews. A Survey of Civil Procedure in Tennessee — 1977, II. Selecting a Proper Forum (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 273.

A Survey of Civil Procedure in Tennessee — 1977, IV. Pretrial Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 308.

A Survey of Civil Procedure in Tennessee — 1977, VII. Appellate Review of the Disposition (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 366.

Attorneys' Fees — Tennessee Recognizes the "Third Party Exception" to the American Rule, 16 Mem. St. U.L. Rev. 399 (1986).

Civil Procedure — Flowers v. Dyer County: The Death of the Motion to Dismiss for Lack of Subject Matter Jurisdiction, 23 Mem. St. U.L. Rev. 409 (1993).

Civil Procedure and Evidence — Tennessee Survey 1970 (Jerry J. Phillips), 38 Tenn. L. Rev. 127.

Counterclaims and Statutes of Limitations — A Critical Commentary on Present Tennessee Law (John L. Sobieski, Jr.), 42 Tenn. L. Rev. 291.

Judicial Notice in Tennessee (Robert Banks, Jr. and Elizabeth T. Collins), 21 Mem. St. U.L. Rev. 431 (1991).

Jurisdiction, Venue and "Localized Actions" in Tennessee (June F. Entman), 39 No. 4 Tenn. B.J. 33 (2003).

Tennessee and Federal Rules of Civil Procedure (Donald F. Paine), 27 No. 5 Tenn. B.J. 25 (1991).

The Emerging State Law of Sanctions (Lucian T. Pera), 28 No. 1 Tenn. B.J. 24 (1992).

The Future of General Jurisdiction in Tennessee, 27 U. Mem. L. Rev. 333 (1997).

Timely Answer After Denial of a Rule 12 Motion (Andrew T. Wampler), 39 No. 7 Tenn. B.J. 26 (2003).

Torts — Hurd v. Woolfork: The Public Duty Doctrine in Tennessee, 28 U. Mem. L. Rev. 885.

NOTES TO DECISIONS

Analysis

1. Demurrer.
2. Failure to State a Claim for Relief.
3. Waiver of Defenses.
4. Standard of Review.
5. Liberal Construction of Complaint.
6. Motion in Writing.
7. Issue of Capacity.
8. Issue of Standing.
9. Affirmative Defense.
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12. Lack of Subject Matter Jurisdiction.
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17. Dismissal of Claim.
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20. Intentional and Negligent Infliction of Emotional Distress.
21. Ecclesiastical Issues.
22. Motion Improperly Granted.

1. Demurrer.

Hereafter the supreme court will not consider any discretionary appeal from action on motion to dismiss unless the chancellor has designated the particular grounds of the motion which he regards as amounting to a demurrer and the discretionary appeal is limited to these particular grounds. State by Canale v. Minimum Salary Dep't of A. M. E. Church, Inc., 477 S.W.2d 11, 1972 Tenn. LEXIS 387 (Tenn. 1972).

Motion to dismiss under Tenn. R. Civ. P. 12 which specifies grounds equivalent to a demurrer will be treated as a demurrer for purposes of a discretionary appeal under T.C.A. § 27-3-105 (repealed). State by Canale v. Minimum Salary Dep't of A. M. E. Church, Inc., 477 S.W.2d 11, 1972 Tenn. LEXIS 387 (Tenn. 1972).

2. Failure to State a Claim for Relief.

It is left to the discretion of the trial judge whether or not to receive matters outside the pleading on a motion to dismiss for failure to state a claim; such extraneous matter may not be considered if the court excludes it, but if the court does not exclude it the motion shall be treated as a motion for summary judgment and disposed of as provided in Tenn. R. Civ. P. 56.02. Hixson v. Stickley, 493 S.W.2d 471, 1973 Tenn. LEXIS 507 (Tenn. 1973).

Where a motion to dismiss a wrongful death action was based on an alleged release it could not be considered as a motion for summary judgment under Tenn. R. Civ. P. 12 or 56.02, since release must be affirmatively pleaded under Tenn. R. Civ. P. 8.03, and consequently such motion did not prevent plaintiff from taking a voluntary nonsuit under Tenn. R. Civ. P. 41.01. Hixson v. Stickley, 493 S.W.2d 471, 1973 Tenn. LEXIS 507 (Tenn. 1973).

In action for injuries after automobile collision where plaintiff's complaint stated that she did not realize until it was too late that the other automobile was stopped in front of her, reasonable minds could differ as to whether her conduct was negligent and trial court should not have granted motion to dismiss. Ellithorpe v. Ford Motor Co., 503 S.W.2d 516, 1973 Tenn. LEXIS 444 (Tenn. 1973), superseded by statute as stated in, Smith v. Detroit Marine Engineering Corp., 712 S.W.2d 472, 1985 Tenn. App. LEXIS 3190 (Tenn. Ct. App. 1985), overruled in part, McIntyre v. Balentine, 833 S.W.2d 52, 1992 Tenn. LEXIS 336 (Tenn. 1992).

Where the trial judge granted defendant's motion to dismiss for failure to state a cause of

action it was unnecessary to rule on plaintiff's motion to strike the defendant's motion for summary judgment. Heath v. Cornelius, 511 S.W.2d 683, 1974 Tenn. LEXIS 496 (Tenn. 1974).

The trial court has the authority to dismiss a complaint sua sponte in the absence of a motion to dismiss when the complaint fails to state a claim upon which relief may be granted. Huckeby v. Spangler, 521 S.W.2d 568, 1975 Tenn. LEXIS 688 (Tenn. 1975); Cockrill v. Everett, 958 S.W.2d 133, 1997 Tenn. App. LEXIS 641 (Tenn. Ct. App. 1997).

A motion to dismiss for failure to state a claim upon which relief can be granted admits the truth of all relevant and material averments contained in the complaint, but asserts that such facts do not constitute a cause of action. Cornpropst v. Sloan, 528 S.W.2d 188, 1975 Tenn. LEXIS 622, 93 A.L.R.3d 979 (Tenn. 1975), overruled, McClung v. Delta Square Ltd. Pshp., 937 S.W.2d 891, 1996 Tenn. LEXIS 699 (1996), overruled, Birge v. Dollar Gen. Corp., — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 97195 (W.D. Tenn. Sept. 28, 2006), overruled in part, Giggers v. Memphis Hous. Auth., — S.W.3d —, 2007 Tenn. App. LEXIS 504 (Tenn. Ct. App. Aug. 3, 2007), overruled, Weaver v. Four Maples Homeowners Ass'n, — S.W.3d —, 2011 Tenn. App. LEXIS 577 (Tenn. Ct. App. Oct. 24, 2011), overruled, Ellington v. Jackson Bowling & Family Fun Ctr., L.L.C., — S.W.3d —, 2013 Tenn. App. LEXIS 109 (Tenn. Ct. App. Feb. 19, 2013).

A motion to dismiss for failure to state a claim upon which relief can be granted is the equivalent of a demurrer under former practice, and is a test of the sufficiency of the leading pleading. Cornpropst v. Sloan, 528 S.W.2d 188, 1975 Tenn. LEXIS 622, 93 A.L.R.3d 979 (Tenn. 1975), overruled, McClung v. Delta Square Ltd. Pshp., 937 S.W.2d 891, 1996 Tenn. LEXIS 699 (1996), overruled, Birge v. Dollar Gen. Corp., — F. Supp. 2d —, 2006 U.S. Dist. LEXIS 97195 (W.D. Tenn. Sept. 28, 2006), overruled in part, Giggers v. Memphis Hous. Auth., — S.W.3d —, 2007 Tenn. App. LEXIS 504 (Tenn. Ct. App. Aug. 3, 2007), overruled, Weaver v. Four Maples Homeowners Ass'n, — S.W.3d —, 2011 Tenn. App. LEXIS 577 (Tenn. Ct. App. Oct. 24, 2011), overruled, Ellington v. Jackson Bowling & Family Fun Ctr., L.L.C., — S.W.3d —, 2013 Tenn. App. LEXIS 109 (Tenn. Ct. App. Feb. 19, 2013), Miletic v. Wal-Mart Stores, Inc., 339 S.C. 327, 529 S.E.2d 68, 2000 S.C. App. LEXIS 40 (Ct. App. 2000); Holloway v. Putnam County, 534 S.W.2d 292, 1976 Tenn. LEXIS 591 (Tenn. 1976).

In a suit to recover city and county ad valorem property taxes paid under protest the chancellor sustained correctly a motion made pursuant to Tenn. R. Civ. P. 12, where the motion of defendants asserted that the suit was filed too late, being four more than 30 days after taxes were paid and more than six months after taxes were paid as provided by T.C.A. § 67-1-903 and T.C.A. § 67-1-911, respectively. Holloway v. Putnam County, 534 S.W.2d 292, 1976 Tenn. LEXIS 591 (Tenn. 1976).

Where complaint was filled with conclusions but did not undertake to describe the substance and severity of the conduct complained of, the suit was dismissed for failure to state a cause of action. Swallows v. Western Electric Co., 543 S.W.2d 581, 1976 Tenn. LEXIS 479 (Tenn. 1976).

In action by smaller municipality challenging the annexation of territory by larger municipality under T.C.A. § 6-51-110, where larger municipality filed motion to dismiss for failure to state a claim on which relief could be granted, judgment for larger municipality was proper where smaller municipality did not respond to the motion to dismiss by showing that it was prepared to present evidence making an issue of whether the annexation by the larger municipality was reasonable for the overall well-being of the communities involved. Watauga v. Johnson City, 589 S.W.2d 901, 1979 Tenn. LEXIS 514 (Tenn. 1979).

A Tenn. R. Civ. P. 12.02(6) motion serves a distinctly different purpose than that authorized by a Tenn. R. Civ. P. 41.02(2) motion; the former tests the sufficiency of the complaint, while the latter evaluates the strength of the plaintiffs' case. Merriman v. Smith, 599 S.W.2d 548, 1979 Tenn. App. LEXIS 389 (Tenn. Ct. App. 1979).

Where motion to dismiss for failure to state a claim upon which relief could be granted was filed, it was within the discretion of the trial judge to receive matters outside the pleadings and when he has done so he is mandated to treat the motion as one for summary judgment. Jacox v. Memphis City Board of Education, 604 S.W.2d 872, 1980 Tenn. App. LEXIS 377 (Tenn. Ct. App. 1980), cert. denied, 449 U.S. 1114, 101 S. Ct. 927, 66 L. Ed. 2d 844, 1981 U.S. LEXIS 574 (1981).

In scrutinizing a complaint in the face of a Tenn. R. Civ. P. 12.02(6) motion, the court should construe the complaint liberally in favor of the plaintiff, taking all of the allegations of fact therein as true. Sullivant v. Americana Homes, Inc., 605 S.W.2d 246, 1980 Tenn. App. LEXIS 381 (Tenn. Ct. App. 1980).

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. Sullivant v. Americana Homes, Inc., 605 S.W.2d 246, 1980 Tenn. App. LEXIS 381 (Tenn. Ct. App. 1980).

A motion to dismiss for failure to state a claim upon which relief can be granted is an admission of the truth of all relevant and material averments contained in the complaint.

Shelby County v. King, 620 S.W.2d 493, 1981 Tenn. LEXIS 478 (Tenn. 1981).

A Tenn. R. Civ. P. 12.02(6) motion to dismiss admits the truth of all relevant and material averments contained in a complaint, but asserts that such facts do not constitute a cause of action. League Cent. Credit Union v. Mottern, 660 S.W.2d 787, 1983 Tenn. App. LEXIS 623 (Tenn. Ct. App. 1983).

The basis of the motion to dismiss for failure to state a claim upon which relief could be granted was that the allegations alone, taken as true, were insufficient to state a claim. Shipley v. Knoxville Journal Corp., 670 S.W.2d 222, 1984 Tenn. App. LEXIS 2647 (Tenn. Ct. App. 1984).

A dismissal pursuant to Tenn. R. Civ. P. 12.02(6) operates as a judgment on the merits in Dyer v. Intera Corp., 870 F.2d 1063, 1989 U.S. App. LEXIS 3202 (6th Cir. Tenn. 1989); Rampy v. ICI Acrylics, Inc., 898 S.W.2d 196, 1994 Tenn. App. LEXIS 603 (Tenn. Ct. App. 1994).

The failure to state a claim for which relief can be granted is determined from an examination of the complaint alone. Wolcotts Financial Services, Inc. v. McReynolds, 807 S.W.2d 708, 1990 Tenn. App. LEXIS 908 (Tenn. Ct. App. 1990).

A civil action will not lie against a judge for his judicial acts committed within the jurisdiction of the court over which he presides. Graham v. Dodson, 830 S.W.2d 70, 1991 Tenn. App. LEXIS 779 (Tenn. Ct. App. 1991), appeal dismissed, Hodges v. State, — S.W.2d —, 1992 Tenn. LEXIS 182 (Tenn. 1992).

Dismissal under Tenn. R. Civ. P. 12.02(6) is warranted only when no set of facts will entitle the plaintiff to relief, or when the complaint is totally lacking in clarity and specificity. Dobbs v. Guenther, 846 S.W.2d 270, 1992 Tenn. App. LEXIS 868 (Tenn. Ct. App. 1992).

Complaint alleging that blockage in city sewer system caused sewage to back-up and flow onto plaintiff's business failed to state a cause of action under the Tennessee Governmental Tort Liability Act, T.C.A. § 29-20-101 et seq., and was properly dismissed. Lee v. City of Cleveland, 859 S.W.2d 347, 1993 Tenn. App. LEXIS 290 (Tenn. Ct. App. 1993), appeal denied, Lee v. Cleveland, — S.W.2d —, 1993 Tenn. LEXIS 275 (Tenn. July 6, 1993).

Plaintiff's reliance on matters outside the pleadings converted a motion to dismiss for failure to state a claim for relief to a motion for summary judgment. Pacific E. Corp. v. Gulf Life Holding Co., 902 S.W.2d 946, 1995 Tenn. App. LEXIS 215 (Tenn. Ct. App. 1995).

In an action for the tort of misrepresentation, where the defendants' theories relied upon in their motion to dismiss for failure to state a claim were outside the challenged complaint, the motion was properly evaluated as one for summary judgment. Allied Sound v. Neely, 909 S.W.2d 815, 1995 Tenn. App. LEXIS 325 (Tenn. Ct. App. 1995).

Allegations that a statute violated due process and equal protection under the federal and state constitutions and suspended general law in violation of the state constitution were legal conclusions that should not have been taken as true in ruling on a motion to dismiss the complaint for failure to state a claim upon which relief could be granted. Riggs v. Burson, 941 S.W.2d 44, 1997 Tenn. LEXIS 126 (Tenn. 1997), rehearing denied, — S.W.2d —, 1997 Tenn. LEXIS 174 (Tenn. 1997), cert. denied, 139 L. Ed. 2d 380, 118 S. Ct. 444, 522 U.S. 982, 1997 U.S. LEXIS 6925 (1997).

Assertion that a statute was preempted by federal law was a legal conclusion that should not have been taken as true in ruling on a motion to dismiss the complaint for failure to state a claim upon which relief could be granted. Riggs v. Burson, 941 S.W.2d 44, 1997 Tenn. LEXIS 126 (Tenn. 1997), rehearing denied, — S.W.2d —, 1997 Tenn. LEXIS 174 (Tenn. 1997), cert. denied, 139 L. Ed. 2d 380, 118 S. Ct. 444, 522 U.S. 982, 1997 U.S. LEXIS 6925 (1997).

A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle him or her to relief. Harvey v. Ford Motor Credit Co., 8 S.W.3d 273, 1999 Tenn. App. LEXIS 314 (Tenn. Ct. App. 1999), review or rehearing denied, — S.W.3d —, 1999 Tenn. App. LEXIS 448 (Tenn. Ct. App. 1999), review or rehearing denied, — S.W.3d —, 1999 Tenn. LEXIS 669 (Tenn. 1999).

Courts reviewing a complaint being tested by a Tenn. R. Civ. P. 12.02(6) motion must construe the complaint liberally in favor of the plaintiff by taking all factual allegations as true, and by giving the plaintiff the benefit of all the inferences that can be reasonably drawn from the pleaded facts. 421 Corp. v. Metropolitan Gov't of Nashville & Davidson County, 36 S.W.3d 469, 2000 Tenn. App. LEXIS 261 (Tenn. Ct. App. 2000).

Claim that zoning board acted arbitrarily and illegally by holding plaintiff to strict requirements of zoning ordinance while at the same time permitting other sexually oriented businesses competing with him to operate illegally outside the zone, was dismissed for failure to state a claim under Tenn. R. Civ. P. 12.02(6) because it did not contain allegations sufficient to make out the elements of a selective enforcement claim. 421 Corp. v. Metropolitan Gov't of Nashville & Davidson County, 36 S.W.3d 469, 2000 Tenn. App. LEXIS 261 (Tenn. Ct. App. 2000).

In-house attorney's common law retaliatory discharge claim was improperly dismissed under Tenn. R. Civ. P. 12.02(6) for failure to state a claim upon which relief could be granted; a

lawyer may generally bring a claim for retaliatory discharge when the lawyer is discharged for abiding by the ethics rules. Crews v. Buckman Labs. Int'l, 78 S.W.3d 852, 2002 Tenn. LEXIS 252 (Tenn. 2002), rehearing denied, — S.W.3d —, 2002 Tenn. LEXIS 332 (Tenn. July 9, 2002).

When a prisoner committed the crimes of murder and armed robbery, the prisoner knew that violations of the prison disciplinary rules could put the prisoner at risk of serving a longer period of time before becoming eligible to be considered for parole; accordingly, changes in the prison's disciplinary policy did not deprive the prisoner of a pre-existing right nor enhance the punishment for the prisoner's crimes beyond the punishment authorized by T.C.A. § 40-35-501(h). Thus, applying prison policy to the prisoner for the disciplinary offenses of escape and assault did not run afoul of the federal or state Ex Post Facto Clauses, U.S. Const. art. I, § 10, cl. 1 and Tenn. Const. art. I, § 11, and the trial court properly granted the Tennessee department of correction's motion to dismiss the prisoner's complaint for failure to state a claim for which relief could be granted. Utley v. Tenn. Dep't of Corr., 118 S.W.3d 705, 2003 Tenn. App. LEXIS 325 (Tenn. Ct. App. 2003).

Trial court properly dismissed the inmate's petition for a writ of certiorari pursuant to Tenn. R. Civ. P. 12.02(6), where the inmate's 42 U.S.C. § 1983 case was not filed within the 60-day limitations of T.C.A. § 27-9-102. Since that action was predicated on federal due process, the action was barred when the only discipline at issue was a sentence of 30 days solitary confinement; the saving statutes were not effective against the state of Gore v. Tenn. Dep't of Corr., 132 S.W.3d 369, 2003 Tenn. App. LEXIS 713 (Tenn. Ct. App. 2003).

Estate's claim against the state did not allege sufficient facts to establish a professional/client relationship between the decedent and a state employee under T.C.A. § 9-8-307(a)(1)(D) and, therefore, failed to state a cause of action upon which relief could be granted pursuant to Tenn. R. Civ. P. 12.02(6), nor did the estate show that the state had care, custody or control under the facts of the case; the complaint was timely filed under T.C.A. § 20-1-119(g), because the state was a governmental entity. Conley v. State, 141 S.W.3d 591, 2004 Tenn. LEXIS 662 (Tenn. 2004).

In a contract action, the letters of intent were riddled with terms indicating the parties intended to "consider" a "proposed purchase" or "contemplated transaction" in anticipation of a final agreement between the parties, and there was also reference to a definitive purchase agreement throughout the letters; it was evident that there would need to be a signed, written, definitive purchase agreement or the deal would be off, plaintiff's down payment returned, and no liability for either party; thus, the trial court correctly dismissed plaintiff's breach of contract claim pursuant to Tenn. R. Civ. P. 12.02(6), and further, Tennessee courts had not recognized a duty to negotiate in good faith to attain a definitive purchase agreement, absent an express contractual agreement to do so and promissory estoppel was not applicable. Barnes & Robinson Co. v. Onesource Facility Servs., 195 S.W.3d 637, 2006 Tenn. App. LEXIS 43 (Tenn. Ct. App. 2006).

Based upon the limitations clearly stated in the letters of intent, it was not reasonable for plaintiff hire employees and incur expenses in reliance upon oral representations; no injustice resulted from giving effect to the terms of the letters of intent the parties negotiated and the trial court properly dismissed plaintiff's promissory estoppel claim pursuant to Tenn. R. Civ. P. 12.02(6). Barnes & Robinson Co. v. Onesource Facility Servs., 195 S.W.3d 637, 2006 Tenn. App. LEXIS 43 (Tenn. Ct. App. 2006).

3. Waiver of Defenses.

Third party plaintiff who had waived defenses and objections under Tenn. R. Civ. P. 12, could not, by reason of the third party defendant's motion against him, have the waiver set aside and secure for himself the benefit of a more definite statement as between himself and the plaintiff. Williamson County v. Twin Lawn Development Co., 498 S.W.2d 317, 1973 Tenn. LEXIS 459 (Tenn. 1973).

Executor of decedent's estate waived the defense that the court did not have jurisdiction over him as an individual but only in his capacity as executor where the executor's attorney accepted service of process on the executor's behalf and an answer was filed asserting no defense based on lack of jurisdiction over the person. Wright v. Universal Tire, Inc., 577 S.W.2d 194, 1978 Tenn. App. LEXIS 333 (Tenn. Ct. App. 1978).

Protection of the welfare of minors physically present in the state is sufficient basis to give subject matter jurisdiction even though another state may also properly have jurisdiction to adjudicate the issues involved. Segelke v. Segelke, 584 S.W.2d 211, 1978 Tenn. App. LEXIS 357 (Tenn. Ct. App. 1978).

If the statute of limitations is not pleaded within the proper time and in the proper manner, it is deemed waived and cannot be relied upon as a defense. Steed Realty v. Oveisi, 823 S.W.2d 195, 1991 Tenn. App. LEXIS 307 (Tenn. Ct. App. 1991).

It is a matter of discretion whether the court will allow the filing of a plea of the statute of limitations after the trial has begun. Steed Realty v. Oveisi, 823 S.W.2d 195, 1991 Tenn. App. LEXIS 307 (Tenn. Ct. App. 1991).

Failure of defendant to raise the defense of plaintiffs' failure to join an interested or indispensable party until after its motion for partial

summary judgment had been denied and plaintiffs' motion for partial summary judgment had been granted constituted a waiver of the defense. Griswold v. Income Properties, II, 880 S.W.2d 672, 1993 Tenn. App. LEXIS 786 (Tenn. Ct. App. 1993), rehearing denied, — S.W.2d —, 1994 Tenn. App. LEXIS 16 (Tenn. Ct. App. 1994).

Although a trial court may refuse to hear argument on an affirmative defense which a party failed to raise in its pleadings, it is not obligated to do so and, since the rules provide the opposing party with the means to develop new evidence or counter-arguments in response to such a defense, the court's allowance of such a defense may not constitute error. Richardson v. Richardson, 969 S.W.2d 931, 1997 Tenn. App. LEXIS 888 (Tenn. Ct. App. 1997).

Where plaintiff did not raise the issue of estoppel prior to trial as contemplated by Tenn. R. Civ. P. 12, and because the issue was not tried by consent, the affirmative defense of estoppel was waived by plaintiff and consequently it was inappropriate for the court to base its ruling on this theory. International Flight Ctr. v. City of Murfreesboro, 45 S.W.3d 565, 2000 Tenn. App. LEXIS 540 (Tenn. Ct. App. 2000).

Dismissal of a medical malpractice complaint against a doctor was overturned, as the doctor waived the affirmative defense of insufficient service of process by waiting nearly two years after answering the original complaint before asserting the defense. Faulks v. Crowder, 99 S.W.3d 116, 2002 Tenn. App. LEXIS 640 (Tenn. Ct. App. 2002), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 102 (Tenn. Feb. 3, 2003).

Employee's argument that the recruiting company's conduct relative to housing constituted fraud; however, the employee never pled fraud as an affirmative defense, as required by Tenn. R. Civ. P. 8.03; never raised fraud as a defense during trial; and the motion to amend the answer to include fraud as an affirmative defense was denied by the trial court. Therefore, that defense was waived. Vintage Health Res., Inc. v. Guiangan, 309 S.W.3d 448, 2009 Tenn. App. LEXIS 567 (Tenn. Ct. App. Aug. 25, 2009), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 188 (Tenn. Feb. 22, 2010).

When a mother sued a railroad and a conductor for wrongful death, the company waived any claim of improper venue because the railroad and conductor could have, but did not, raise such a defense in the trial court. Freeman v. CSX Transp., Inc., 359 S.W.3d 171, 2010 Tenn. App. LEXIS 691 (Tenn. Ct. App. Nov. 3, 2010).

Doctor timely raised her statute of limitations defense when she raised it in her first answer to the complaint and also raised it in a motion to dismiss for failure to state a claim upon which relief could be granted prior to filing her answer in the case. A party does not waive its statute of limitations defense by failing to raise such defense in its pre-answer motion; instead, the defense may be raised by a motion to dismiss for failure to state a claim upon which relief can be granted, or in the party's answer to the complaint. Young v. Lisa Kennedy, 429 S.W.3d 536, 2013 Tenn. App. LEXIS 523 (Tenn. Ct. App. Aug. 13, 2013), rehearing denied, Young v. Kennedy, 429 S.W.3d 536, 2013 Tenn. App. LEXIS 849 (Tenn. Ct. App. 2013), appeal denied, Young ex rel. Estate of Young v. Kennedy, — S.W.3d —, 2014 Tenn. LEXIS 174 (Tenn. Feb. 11, 2014).

Allegations in the record were sufficient to plead a statute of limitations defense as the complaint contained detailed allegations regarding the dates of all of the doctor's allegedly negligent acts, and the doctor's motion to dismiss contained facts, not conclusory allegations, that would support a finding that the complaint was untimely. Young v. Lisa Kennedy, 429 S.W.3d 536, 2013 Tenn. App. LEXIS 523 (Tenn. Ct. App. Aug. 13, 2013), rehearing denied, Young v. Kennedy, 429 S.W.3d 536, 2013 Tenn. App. LEXIS 849 (Tenn. Ct. App. 2013), appeal denied, Young ex rel. Estate of Young v. Kennedy, — S.W.3d —, 2014 Tenn. LEXIS 174 (Tenn. Feb. 11, 2014).

Where a next of kin argued that under Tenn. R. Civ. P. 8.03 a statute of limitations constituted an affirmative defense that had to be pled and that a medical center waived that defense in the first case, pursuant to Tenn. R. Civ. P. 12.08, the center could have presented its defense of the statute of limitations in the first suit in a motion, in its answer, or in an amendment to its answer. Given that the next of kin took a voluntary non-suit early on in the proceedings, it could not be said that the medical center waived its right to present the defense of the statute of limitations in the first suit. Byrge v. Parkwest Med. Ctr., 442 S.W.3d 245, 2014 Tenn. App. LEXIS 38 (Tenn. Ct. App. Jan. 30, 2014), appeal denied, — S.W.3d —, 2014 Tenn. LEXIS 538 (Tenn. June 24, 2014).

Because appellant failed to raise the issues of insufficient process and service of process in appellant's answer to appellee's counter-complaint, these defenses were waived. Johnson v. Memphis Guitar Spa, LLC, 600 S.W.3d 348, 2019 Tenn. App. LEXIS 254 (Tenn. Ct. App. May 23, 2019), appeal denied, Johnson v. Memphis Guitar Spa, LLC, — S.W.3d —, 2019 Tenn. LEXIS 464 (Tenn. Sept. 20, 2019).

Lessor effectively waived the defense of laches because the lessor did not assert this defense to the lessee's action for breach of the parties' lease agreement in the lessor's answer or by motion and raised the issue for the first time on appeal. B.W. Byrd Metal Fabricators, Inc. v. Alcoa, Inc., — S.W.3d —, 2019 Tenn. App. LEXIS 401 (Tenn. Ct. App. Aug. 19, 2019).

Trial court properly granted summary judgment to the sellers on a buyer's breach of contract and/or warranties claim because the contract had an unambiguous integration clause, the buyer could not point to terms in the contract that would lead a factfinder to find a breach of contract without parol evidence, the sellers did not waive their statute of limitations defense, there was simply no evidence of a deceptive act by the sellers that would indicate that the transaction conferred rights, remedies, or obligations to "take care" of removing the occupants where, prior to signing the contract, the buyer was aware that the property may be occupied and affirmed that she would be responsible for any necessary eviction actions after closing. Roby v. Nationstar Mortg., LLC, — S.W.3d —, 2020 Tenn. App. LEXIS 212 (Tenn. Ct. App. May 11, 2020), appeal denied, Roby v. Nationstar Mortg. LLC, — S.W.3d —, 2020 Tenn. LEXIS 546 (Tenn. Sept. 18, 2020).

The proponents of a purported last will by the decedent failed to question the form the contestants used to contest the will in any of their filings with the probate court, and they never raised a statute of limitations or service of process argument, thus depriving that court of the opportunity to address these issues. Because the proponents failed to raise any of these issues before the probate court, they were precluded from raising them on appeal. In re Estate of Dattel, — S.W.3d —, 2020 Tenn. App. LEXIS 277 (Tenn. Ct. App. June 12, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 555 (Tenn. Oct. 9, 2020).

4. Standard of Review.

Purpose of motion was to promote speedy trial, often by terminating suits at the pleading stage and where trial judge granted motion the judgment will not be overruled except for abuse of discretion. Heath v. Cornelius, 511 S.W.2d 683, 1974 Tenn. LEXIS 496 (Tenn. 1974).

A worker's compensation appeal from a summary judgment is not controlled by the material evidence rule; it is governed by Tenn. R. Civ. P. 56. Blocker v. Regional Medical Center, 722 S.W.2d 660, 1987 Tenn. LEXIS 815 (Tenn. 1987).

In considering a motion under Tenn. R. Civ. P. 12, all of the facts alleged in the complaint must be taken as true and then the issue is whether those facts state a cause of action that should be decided by a jury. Gray v. McDonald's Corp., 874 S.W.2d 44, 1993 Tenn. App. LEXIS 694 (Tenn. Ct. App. 1993), appeal denied, — S.W.2d —, 1994 Tenn. LEXIS 111 (Tenn. 1994).

Under Tenn. R. Civ. P. 12, the court should construe the complaint liberally in favor of the plaintiff, taking all allegations of fact as true, and should deny the motion unless it appears that the plaintiff can prove no set of facts in support of the claim that would entitle him to relief. Waller v. Bryan, 16 S.W.3d 770, 1999 Tenn. App. LEXIS 698 (Tenn. Ct. App. 1999), review or rehearing denied, — S.W.3d —, 2000 Tenn. LEXIS 234 (Tenn. Apr. 17, 2000).

5. Liberal Construction of Complaint.

In the face of Tenn. R. Civ. P. 12 it is the duty of the court to construe the complaint liberally in favor of plaintiff. Huckeby v. Spangler, 521 S.W.2d 568, 1975 Tenn. LEXIS 688 (Tenn. 1975); Holloway v. Putnam County, 534 S.W.2d 292, 1976 Tenn. LEXIS 591 (Tenn. 1976).

Allegations of the complaints of police officers were sufficient to overcome a dismissal by the trial court in the absence of a motion to dismiss where the officers alleged that all named defendants were present in gambling house and participated knowingly and willfully in gambling activities when officers lawfully entered the establishment in the discharge of their duties and were fired upon by a person or persons engaged to protect gambling activities, to the personal injury of the officers. Huckeby v. Spangler, 521 S.W.2d 568, 1975 Tenn. LEXIS 688 (Tenn. 1975).

Under Tenn. R. Civ. P. 12 the court should construe the complaint liberally in favor of the plaintiff. Fuerst v. Methodist Hospital South, 566 S.W.2d 847, 1978 Tenn. LEXIS 556 (Tenn. 1978).

When a complaint is tested by a Tenn. R. Civ. P. 12.02(6) motion to dismiss, the reviewing court must take all the well-pleaded, material factual allegations as true, and construe the complaint liberally in the plaintiff's favor. Dobbs v. Guenther, 846 S.W.2d 270, 1992 Tenn. App. LEXIS 868 (Tenn. Ct. App. 1992).

Where the plaintiff in a quiet title action failed to do anything during the nine-month window for challenging a wrongful tax levy, 26 U.S.C. §§ 6532 and 7426, the trial court's dismissal of the action on the grounds of statute of limitations was premature. Reading the complaint in the light most favorable to the plaintiff, the gravamen of the action alleged the quitclaim deed issued to the purchaser of the property at a tax sale was void. Stigall v. Lyle, 119 S.W.3d 701, 2003 Tenn. App. LEXIS 89 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 773 (Tenn. Sept. 2, 2003).

6. Motion in Writing.

In an action instituted by adjoining and abutting property owners seeking to enjoin the obstruction of a roadway and a declaration of its existence as a public right-of-way, where a third defendant orally joined in on two defendants' motion to dismiss, but where the oral motion was not reduced to a writing which could be filed and made a part of the record, third defendant's motion was of no effect and would not be noted on appellate review. Knierim v. Leatherwood, 542 S.W.2d 806, 1976 Tenn. LEXIS 521 (Tenn. 1976).

Where it does not appear that the motion is based upon any of the eight grounds set out in

Tenn. R. Civ. P. 12.02, the motion is not proper for consideration. McKinney v. Widner, 746 S.W.2d 699, 1987 Tenn. App. LEXIS 3021 (Tenn. Ct. App. 1987).

Tenn. R. Civ. P. 12.02(6) motions are not designed to correct inartfully worded pleadings. Dobbs v. Guenther, 846 S.W.2d 270, 1992 Tenn. App. LEXIS 868 (Tenn. Ct. App. 1992).

7. Issue of Capacity.

If a defendant conceives that the plaintiff does not have capacity, authority or legal existence, he could move to dismiss for failure to state a claim upon which relief may be granted, or move to strike, or move for a judgment on the pleadings. Knierim v. Leatherwood, 542 S.W.2d 806, 1976 Tenn. LEXIS 521 (Tenn. 1976).

8. Issue of Standing.

"Standing," in contrast with "capacity" which is governed by Tenn. R. Civ. P. 17.02 and 17.03, is a judge-made doctrine used to refuse to determine the merits of a controversy where the party advancing it is not properly situated to prosecute the action, and an issue of standing is raised by specific denial or defense in the answer or responsive pleading or by motion under Tenn. R. Civ. P. 12. Knierim v. Leatherwood, 542 S.W.2d 806, 1976 Tenn. LEXIS 521 (Tenn. 1976).

Where motion to strike based upon lack of standing in the plaintiff was improper, court treated the motion to strike as a motion to dismiss for failure to state a claim upon which relief can be granted. Curve Elementary School Parent & Teacher's Organization v. Lauderdale County School Board, 608 S.W.2d 855, 1980 Tenn. App. LEXIS 397 (Tenn. Ct. App. 1980).

Trial court erred in holding that a city lacked standing to appeal the decision of the metropolitan board of zoning appeals that allowed a billboard to be erected close to the entrance to the city, where the city adequately articulated the substantial, direct, and adverse effects the billboard would have had on it; based on the generous construction of the city's petition required by a Tenn. R. Civ. P. 12.02(6) motion, the interests articulated in the city's complaint were within the zone of interests protected by the zoning ordinance. City of Brentwood v. Metro. Bd. of Zoning Appeals, 149 S.W.3d 49, 2004 Tenn. App. LEXIS 82 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 803 (Tenn. Sept. 13, 2004).

9. Affirmative Defense.

An affirmative defense, such as the statute of frauds, may be raised in a motion to dismiss a complaint for failure to state a claim so long as the affirmative defense clearly and unequivocally appears on the face of the complaint, and it is not necessary for the defendant to submit evidence in support of his motion when the facts on which he relies to defeat plaintiff's claim are admitted by the plaintiff in his complaint. Anthony v. Tidwell, 560 S.W.2d 908, 1977 Tenn. LEXIS 648 (Tenn. 1977).

Defendant's entry of an appearance and participation as a party did not constitute a waiver of his objection to any defect in the service of process where he included insufficiency of process in his answer, which was his first responsive pleading. Toler by Lack v. City of Cookeville, 952 S.W.2d 831, 1997 Tenn. App. LEXIS 89 (Tenn. Ct. App. 1997).

In wrongful death suit brought by decedent's minor children and their other parent against the city, in whose jail decedent was incarcerated when decedent committed suicide, the statute of limitations for the Tennessee Governmental Tort Liabilities Act, T.C.A. § 29-20-101 et seq., was not tolled by the children's minority, nor was it tolled by the pendency of the suit in federal court; trial court properly granted the city's motion to dismiss. Lynn v. City of Jackson, 63 S.W.3d 332, 2001 Tenn. LEXIS 858 (Tenn. 2001), overruled, Moore v. Coffee County, 2010 FED App. 0715N, 402 Fed. Appx. 107, 2010 U.S. App. LEXIS 23639, 2010 FED App. 715N (6th Cir.) (6th Cir. Tenn. 2010).

Finding that an employment agreement was unconscionable was improper because unconscionability was never pled, the employment agreement was not unconscionable, and the agreement was not contrary to public policy. Even the employee's counsel did not interpret the public policy defense to include an unconscionability defense; on two separate occasions, the employee's attorney asked the trial court for a short recess in order to research the elements of unconscionability, noting that he had not briefed the issue. Vintage Health Res., Inc. v. Guiangan, 309 S.W.3d 448, 2009 Tenn. App. LEXIS 567 (Tenn. Ct. App. Aug. 25, 2009), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 188 (Tenn. Feb. 22, 2010).

10. More Definite Statement.

Where defendant files an answer to a bill or petition for divorce, the court may require complainant to file a bill of particulars upon defendant's motion pursuant to Tenn. R. Civ. P. 12. Farrar v. Farrar, 553 S.W.2d 741, 1977 Tenn. LEXIS 589 (Tenn. 1977).

11. Motion to Strike.

Although ordinarily a motion to strike is not the proper vehicle by which to strike an entire pleading, but only those portions which are objectionable, a motion to strike can be used to eliminate an entire pleading, including a complaint, where its allegations are offensive, scurrilous or in gross violation of Tenn. R. Civ. P. 8. Curve Elementary School Parent & Teacher's Organization v. Lauderdale County School Board, 608 S.W.2d 855, 1980 Tenn. App. LEXIS 397 (Tenn. Ct. App. 1980).

12. Lack of Subject Matter Jurisdiction.

Lack of subject matter jurisdiction may be raised at any time by the court or by the

parties. Gillespie v. State, 619 S.W.2d 128, 1981 Tenn. App. LEXIS 510 (Tenn. Ct. App. 1981); First Tenn. Bank Nat'l Ass'n v. Thoroughbred Motor Cars, 932 S.W.2d 928, 1996 Tenn. App. LEXIS 172 (Tenn. Ct. App. 1996); National Advertising v. McCormick Ashland City, 936 S.W.2d 256, 1996 Tenn. App. LEXIS 305 (Tenn. Ct. App. 1996).

The question oaf jurisdiction may be decided upon facts stated in the complaint and/or upon facts otherwise presented to the court. Wolcotts Financial Services, Inc. v. McReynolds, 807 S.W.2d 708, 1990 Tenn. App. LEXIS 908 (Tenn. Ct. App. 1990).

Defendant's participation in joint motion for continuance in juvenile court did not constitute "general appearance" waiving defendant's right to contest issue of personal jurisdiction. Landers v. Jones, 872 S.W.2d 674, 1994 Tenn. LEXIS 46 (Tenn. 1994).

The lack of subject matter jurisdiction is so fundamental that it requires dismissal whenever it is raised and demonstrated. Dishmon v. Shelby State Community College, 15 S.W.3d 477, 1999 Tenn. App. LEXIS 685 (Tenn. Ct. App. 1999).

When an appellate court determines that a trial court lacked subject matter jurisdiction, it must vacate the judgment and dismiss the case without reaching the merits of the appeal. Dishmon v. Shelby State Community College, 15 S.W.3d 477, 1999 Tenn. App. LEXIS 685 (Tenn. Ct. App. 1999).

Neither the college handbook or the acceptance letter to medical school was a contract between the college and the medical student because: (1) The state did not intend to be contractually bound by the contents of the handbook; and (2) If the acceptance letter was a contract, its terms had been completed long before the current action; therefore, the Tennessee claims commission's decision granting summary judgment to the state and dismissing the student's claim for damages against the college for the student's removal from a clerkship and the creation of requirements the student had to complete in order to be allowed to resume medical school classes for lack of subject matter jurisdiction was proper. Ku v. State, 104 S.W.3d 870, 2002 Tenn. App. LEXIS 888 (Tenn. Ct. App. 2002), review or rehearing denied, — S.W.3d—, 2003 Tenn. LEXIS 396 (Tenn. 2003).

13. Lack of Personal Jurisdiction.

It was error for the trial courts to treat defendant's motion to dismiss for lack of in personam jurisdiction under Tenn. R. Civ. P. 12.02(2) as a Tenn. R. Civ. P. 56 motion for summary judgment. Nicholstone Book Bindery, Inc. v. Chelsea House Publishers, 621 S.W.2d 560, 1981 Tenn. LEXIS 487 (Tenn. 1981), cert. denied, Chelsea House Publishers, etc. v. Nicholstone Book Bindery, Inc., 455 U.S. 994, 102 S. Ct. 1623, 71 L. Ed. 2d 856, 1982 U.S. LEXIS 1195 (1982).

Question as to whether appearance of defendant in juvenile court paternity proceeding conferred jurisdiction can be raised either by motion or in the answer. Tennessee Dep't of Human Services v. Daniel, 659 S.W.2d 625, 1983 Tenn. App. LEXIS 616 (Tenn. Ct. App. 1983).

Foreign corporation's distribution of film to libraries in Tennessee via computer transfer was not sufficient to establish minimum contacts; thus, an action against the corporation was properly dismissed for lack of personal jurisdiction. Gibbons v. Schwartz-Nobel, 928 S.W.2d 922, 1996 Tenn. App. LEXIS 57 (Tenn. Ct. App. 1996).

Where the only jurisdictional statement as to defendant was contained in plaintiff's complaint, asserting that defendant was a citizen and resident of Florida, and there was no evidence of activities by defendant in Tennessee, the trial court properly dismissed the complaint. Gibbons v. Schwartz-Nobel, 928 S.W.2d 922, 1996 Tenn. App. LEXIS 57 (Tenn. Ct. App. 1996).

Tenn. R. Civ. P. 12.03 does not apply to a motion to dismiss for lack of personal jurisdiction unless the evidence brought to the court is so conclusive that the motion may be fully and finally resolved on the merits. Chenault v. Walker, 36 S.W.3d 45, 2001 Tenn. LEXIS 46 (Tenn. 2001).

Spouse waived any objection and consented to personal jurisdiction in a divorce proceeding by filing an answer and counter-complaint. The spouse did not object to the trial court's exercise of personal jurisdiction in the spouse's initial filing with the trial court, and indicated the spouse's consent to the trial court's jurisdiction in the spouse's answer by requesting specific relief from the court and indicating that the spouse wished to appear before the court to present evidence. Singh v. Singh, — S.W.3d —, 2019 Tenn. App. LEXIS 334 (Tenn. Ct. App. July 3, 2019).

14. Priority of Motions.

Defendant's motion to dismiss for lack of venue was proper and took precedence over the motion to amend filed by plaintiff and, in the absence of any evidence contrary to its assertions, should have been granted. Turpin v. Conner Bros. Excavating Co., 761 S.W.2d 296, 1988 Tenn. LEXIS 242 (Tenn. 1988), overruled in part, Five Star Express v. Davis, 866 S.W.2d 944, 1993 Tenn. LEXIS 413 (Tenn. 1993).

15. Insufficiency of Service of Process.

It was improper to dismiss the case on the basis of Tenn. R. Civ. P. 12.02(5) because the moving party failed to comply with Tenn. R. Civ. P. 8.03, in that it failed to include in its motion to dismiss a recitation of those facts, in short and plain terms, upon which it was rely-

ing for dismissal. Barker v. Heekin Can Co., 804 S.W.2d 442, 1991 Tenn. LEXIS 69 (Tenn. 1991).

Although individual argued that the driver should have been estopped from claiming that service of process was insufficient because he did not file his motion to dismiss until May of 2007, and service was attempted in December of 2005, court found that the individual's argument was without merit since filing a motion to dismiss was a proper method of raising the issue of insufficient service pursuant to Tenn. R. Civ. P. 12.02, and the driver did not engage in any conduct prior to filing the motion which would have demanded that he be estopped from raising the defense. Watson v. Garza, 316 S.W.3d 589, 2008 Tenn. App. LEXIS 681 (Tenn. Ct. App. Nov. 7, 2008).

In clients' legal malpractice action, trial court erred in denying their former attorney's motion to dismiss because clients' intentional nine and one-half month delay in service of the summons after the filing of the complaint against their former attorney rendered the filing of the complaint ineffective pursuant to Tenn. R. Civ. P. 4.01(3). Jones v. Cox, 316 S.W.3d 616, 2008 Tenn. App. LEXIS 697 (Tenn. Ct. App. Nov. 25, 2008), appeal denied, — S.W.3d —, 2009 Tenn. LEXIS 282 (Tenn. June 1, 2009).

Circuit court properly granted the defendant's motion for summary judgment because there were no relevant facts in dispute where the defendant included the defense of insufficiency of process in his answer, and his participation in subsequent litigation did not serve to waive that defense. Webster v. Isaacs, — S.W.3d —, 2019 Tenn. App. LEXIS 404 (Tenn. Ct. App. Aug. 21, 2019).

16. Motion to Dismiss.

The sole purpose of a Tenn. R. Civ. P. 12.02(6) motion to dismiss is to test the legal sufficiency of the complaint. Dobbs v. Guenther, 846 S.W.2d 270, 1992 Tenn. App. LEXIS 868 (Tenn. Ct. App. 1992).

The defense of insufficiency of process was allowed to be raised in a motion to dismiss; once the defense was raised, any other participation in the lawsuit by the defendant did not constitute a waiver. State ex rel. Barger v. City of Huntsville, 63 S.W.3d 397, 2001 Tenn. App. LEXIS 604 (Tenn. Ct. App. 2001), review or rehearing denied, State ex rel. Barger v. City of Huntsville, — S.W.3d —, 2002 Tenn. LEXIS 2 (Tenn. Jan. 7, 2002).

Where movant combined a motion to dismiss with a motion for summary judgment, the appellate court treated the motion as a motion to dismiss to the extent that the motion asserted grounds for dismissal that did not rely on an accompanying affidavit, and as a motion for summary judgment to the extent the motion relied upon the grounds in the accompanying affidavit. Pendleton v. Mills, 73 S.W.3d 115, 2001 Tenn. App. LEXIS 689 (Tenn. Ct. App. 2001).

Trial court erred in granting a county's motion to dismiss a case brought under the Tennessee Governmental Tort Liability Act, T.C.A. § 29-20-201 et seq., seeking damages arising from the killing of a decedent by a convicted felon who was placed on house arrest; actions taken by county employees which allowed the charged felon onto house arrest were not discretionary, and the county was not immune pursuant to T.C.A. § 29-20-205. Brown v. Hamilton County, 126 S.W.3d 43, 2003 Tenn. App. LEXIS 580 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 102 (Tenn. Jan. 26, 2004).

Trial court erroneously granted an insurer's motion to dismiss in a contract action brought by a decedent's survivor; the motion on its face did not comply with civil procedure rules, as it did not state, with particularity, the motion's grounds. Finchum v. Ace, USA, 156 S.W.3d 536, 2004 Tenn. App. LEXIS 538 (Tenn. Ct. App. 2004), review or rehearing denied, Finchum v. ACE, USA, — S.W.3d —, 2005 Tenn. LEXIS 68 (Tenn. 2005).

Tennessee trial court did not err in denying the mother's motion to dismiss under Tenn. R. Civ. P. 12.02(1) that challenged the Tennessee trial court's subject matter jurisdiction in the father's action in Tennessee to modify an original custody determination in Florida because Florida no longer had exclusive, continuing jurisdiction over the child custody determination. Staats v. McKinnon, 206 S.W.3d 532, 2006 Tenn. App. LEXIS 292 (Tenn. Ct. App. 2006).

17. Dismissal of Claim.

In considering an appeal of a dismissal pursuant to Tenn. R. Civ. P. 12.02, an appellate court is required to take the allegations of the complaint as true, and to construe the allegations liberally in favor of the plaintiff. Breeding v. Edwards, 62 S.W.3d 170, 2001 Tenn. App. LEXIS 459 (Tenn. Ct. App. 2001).

18. Judgment on the Pleadings.

In a personal injury suit, a court properly granted an insurer a judgment on the pleadings where plaintiff never alleged a breach of duty, and the bare allegation concerning low repair payments did not state a claim on which relief could be granted. Young v. Barrow, 130 S.W.3d 59, 2003 Tenn. App. LEXIS 678 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 80 (Tenn. Jan. 26, 2004).

19. Conversion to Summary Judgment.

Policy of insurance, not having been exhibited to the complaint itself, did not become a part of the complaint pursuant to Tenn. R. Civ. P. 10.03; thus, since the policy of insurance at issue first appeared in the case as an exhibit to the motion to dismiss, the provisions of Tenn. R. Civ. P. 12.02(6) converted the motion to dismiss

at that time to a motion for summary judgment under Tenn. R. Civ. P. 56. Brick Church Transmission, Inc. v. S. Pilot Ins. Co., 140 S.W.3d 324, 2003 Tenn. App. LEXIS 829 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 392 (Tenn. May 10, 2004).

Conversion of employer's motion to dismiss to one for summary judgment in an apartment manager's action against the employer and its insurer after the apartment manager was refused reimbursement for losses she incurred as the result of a fire was appropriate, because the employer filed an affidavit of one of its regional managers and the affidavit and the lease agreement were considered by the trial court in making its determination. Ferguson v. Nationwide Prop. & Cas. Ins. Co., 218 S.W.3d 42, 2006 Tenn. App. LEXIS 793 (Tenn. Ct. App. 2006).

20. Intentional and Negligent Infliction of Emotional Distress.

Where a postal carrier, while on duty, directly observed a man shoot his wife to death and then kill himself in her presence, the postal carrier and her husband, where the husband's claims were loss of consortium and the loss of companionship, stated a claim as required by Tenn. R. Civ. P. 12.02(6) for intentional infliction of emotional distress because she witnessed an "outrageous" act. The plaintiffs also stated a claim for negligent infliction of emotional distress, even though the postal carrier was not related to the man and the victim, accordingly, the trial court erred in dismissing the complaint. Lourcey v. Estate of Scarlett, 146 S.W.3d 48, 2004 Tenn. LEXIS 740 (Tenn. 2004).

21. Ecclesiastical Issues.

Short time after pastor was terminated, certain church members or officers were alleged to have referred to the pastor as a "witch doctor," a "voodoo preacher," and a "dog"; whether or not the statements were justified, because the pastor's complaint alleged that said slanderous statements were made outside the confines of the church, and in front of other nonparty church members, local law enforcement, and members of the community, the trial court erred in finding the statements by said church members were too closely entangled with the decision to terminate the pastor's employment (ecclesiastical workings of the church), to treat them as a civil wrong, and to conclude that it lacked subject matter jurisdiction over the matter. Ausley v. Shaw, 193 S.W.3d 892, 2005 Tenn. App. LEXIS 709 (Tenn. Ct. App. 2005), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 351 (Tenn. 2006).

22. Motion Improperly Granted.

Orders dismissing a local government's amended complaint against the second real estate developer for failure to state a claim and granting the first developer summary judgment in the government's action seeking to force the developers to complete a road or to pay damages were vacated because the ordinance approving the project, Metropolitan Government of Nashville and Davidson County, Tennessee, Ordinance No. 88-491, provided a sufficient legal basis for requiring both developers to build and pave the missing section of the road; the ordinance specifically referred to and incorporated the project's preliminary master plan, which included the road, and the first developer's transfer of the property to the second developer did not terminate its legal obligation to build and pave the road. The court further held that the conditions and requirements of the preliminary master plan were binding not only on the first developer but on the second developer as well; the second developer's omission of the middle of the road from the final subdivision plats approved by the planning commission did not absolve it of its legal obligation to finish the road. Metro. Gov't of Nashville & Davidson County v. Barry Constr. Co., 240 S.W.3d 840, 2007 Tenn. App. LEXIS 93 (Tenn. Ct. App. Feb. 21, 2007), rehearing denied, 240 S.W.3d 840, 2007 Tenn. App. LEXIS 140 (Tenn. Ct. App. Mar. 14, 2007).

RULE 13

COUNTERCLAIM AND CROSS-CLAIM

13.01. Compulsory Counterclaims. A pleading shall state as a counterclaim any claim, other than a tort claim, which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction, except that a claim need not be stated as a counterclaim if at the time the action was commenced the claim was the subject of another pending action. This rule shall not be construed as requiring a counterclaim to be filed in any court whose jurisdiction is limited

either as to subject matter or as to monetary amount so as to be unable to entertain such counterclaim.

Advisory Commission Comments. 13.01: Rule 13.01 requires that a party who has a claim, other than a tort claim, which arose out of the same transaction or occurrence as the claim of the opposing party, assert the claim by way of counterclaim. Multiplicity of suits is avoided by requiring all matured claims arising between the parties out of the same transaction or occurrence to be settled in a single proceeding. Exceptions are made to protect a party against injustice. The exception of tort actions from this Rule was made because these Rules do not affect the law of venue; in tort actions, a claimant may have a legitimate choice of venue among several counties. So long as the venue laws permit such choice, the Committee felt that injustice could result from making tort claims subject to this Rule.

NOTES TO DECISIONS

Analysis

1. Compulsory Counterclaim.
2. Suit Filed in Another State.
3. Counterclaims Required.
4. Recoupment.

1. Compulsory Counterclaim.

When defendants in the original suit elected to proceed on their counterclaim after plaintiffs voluntarily dismissed their suit, it was necessary that plaintiffs' "nonsuited" claim be asserted by way of counterclaim or it would be deemed waived. Quelette v. Whittemore, 627 S.W.2d 681, 1981 Tenn. App. LEXIS 536 (Tenn. Ct. App. 1981); Carnation Co. v. T.U. Parks Constr. Co., 816 F.2d 1099, 1987 U.S. App. LEXIS 5154 (6th Cir. 1987).

A mandatory counterclaim which was voluntarily nonsuited was forever barred even though the court order stated that it was voluntarily dismissed without prejudice. Clements v. Austin, 673 S.W.2d 867, 1983 Tenn. App. LEXIS 664 (Tenn. Ct. App. 1983); Carnation Co. v. T.U. Parks Constr. Co., 816 F.2d 1099, 1987 U.S. App. LEXIS 5154 (6th Cir. 1987).

2. Suit Filed in Another State.

Summary judgment for an employer in an employee's action upon an employment contract was proper as the doctrine of res judicata applied and it was entitled to judgment pursuant to the Uniform Enforcement of Foreign Judgments Act. The employer did not violate Tenn. R. Civ. P. 13.01 by filing an action in another state as it filed a counterclaim in the employee's action. Crain v. CRST Van Expedited, Inc., 360 S.W.3d 374, 2011 Tenn. App. LEXIS 240 (Tenn. Ct. App. May 11, 2011), appeal denied, — S.W.3d —, 2011 Tenn. LEXIS 943 (Tenn. Sept. 21, 2011).

3. Counterclaims Required.

Theories of liability were different, but the contract was the same and thus the couple was required to assert a counterclaim in the 2010 litigation initiated by the bank to pursue their breach of contract claim; the court denied the request to excuse them from complying with the rule to protect them from injustice, as they had a full and fair opportunity to defend the bank's claim against them and nothing prevented them from asserting a counterclaim against the bank as part. Hulan v. Coffee Cty. Bank, — S.W.3d —, 2019 Tenn. App. LEXIS 42 (Tenn. Ct. App. Jan. 28, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 280 (Tenn. June 20, 2019).

4. Recoupment.

Recoupment is the right of a defendant to have a deduction from the amount of plaintiff's damages for the reason that the plaintiff has not complied with the cross obligations or independent covenants arising under the same contract. Howard v. Abernathy, 751 S.W.2d 432, 1988 Tenn. App. LEXIS 103 (Tenn. Ct. App. 1988).

Recoupment is the right to set off unliquidated damages while the right of set off comprehends only liquidated damages or those capable of being ascertained by calculation. Howard v. Abernathy, 751 S.W.2d 432, 1988 Tenn. App. LEXIS 103 (Tenn. Ct. App. 1988).

Recoupment differs from set off in that any claim or demand the defendant may have against the plaintiff may be used as a set off, while it is not a subject of recoupment unless it grows out of the very same transaction which furnishes the plaintiff's cause of action. Howard v. Abernathy, 751 S.W.2d 432, 1988 Tenn. App. LEXIS 103 (Tenn. Ct. App. 1988).

Insurance agencies' obligations to insurer to collect and remit premiums, and insurer's obligation to agencies for share of profit were mutual, and thus could be offset in insolvent insurer's action against agencies for unpaid premiums. McReynolds v. Cherokee Ins. Co., 815 S.W.2d 201, 1990 Tenn. App. LEXIS 673 (Tenn. Ct. App. 1990).

13.02. Permissive Counterclaim. A pleading may state as a counterclaim any claim against an opposing party, whether or not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

Advisory Commission Comments. 13.02: Rule 13.02 is very broad and allows a party to state by way of counterclaim any claim which he or she may have against the opposing party, without regard to the source of the claim. In the event that the counterclaim should make it difficult for the jury or court to follow the issues in a single trial, the court may order a separate trial of the counterclaim under Rule 42.02.

NOTES TO DECISIONS

1. Permissive Counterclaim.

Savings and loan associate could counterclaim against assignee of deposit for amount of erroneous preassignment payments to assignor on separate note. Rowland v. American Federal Sav. & Loan Asso., 523 S.W.2d 207, 1975 Tenn. App. LEXIS 179 (Tenn. Ct. App. 1975).

13.03. Counterclaim Exceeding Opposing Claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

Advisory Commission Comments. 13.03: Rule 13.03 provides that a counterclaim may claim relief exceeding in amount or different in kind from the relief sought in the pleading of the opposing party. As the scope of counterclaim is greatly enlarged, it is necessary that the relief granted on a counterclaim not be limited to the same amount or kind claimed in the original complaint.

Compiler's Notes. For Notes to Decisions, See rule 13.09.

13.04. Counterclaim against the State of Tennessee. These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the state of Tennessee or an officer or agency thereof or any subdivision thereof.

Advisory Commission Comments. 13.04: The right to assert claims against the State or an officer, agent or subdivision thereof should not be enlarged by procedural rules. Accordingly, the disclaimer of Rule 13.04 is inserted.

Compiler's Notes. For Notes to Decisions, See rule 13.09.

13.05. Counterclaim Maturing or Acquired after Pleading. A claim which either matured or was acquired by the pleader after serving the pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

Advisory Commission Comments. 13.05: Rule 13.05 allows a claim acquired or matured after suit has begun to be presented as a counterclaim by supplemental pleading. The right is dependent on the permission of the court; permission could be denied where the introduction of the counterclaim could unreasonably delay the suit or otherwise defeat the ends of justice.

Compiler's Notes. For Notes to Decisions, See rule 13.09.

13.06. Omitted Counterclaim. When a pleader fails to set up a counterclaim through oversight, inadvertence or excusable neglect, or when justice requires, the pleader may by leave of court set up the counterclaim by amendment.

Advisory Commission Comments. 13.06: Rule 13.06 provides an element of flexibility in the handling of counterclaims. Since, under Rule 13.01 certain matters must be asserted, if at all, by way of counterclaim, it is important to empower the court to allow counsel to correct by amendment any error of oversight, excusable neglect or inadvertence which would bar a just claim of counsel's client.

NOTES TO DECISIONS

1. Statute of Limitations.

Where plaintiff filed his tort claim within the limitation period, but defendant filed first his answer and then his omitted counterclaim after the limitation period had expired, the timely filing of the original claim did not toll the statute of limitations with respect to the untimely counterclaim which was therefore dismissed. Brown v. Hipshire, 553 S.W.2d 570, 1977 Tenn. LEXIS 582 (Tenn. 1977).

13.07. Cross-Claim Against Co-Party. A pleading may state as cross-claim any claim by one (1) party against a co-party arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such a cross-claim may include a claim that the party against whom it is asserted is or may be liable to the cross-claimant for all or part of a claim asserted in the action against the cross-claimant.

NOTES TO DECISIONS

1. Permissive Counterclaim.

Investor, in its cross-claim, alleged that the lender's loan was usurious and that the lender should be liable for the $150,000 overbid on the property at the foreclosure sale; without question, the investor's cross-claim against the lender related to property that was the subject matter of the original action, such that there was no error in the chancery court's decision to allow the investor to remain in the lawsuit to litigate its cross-claim against the lender. Fossett v. Gray, 173 S.W.3d 742, 2004 Tenn. App. LEXIS 602 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2005 Tenn. LEXIS 273 (Tenn. Mar. 21, 2005).

13.08. Additional Parties May Be Brought in. When the presence of parties other than those to the original action is required for the granting of complete relief in the determination of a counterclaim or cross-claim, the court may order them to be brought in as defendants as provided in these rules, if jurisdiction of them can be obtained.

NOTES TO DECISIONS

1. Improper Joinder.

Where an indigent defendant in a divorce and child custody proceeding requested that the state be required to pay her attorney's fees, whereupon she was granted a motion to amend her counterclaim by joining the state and the commissioner of finance and administration as third party defendants pursuant to Tenn. R. Civ. P. 13, the supreme court held that the joinder was improper since additional parties may be joined only when their presence is needed to give the moving party the complete relief sought in the original cause of action, and this rule was not designed to permit the litigation of a separate and distinct cause of action within the framework of an existing lawsuit. Gaston v. State, 558 S.W.2d 834, 1977 Tenn. LEXIS 663 (Tenn. 1977).

13.09. Separate Trials — Separate Judgments. If the court orders separate trials as provided in Rule 42, judgment on a counterclaim or cross-claim may be rendered in accordance with the terms of Rule 54 when the court has jurisdiction to do so, even if the claims of the opposing party may have been dismissed or otherwise disposed of.

Advisory Commission Comments. 13.09: Rule 42 empowers the court, in order to avoid inconvenience or prejudice to a party, to order separate trials of one or more cross claims, counterclaims, etc. Rule 13.09 empowers the court to enter judgment on a cross claim or counterclaim, even though the claims of the opposing party have been already disposed of.

Cross-References. Setoff by surety or co-maker, T.C.A. § 20-6-401.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 222, 223.

Pritchard on Wills and Administration of Estates (4th ed., Phillips and Robinson), §§ 745, 912.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-13.01, 1-13.02, 1-13.05, 1-13.06, 1-13.08.

Tennessee Jurisprudence. 1 Tenn. Juris., Amendments, §§ 2, 15, 17; 11 Tenn. Juris., Equity, §§ 52-54; 20 Tenn. Juris., Parties, § 1; 22 Tenn. Juris., Setoff, Recoupment and Counterclaim, §§ 13, 25; 26 Tenn. Juris., Working Contracts, § 18.

Law Reviews. A Survey of Civil Procedure in Tennessee — 1977, IV. Pretrial Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 308.

Nonsuits Don't Necessarily Save You (Donald F. Paine), 25 No. 1 Tenn. B.J. 28 (1989).

NOTES TO DECISIONS

Analysis

1. Recoupment.
2. Improper Joinder.
3. Notice.
4. Jurisdiction.

1. Recoupment.

Recoupment is the right of a defendant to have a deduction from the amount of plaintiff's damages for the reason that the plaintiff has not complied with the cross obligations or independent covenants arising under the same contract. Howard v. Abernathy, 751 S.W.2d 432, 1988 Tenn. App. LEXIS 103 (Tenn. Ct. App. 1988).

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Recoupment differs from set off in that any claim or demand the defendant may have against the plaintiff may be used as a set off, while it is not a subject of recoupment unless it grows out of the very same transaction which furnishes the plaintiff's cause of action. Howard v. Abernathy, 751 S.W.2d 432, 1988 Tenn. App. LEXIS 103 (Tenn. Ct. App. 1988).

Insurance agencies' obligations to insurer to collect and remit premiums, and insurer's obligation to agencies for share of profit were mutual, and thus could be offset in insolvent insurer's action against agencies for unpaid premiums. McReynolds v. Cherokee Ins. Co., 815 S.W.2d 201, 1990 Tenn. App. LEXIS 673 (Tenn. Ct. App. 1990).

2. Improper Joinder.

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3. Notice.

Trial court did not err in denying a conservator's motion for a default judgment on a cross-claim against the department of veterans' affairs because the department had not been served, and it was not a party because it had not filed a pleading, nor had it made an appearance in the conservatorship proceedings; since the department had not waived its sovereign immunity, the probate court did not have jurisdiction over it. AmSouth Bank v. Cunningham, 253 S.W.3d 636, 2006 Tenn. App. LEXIS 144 (Tenn. Ct. App. Feb. 27, 2006).

4. Jurisdiction.

Circuit court was well within its discretion in retaining jurisdiction over a counterclaim and in granting a default judgment on the counterclaim, notwithstanding the dismissal of the

general sessions appeal for lack of subject matter jurisdiction, because the dismissal of the general sessions appeal did not deprive the court of subject matter jurisdiction to adjudicate the counterclaim, as the court was permitted to render a judgment in the separate counterclaim, even though the original lawsuit was dismissed. Johnson v. Memphis Guitar Spa, LLC, 600 S.W.3d 348, 2019 Tenn. App. LEXIS 254 (Tenn. Ct. App. May 23, 2019), appeal denied, Johnson v. Memphis Guitar Spa, LLC, — S.W.3d —, 2019 Tenn. LEXIS 464 (Tenn. Sept. 20, 2019).

RULE 14

THIRD-PARTY PRACTICE

14.01. When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party complaint is filed not later than ten (10) days after service of the third party plaintiff's original answer. Otherwise the third-party must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make his or her defenses to the third-party plaintiff's claim as provided in Rule 12 and counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert any defenses as provided in Rule 12 and his or her counterclaim and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to the third-party defendant for all or part of the claim made in the action against the third-party defendant.

14.02. When Plaintiff May Bring in Third Party. When a counterclaim is asserted against a plaintiff, the plaintiff may cause a third party to be brought in under circumstances which under this rule would entitle a defendant to do so.

Advisory Commission Comments. Rule 14 allows a defendant to bring in, as a third party defendant, any new party who is or may be liable to defendant for all or part of the plaintiff's claim against the defendant. Third-party defendants have all of the rights as to cross-claims and counterclaims as do the original parties to the suit, including the right to bring in additional parties who may be liable to the third-party defendant for the claims asserted against him or her. If a counterclaim is asserted against a plaintiff, the plaintiff may bring in new parties under the same circumstances as if the plaintiff were a defendant. The rule thus makes it possible for ultimate liability to be determined in a single suit where there are several parties whose rights and liabilities are interconnected. A third party claim is subject to being stricken or tried separately on motion of any party.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 148, 187, 510.

Pritchard on Wills and Administration of Estates (4th ed., Phillips and Robinson), § 745.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-14.01, 1-14.02.

Tennessee Jurisprudence. 11 Tenn. Juris., Equity, §§ 52, 53; 20 Tenn. Juris., Parties, § 1; 20 Tenn. Juris., Pleading, § 4.

Law Reviews. A Survey of Civil Procedure in Tennessee — 1977, IV. Pretrial Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 308.

NOTES TO DECISIONS

ANALYSIS

1. In General.
2. Pleading.
3. Judgments.
4. Parties Subject to Impleader.
5. Basis of Third Party Liability.
6. Severability of Claims.
7. Claims of Plaintiff Against Third Party.
8. Statute of Limitations.
9. Notice.

1. In General.

The motion for a more definite statement by the third-party defendant against the third-party plaintiff did not authorize the third-party plaintiff, who as the original defendant had waived such objections and defenses, to obtain a more definite statement as between the original plaintiff and himself. Williamson County v. Twin Lawn Development Co., 498 S.W.2d 317, 1973 Tenn. LEXIS 459 (Tenn. 1973).

This rule authorizes a third-party complaint based upon a claim of one tort-feasor for indemnity or contribution from other alleged joint tort-feasors. Velsicol Chemical Corp. v. Rowe, 543 S.W.2d 337, 1976 Tenn. LEXIS 478 (Tenn. 1976).

A third-party complaint seeking recovery as a third-party beneficiary is not properly maintainable. Koontz v. Epperson Electric Co., 643 S.W.2d 333, 1982 Tenn. App. LEXIS 386 (Tenn. Ct. App. 1982).

2. Pleading.

A third-party complaint for contribution from jointly liable wrongdoers need not show that recovery is a certainty, but will be allowed to stand if, under some reasonable construction of the facts which might be advanced at trial, recovery would be possible. Velsicol Chemical Corp. v. Rowe, 543 S.W.2d 337, 1976 Tenn. LEXIS 478 (Tenn. 1976).

3. Judgments.

The fact that contribution may not be obtained until the original defendant has been cast in judgment and has paid does not prevent impleader; the impleader judgment may be so fashioned as to protect the rights of the other tort-feasors, so the defendant's judgment against them may not be enforced until the defendant has paid more than his proportionate share. Velsicol Chemical Corp. v. Rowe, 543 S.W.2d 337, 1976 Tenn. LEXIS 478 (Tenn. 1976).

4. Parties Subject to Impleader.

This rule is not intended to permit a defendant to implead another person who is directly liable to the plaintiff but not to the defendant. Its purpose is to enable the defendant to implead another person who is or may be liable to him for all or part of the plaintiff's claim against him. Turner v. Aldor Co. of Nashville, Inc., 827 S.W.2d 318, 1991 Tenn. App. LEXIS 911 (Tenn. Ct. App. 1991).

5. Basis of Third Party Liability.

This rule does not require the existence of any type of legal relationship between the plaintiff and the third-party defendant. The third-party defendant's liability to the defendant may be based on an entirely different theory than the defendant's liability to the plaintiff. Turner v. Aldor Co. of Nashville, Inc., 827 S.W.2d 318, 1991 Tenn. App. LEXIS 911 (Tenn. Ct. App. 1991).

Where plaintiff's suit against defendants was for the purpose of recovering the balance due upon a promissory note executed by defendants to plaintiff, and the defendants' third-party action was for damages arising out of alleged tortious interference with a contractual or business relationship that involved a separate contract for the sale of a portion of the pledged property, third-party defendants' potential liability to defendant as a third-party plaintiff was not dependent upon the outcome of plaintiff's suit, and therefore they could not be impleaded as third-party defendants by the original defendants. Valley Fidelity Bank & Trust Co. v. Ayers, 861 S.W.2d 366, 1993 Tenn. App. LEXIS 361 (Tenn. Ct. App. 1993).

In a negligence action against a restaurant for injuries sustained when a stool collapsed, since the claims that the defendant restaurant had against third-party defendants, the seller and the manufacturer of the stool, were claims that the plaintiff could have asserted against such defendants, an apportionment of liability among the first-party defendant and the third-party defendants consistent with principles of comparative fault could be accomplished according to third-party proceedings. Owens v. Truckstops of Am., 915 S.W.2d 420, 1996 Tenn. LEXIS 62 (Tenn. 1996).

Notwithstanding the rule that a third-party defendant's liability to the defendant may be based on a different theory than the defendant's liability to the plaintiff, the doctrine of comparative fault contemplates that the appor-

tionment of fault is limited to those against which the plaintiff has a cause of action; therefore, where plaintiff filed a negligence action against a restaurant for injuries sustained when a stool collapsed, the basis on which the defendant restaurant could assert third-party claims against the seller and the manufacturer of the stool was not limited by the plaintiff's cause of action; the defendant could assert third-party claims based on negligence, strict liability in tort, and breach of implied warranty. Owens v. Truckstops of Am., 915 S.W.2d 420, 1996 Tenn. LEXIS 62 (Tenn. 1996).

6. Severability of Claims.

Where a defendant's cross action is based upon a cause of action which is severable and distinct from the cause of action asserted in the main action, the cross-defendant or third-party defendant is entitled to be sued in the county where he resides. Valley Fidelity Bank & Trust Co. v. Ayers, 861 S.W.2d 366, 1993 Tenn. App. LEXIS 361 (Tenn. Ct. App. 1993).

7. Claims of Plaintiff Against Third Party.

Once the defendant has impleaded a third-party defendant, this rule permits, but does not require, the plaintiff to assert what is commonly known as an "upsloping claim" against the third-party defendant. An upsloping claim is considered as an original complaint and may take the form of an amendment to the original complaint or a new pleading. Turner v. Aldor Co. of Nashville, Inc., 827 S.W.2d 318, 1991 Tenn. App. LEXIS 911 (Tenn. Ct. App. 1991).

8. Statute of Limitations.

The filing of the third-party complaint does not toll the running of the statute of limitations on the plaintiff's claim against the third-party defendant. Thus, the plaintiff cannot file a new pleading or amend its complaint to state a claim against the third-party defendant when the statute of limitations has already run on its claim. Turner v. Aldor Co. of Nashville, Inc., 827 S.W.2d 318, 1991 Tenn. App. LEXIS 911 (Tenn. Ct. App. 1991).

9. Notice.

Trial court did not err in denying a conservator's motion for a default judgment on a cross-claim against the department of veterans' affairs because the department had not been served, and it was not a party because it had not filed a pleading, nor had it made an appearance in the conservatorship proceedings; since the department had not waived its sovereign immunity, the probate court did not have jurisdiction over it. AmSouth Bank v. Cunningham, 253 S.W.3d 636, 2006 Tenn. App. LEXIS 144 (Tenn. Ct. App. Feb. 27, 2006).

RULE 15

AMENDED AND SUPPLEMENTAL PLEADINGS

NOTES TO DECISIONS

1. Jurisdiction.

Circuit properly granted summary judgment to a non-party insurer because the general sessions court lacked jurisdiction to grant the insured's motion to amend or otherwise modify its judgment to name the correct entity where its judgment became final months before the insured's motion was noticed for hearing, and what the insured sought was no mere correction of a clerical mistake, but rather, the modification or setting aside of the judgment itself, it was not a simple matter of substituting the name of the defendant since the non-party insurer would have to be formally and properly brought into the lawsuit and given a chance to defend itself. Burns v. State Farm Fire & Cas. Co., — S.W.3d —, 2020 Tenn. App. LEXIS 98 (Tenn. Ct. App. Mar. 6, 2020).

15.01. Amendments. A party may amend the party's pleadings once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been set for trial, the party may so amend it at any time within fifteen (15) days after it is served. Otherwise a party may amend the party's pleadings only by written consent of the adverse party or by leave of court; and leave shall be freely given when justice so requires. For amendments adding defendants pursuant to Tenn. Code Ann. § 20-1-119, however, written consent of the adverse party or leave of court is not required. A party shall plead in response

to an amended pleading within the time remaining for response to the original pleading or within fifteen (15) days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders. [Amended by order filed January 2, 2007, effective July 1, 2007.]

NOTES TO DECISIONS

ANALYSIS

1. Abuse of Discretion.
2. Leave to Amend Denied.
3. Motion Improperly Denied.
4. Leave to Amend Not Sought.
5. Amended Pleading.
6. Leave to Amend Properly Denied.
7. Leave to Amend Not Required.

1. Abuse of Discretion.

Judgment against a property owner was vacated because, inter alia, it was an abuse of discretion to amend a complaint to join the owner during trial, as no amended pleading giving the owner notice that the owner was a defendant was ever filed. City of Oak Ridge v. Levitt, 493 S.W.3d 492, 2015 Tenn. App. LEXIS 864 (Tenn. Ct. App. Oct. 21, 2015).

Judgment against a property owner was vacated because, inter alia, the owner's actual notice of the lawsuit was not a substitute for being served with an amended complaint naming the owner as a defendant. City of Oak Ridge v. Levitt, 493 S.W.3d 492, 2015 Tenn. App. LEXIS 864 (Tenn. Ct. App. Oct. 21, 2015).

Judgment against a property owner was vacated because, inter alia, the owner had insufficient time to respond to the complaint, which was amended at trial to name the owner as a defendant, so the owner's due process rights were violated. City of Oak Ridge v. Levitt, 493 S.W.3d 492, 2015 Tenn. App. LEXIS 864 (Tenn. Ct. App. Oct. 21, 2015).

2. Leave to Amend Denied.

Trial court did not abuse its discretion by denying a doctor's motion to amend the doctor's complaint because the court found that: (1) there were no new claims which the doctor sought to assert which were not known or should have been known by the time of the filing of the second amended complaint; (2) the doctor had withdrawn an amendment; and (3) the proposed amendment was futile, untimely, and prejudicial at the late stage of the proceedings. Stratienko v. Chattanooga-Hamilton County Hosp. Auth., 435 S.W.3d 189, 2013 Tenn. App. LEXIS 755 (Tenn. Ct. App. Nov. 21, 2013), appeal denied, Stratienko v. Chattanooga-Hamilton County Hosp. Auth., — S.W.3d —, 2014 Tenn. LEXIS 296 (Tenn. Apr. 10, 2014).

3. Motion Improperly Denied.

In a consolidated personal injury action, the trial court erred in denying Tenn. R. Civ. P. 15.01 motions by a private club and a surgeon to amend their answers to assert comparative fault claims against a nursing home because the doctrine of joint and several liability no longer applied to circumstances in which separate, independent negligent acts of more than one tortfeasor combined to cause a single, indivisible injury. Banks v. Elks Club Pride of Tenn. 1102, 301 S.W.3d 214, 2010 Tenn. LEXIS 5 (Tenn. Jan. 13, 2010).

4. Leave to Amend Not Sought.

Court of appeals did not err in affirming an order dismissing an insured's underinsured motorist claim against an insurer because the insured failed to amend to increase the amount of damages beyond those specified in the warrant she filed in general sessions court after she perfected a de novo appeal to the circuit court, and the amount of the insured's damages was limited to the amount she requested in her general sessions warrant; the amount of damages a party appealing to circuit court from general sessions court seeks to recover is limited to the amount sought in the warrant filed in general sessions court until an amendment to increase the amount of damages is filed in the circuit court. Brown v. Roland, 357 S.W.3d 614, 2012 Tenn. LEXIS 2 (Tenn. Jan. 18, 2012).

5. Amended Pleading.

Pursuant to Tenn. R. Civ. P. 15, an employee's claim under the Fair Labor Standards Act, 29 U.S.C. § 201 et seq., was timely pursuant to 28 U.S.C. § 255(a) where it was added by the filing of an amendment to the original complaint. Edmunds v. Delta Partners, L.L.C., 403 S.W.3d 812, 2012 Tenn. App. LEXIS 884 (Tenn. Ct. App. Dec. 18, 2012), rehearing denied, — S.W.3d —, 2013 Tenn. App. LEXIS 28 (Tenn. Ct. App. Jan. 9, 2013), appeal denied, Edmunds v. Delta Partners, LLC, — S.W.3d —, 2013 Tenn. LEXIS 457 (Tenn. May 9, 2013).

6. Leave to Amend Properly Denied.

Trial court did not abuse its discretion in denying a husband's motion to amend to assert a counterclaim for alimony where he maintained that the trial court's action was a form of punishment for his admitted lies, but did not cite any specific references to the record. Sullivan v. Sullivan, — S.W.3d —, 2019 Tenn. App. LEXIS 492 (Tenn. Ct. App. Oct. 4, 2019).

7. Leave to Amend Not Required.

Current version of the rule for amending a complaint dispenses with two of the require-

ments outlined in the case law: (1) the filing of a motion to amend and (2) an order granting the motion to amend. Under the current version of the rule for amending a complaint and the case law, a plaintiff relying on the statute for joinder of third party defendants based on comparative fault must satisfy two requirements within 90 days: (1) file an amended complaint and (2) cause process to be issued to the party named in the amended complaint. Bidwell ex rel. Bidwell v. Strait, — S.W.3d —, 2021 Tenn. LEXIS 9 (Tenn. Jan. 28, 2021).

15.02. Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. Provided, however, amendment after verdict so as to increase the amount sued for in the action shall not be permitted. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice that party in maintaining the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

NOTES TO DECISIONS

Analysis

1. Waiver of Defenses.
2. Amendment to Conform to Evidence.
3. Leave to Amend Properly Denied.

1. Waiver of Defenses.

Employee's argument that the recruiting company's conduct relative to housing constituted fraud; however, the employee never pled fraud as an affirmative defense; never raised fraud as a defense during trial; and the motion to amend the answer to include fraud as an affirmative defense was denied by the trial court. Therefore, that defense was waived. Vintage Health Res., Inc. v. Guiangan, 309 S.W.3d 448, 2009 Tenn. App. LEXIS 567 (Tenn. Ct. App. Aug. 25, 2009), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 188 (Tenn. Feb. 22, 2010).

2. Amendment to Conform to Evidence.

Judgment against a property owner was vacated because, inter alia, Tenn. R. Civ. P. 15.02 did not permit an amendment of the complaint at trial to join the owner, since the Rule only provided for an amendment to include issues tried without being pled, rather than an amendment to join a party. City of Oak Ridge v. Levitt, 493 S.W.3d 492, 2015 Tenn. App. LEXIS 864 (Tenn. Ct. App. Oct. 21, 2015).

Even if a board of zoning appeals failed to specifically raise the res judicata defense in its answer, the defense was tried with the property owner's express consent as the owner responded to the board's answer but did not argue that the board waived its res judicata defense. Accordingly, the trial court did not err in applying the doctrine of res judicata in the case. Hirt v. Metro. Bd. of Zoning Appeals, — S.W.3d —, 2020 Tenn. App. LEXIS 190 (Tenn. Ct. App. Apr. 27, 2020).

Although a lessor did not allege that a lessee's denial of its access to a gas station on leased premises as a material breach of the commercial lease in its amended complaint, inasmuch as the lessee did not object at trial to the presentation of evidence regarding this alleged breach and the trial court clearly treated it as one of the lessor's allegations, breach of the lease by denial of access was tried by implied consent. Southeast Diamond Jubilee Invs., LLC v. Uma Shiv, Inc., — S.W.3d —, 2020 Tenn. App. LEXIS 539 (Tenn. Ct. App. Nov. 30, 2020).

3. Leave to Amend Properly Denied.

Trial court did not abuse its discretion in denying a requested amendment of a complaint by an automobile accident victim because amending the victim's complaint to add a business entity that was affiliated with the victim's employer would have been futile as the business entity, like the employer, also did not obtain uninsured motorist coverage. Evans v. Croxdale, — S.W.3d —, 2020 Tenn. App. LEXIS 547 (Tenn. Ct. App. Dec. 2, 2020).

15.03. Relation Back of Amendments. Whenever the claim or defense asserted in the amended pleadings arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party or the naming of the party by or against whom a claim is asserted relates back if the foregoing provision is satisfied and if, within the period provided by law for commencing an action or within 120 days after commencement of the action, the party to be brought in by amendment (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

NOTES TO DECISIONS

Analysis

1. Motion Properly Denied.
2. Application.

1. Motion Properly Denied.

In a personal injury action filed by plaintiff injured party against a deceased driver, a trial court properly denied plaintiff's Tenn. R. Civ. P. 15.03 motion to amend to add the personal representative as a defendant and dismissed the action because plaintiff failed to name the personal representative as a defendant, as required by T.C.A. § 20-5-103, before the expiration of the one-year statute of limitations in T.C.A. § 28-3-104. Vaughn v. Morton, 371 S.W.3d 116, 2012 Tenn. App. LEXIS 201 (Tenn. Ct. App. Mar. 28, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 435 (Tenn. June 19, 2012).

2. Application.

When a personal representative gave presuit notice of a health care liability claim to an entity that, while related to the correct health care provider, did not provide the health care in question, Tenn. R. Civ. P. 15.03 did not let the personal representative retroactively amend the defective notice because the Rule only applied to pleadings, and the notice was not a pleading, since the notice preceded the filing of a lawsuit. Shockley v. Mental Health Coop., 429 S.W.3d 582, 2013 Tenn. App. LEXIS 726 (Tenn. Ct. App. Nov. 4, 2013), appeal denied, Shockley v. Mental Health Coop., Inc., — S.W.3d —, 2014 Tenn. LEXIS 155 (Tenn. Feb. 11, 2014).

Trial court erred by granting the homeowners' association's motion to dismiss the homeowner's negligence claim on the ground that the statute of limitations had expired, as the homeowners' amendment to the complaint should have related back to the buyer's original complaint, as the buyer's compliant put the association on notice of the alleged water pipeline break, which was the common set of operational facts giving rise to the homeowners' claims, the original complaint sufficiently identified that property allegedly damaged by the association, the homeowners' amendment alleged identical theories of recovery, and the court perceived no reason why the relation back would prejudice the association. Tolliver v. Tellico Vill. Prop. Owners Ass'n, 579 S.W.3d 8, 2019 Tenn. App. LEXIS 6 (Tenn. Ct. App. Jan. 7, 2019).

Property owner's amended complaint naming a metropolitan government as an additional party did not relate back to its initial filing against a contractor which was issued street closure permits because the owner's amended complaint added the metropolitan government as a new party and asserted new claims against it. Furthermore, after the contractor filed its answer, the owner was on notice that the metropolitan government had some involvement in the street closures through issuing the permits to the contractor. Deja Vu of Nashville, Inc. v. Brasfield & Gorrie, LLC, — S.W.3d —, 2019 Tenn. App. LEXIS 76 (Tenn. Ct. App. Feb. 8, 2019).

Communication through a hotel's website by the claimant in a premises liability case concerning the claimant's alleged injury did not provide the requisite notice for the claimant's amended complaint to relate back to the claimant's original complaint and to add the owner of the hotel as a party because the statements which the claimant made on the website before the statute of limitations expired did not give the owner sufficient notice of the lawsuit and no connection was shown between the defendant in the original complaint and the owner. Hensley v. Stokely Hospitality Props., — S.W.3d —, 2020 Tenn. App. LEXIS 404 (Tenn. Ct. App. Sept. 9, 2020).

15.04. Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor. [As amended by order filed February 1, 1995, effective July 1, 1995.]

Advisory Commission Comments. 15.02: Rule 15 grants a party an absolute right to amend once within a specified time, and allows amendment freely at any time by consent of the parties or by leave of court. Where issues not raised by the pleadings are actually tried, amendment may conform the pleadings to the evidence. Amendment after verdict is permitted, but it is expressly provided that no amendment after verdict may increase the amount sued for. Specified times for response to amendments are set out, but these may be changed by order of the court, and continuances may be granted when necessary.

15.04: Rule 15.04 authorizes the court to permit a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented, and empowers the court to order a responsive pleading to the supplemental pleading where advisable. This Rule has especial significance in the light of Rule 7.01 which limits the pleadings which may ordinarily be filed.

Advisory Commission Comments. [1995]. The amendment to Rule 15.03 incorporates language similar to that adopted in the federal version to change the unfortunate result of decisions such as *Schiavone v. Fortune*, 477 U.S. 21 (1986). Under the revised wording, an action commenced under a corporate defendant's trade name just before the statute of limitations runs — but not served on the corporation's agent until two weeks after the statute runs — could be corrected by amendment.

Advisory Commission Comments [2007]. The need for the new third sentence of Rule 15.01 was highlighted by *Jones v. Professional Motorcycle Escort Service, L.L.C.*, 193 S.W.3d 564 (Tenn. 2006). Because Tenn. Code Ann. § 20-1-119 allows potential comparative tortfeasors pleaded in the answer to be added to the complaint, there is no reason to trouble the trial court with permission to amend. The new language resolves an ambiguity created by the statute and the earlier version of the rule.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 2, 2007, was ratified and approved by 2007 House Resolution 18 and Senate Resolution 11. The order promulgating the 2007 amendment of this rule provided that it take effect July 1, 2007.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 41, 69, 149, 162, 181, 184-187, 197, 204, 218, 220, 223, 224, 335, 336, 343, 408, 618, 619.

Pritchard on Wills and Administration of Estates (4th ed., Phillips and Robinson), § 745.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-15.01-3, 1-15.02-1, 1-40-3.

Tennessee Jurisprudence. 1 Tenn. Juris., Abatement, Survival and Revival, § 22; 1 Tenn. Juris., Amendments, §§ 2-18; 2 Tenn. Juris., Appeal and Error, § 145; 3 Tenn. Juris., Attachment and Garnishment, § 70; 9 Tenn. Juris., Dismissal, Discontinuance and Nonsuit, §§ 7, 15; 9 Tenn. Juris., Divorce and Alimony, § 23; 10 Tenn. Juris., Elections, § 20; 15 Tenn. Juris., Insurance, § 104; 18 Tenn. Juris., Limitations of Actions, § 50; 19 Tenn. Juris., Negligence, §§ 32, 34; 20 Tenn. Juris., Pleading, §§ 13, 14, 19; 21 Tenn. Juris., Public Officers, § 29.

Tennessee Law of Evidence (Paine, Schaffner, and Ulin), § 1.

Law Reviews. A Critical Survey of Developments in Tennessee Family Law in 1976-77, IV. Divorce (Neil P. Cohen), 45 Tenn. L. Rev. 433.

A Survey of Civil Procedure in Tennessee — 1977, IV. Pretrial Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 308.

An Exegesis of the Ejectment Statutes of Tennessee (R.D. Cox), 18 Mem. St. U.L. Rev. 581 (1988).

New Procedure Amendments (Donald F. Paine), 31 No. 4 Tenn. B.J. 5 (1995).

Recent Developments in the Tennessee Law of Uninsured Motorist Insurance, 58 Tenn. L. Rev. 413 (1991).

Removal Jurisdiction (Donald F. Paine), 38 No. 2 Tenn. B.J. 19 (2002).

Tennessee and Federal Rules of Civil Procedure (Donald F. Paine), 27 No. 5 Tenn. B.J. 25 (1991).

The Exclusiveness of an Employee's Workers' Compensation Remedy Against His Employer (Joseph H. King, Jr.), 55 Tenn. L. Rev. 405 (1988).

The Long-Arm Wrestle: Personal Jurisdiction in Tennessee (Steven E. Winn), 56 Tenn. L. Rev. 557 (1989).

The McIntyre Saving Statute (Donald F. Paine), 33 No. 4 Tenn. B.J. 21 (1997).

Torts — Ridings v. Ralph M. Parsons Co.: The Tennessee Supreme Court Rejects Use of Employer Negligence to Reduce Liability of Defendants in Post-McIntyre On-the-Job Tort Cases, 26 U. Mem. L. Rev. 1533 (1996).

Waiting for the Jury (George W. Jenkins III), 20 No. 4 Tenn. B.J. 31 (1984).

NOTES TO DECISIONS

Analysis

1. In General.
2. Purpose.
3. Conforming to Evidence.
4. Conditions on Granting Amendments.
5. Discretion of Court.
6. Amendment Relating Back to Original Pleading.
7. —Notice.
8. Amendment After Responsive Pleadings.
9. —Dismissal for Failure to State a Claim.
10. Denial of Motion to Amend Held Proper.
11. Denial of Motion to Amend Held Improper.
12. Granting of Motion to Amend Held Improper.
13. Granting of Motion to Amend Held Proper.
14. Issues Tried by Consent.
15. —Timing of Amendment.
16. Procedure.
17. Federal Rules.
18. Ouster Proceedings.
19. Supplemental Pleadings.
20. Disciplinary Proceeding.

1. In General.

Tenn. R. Civ. P. 15 clearly recognizes that liberality in the granting of amendments is a necessary part of a system in which pleadings serve primarily a notice-giving function. Walden v. Wylie, 645 S.W.2d 247, 1982 Tenn. App. LEXIS 439 (Tenn. Ct. App. 1982).

When a party seeks leave to amend, he waives the absolute right granted by Tenn. R. Civ. P. 15 to amend. Gribble v. Buckner, 730 S.W.2d 630, 1986 Tenn. App. LEXIS 3520 (Tenn. Ct. App. 1986).

Defendants should be freely permitted to amend their answers when a case has not been set for trial, when discovery had not been completed, and when the plaintiff will suffer no prejudice except insofar as the defense itself might prevail. Guarantor Partners v. Huff, 830 S.W.2d 73, 1992 Tenn. App. LEXIS 50 (Tenn. Ct. App. 1992).

Hospital filed a response opposing the family's motion to amend, but did not specifically set out how it could be prejudiced by granting the amendment; consequently, the trial court did not abuse its discretion in granting the amendment and proceeding to trial. Matus v. Metro. Gov't of Nashville, 128 S.W.3d 653, 2003 Tenn. App. LEXIS 272 (Tenn. Ct. App. 2003).

Trial court erred in granting summary judgment for defendant doctors in wrongful death case where plaintiff nephew voluntarily dismissed the claim but refiled the action within one year of nonsuiting but beyond the expiration of the original statute of limitations, adding the decedent's husband as a plaintiff; in light of the Tennessee supreme court's avowed liberality in permitting the substitution of a proper party plaintiff for an improper party plaintiff, even after the statute of limitations had passed, it was error for the trial court to find that the original lawsuit was a nullity. The claim was not void but, rather, merely voidable, because the savings statute applied. Foster v. St. Joseph Hosp., 158 S.W.3d 418, 2004 Tenn. App. LEXIS 491 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2005 Tenn. LEXIS 82 (Tenn. Jan. 31, 2005).

In an attorney disciplinary proceeding, although the hearing panel erred in concluding that disciplinary counsel was not required to seek leave of the panel before filing the supplemental petitions, reversal was not required because the attorney was not prejudiced by the purported error. Sneed v. Bd. of Prof'l Responsibility of the Supreme Court of Tenn., 301 S.W.3d 603, 2010 Tenn. LEXIS 66 (Tenn. Jan. 26, 2010).

2. Purpose.

While procedural rules should not be used to frustrate the consideration of claims on their merits, they should not be used to breathe life into claims that are plainly time barred. Turner v. Aldor Co. of Nashville, Inc., 827 S.W.2d 318, 1991 Tenn. App. LEXIS 911 (Tenn. Ct. App. 1991).

3. Conforming to Evidence.

Rules relating to amendment of pleadings are liberal and trial court's discretion in allowing amendments at any stage of the proceeding should not be disturbed on appeal unless it plainly appears that such discretion was abused. Derryberry v. Ledford, 506 S.W.2d 152, 1973 Tenn. App. LEXIS 267 (Tenn. Ct. App. 1973).

Although wife's counterclaim for divorce was based on cruel and inhuman treatment and did not allege adultery in haec verba, a clear charge of adultery was made, it was the major issue tried by the parties, and the court treated the issue as being tried by express or implied consent of the parties as though it had been raised in the pleadings. Farrar v. Farrar, 553

S.W.2d 741, 1977 Tenn. LEXIS 589 (Tenn. 1977).

Husband argued that an award of alimony was not appropriate, because the wife never requested an award of alimony. While she made no request for alimony in her counter-complaint or amended counter-complaint for divorce, she requested an award in her opening statement at trial without objection from the husband; issues not raised by the pleadings, tried by express or implied consent of the parties, are treated in all respects as if they were raised in the pleadings. Martin v. Martin, 155 S.W.3d 126, 2004 Tenn. App. LEXIS 450 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 1053 (Tenn. Nov. 29, 2004).

4. Conditions on Granting Amendments.

Conditions may be placed upon the granting of a motion to amend under the liberal policy of the rule in order to lessen or avoid whatever prejudice might result to the opposing party. Such conditions, however, should bear some relationship to the actual harm suffered by the party. Gardiner v. Word, 731 S.W.2d 889, 1987 Tenn. LEXIS 913 (Tenn. 1987).

5. Discretion of Court.

Where it was not clear whether an issue not raised in the pleadings was tried by the express or implied consent of the parties, the chancellor did not abuse his discretion in denying plaintiffs' motion to amend their pleadings to conform to the evidence presented. Diversified Equities, Inc. v. Warren, 567 S.W.2d 171, 1976 Tenn. App. LEXIS 271 (Tenn. Ct. App. 1976), overruled, V. L. Nicholson Co. v. Transcon Inv. & Financial, Ltd., 595 S.W.2d 474, 1980 Tenn. LEXIS 406 (Tenn. 1980), overruled in part, Green v. Green, 293 S.W.3d 493, 2009 Tenn. LEXIS 518 (Tenn. Aug. 26, 2009).

A trial court's discretionary ruling on amendments to pleadings will not be disturbed on appeal unless there is a showing of a clear abuse of discretion. McKinney v. Educator & Executive Insurers, Inc., 569 S.W.2d 829, 1977 Tenn. App. LEXIS 330 (Tenn. Ct. App. 1977).

Where amendment was necessary to bring before the court an issue which, if found in favor of the pleader, would be conclusive of the case, there is no abuse of discretion on the part of the trial judge in allowing the amendment. Liberty Mut. Ins. Co. v. Taylor, 590 S.W.2d 920, 1979 Tenn. LEXIS 523 (Tenn. 1979).

The granting or denying of a motion to amend is within the sound discretion of the trial court and will be reversed only for an abuse of discretion. Merriman v. Smith, 599 S.W.2d 548, 1979 Tenn. App. LEXIS 389 (Tenn. Ct. App. 1979).

Although a subsequent operation might arise out of the "conduct, transaction or occurrence" in the original pleading, where the claim of negligence in the second operation does not arise out of the "conduct, transaction or occurrence" set out in the original pleading there will be no relation back of the amendment. Gamble v. Hospital Corp. of America, 676 S.W.2d 340, 1984 Tenn. App. LEXIS 3415 (Tenn. Ct. App. 1984).

Tenn. R. Civ. P. 15 mandates the allowance of amendments if justice requires. Where the case had not been set for trial, and to grant leave for defendants to amend their answer and rely upon the defense would not in any way delay the case or otherwise prejudice plaintiff except insofar as the defense itself might prevail, the trial court abused its discretion in denying leave to amend. Garthright v. First Tennessee Bank, 728 S.W.2d 7, 1986 Tenn. App. LEXIS 3337 (Tenn. Ct. App. 1986).

Neither the trial judge nor the court of appeals has authority to expand the limitation placed by the supreme court upon a remand. Cook v. McCullough, 735 S.W.2d 464, 1987 Tenn. App. LEXIS 3181 (Tenn. Ct. App. 1987).

The trial court did not abuse its discretion in refusing to amend or alter its judgment according to the plaintiffs' motion where there was not convincing evidence that the issue was fully litigated at trial. Lapray v. Smith, 804 S.W.2d 87, 1990 Tenn. App. LEXIS 802 (Tenn. Ct. App. 1990), appeal denied, — S.W.2d —, 1991 Tenn. LEXIS 53 (Tenn. Jan. 28, 1991).

Although amendments to the pleadings lie within the discretion of the trial court, the rule mandates the allowance of amendments if justice requires. HMF Trust v. Bankers Trust Co., 827 S.W.2d 296, 1991 Tenn. App. LEXIS 568 (Tenn. Ct. App. 1991).

Tenn. R. Civ. P. 15 provides that leave to amend shall be freely given when justice so requires; this proviso in the rules substantially lessens the exercise of pre-trial discretion on the part of a trial judge. Huntington Nat'l Bank v. Hooker, 840 S.W.2d 916, 1991 Tenn. App. LEXIS 177 (Tenn. Ct. App. 1991).

This provision substantially lessens the trial court's discretion with regard to permitting the parties to amend their pleadings. Guarantor Partners v. Huff, 830 S.W.2d 73, 1992 Tenn. App. LEXIS 50 (Tenn. Ct. App. 1992).

Tenn. R. Civ. P. 15.01 substantially lessens the exercise of pretrial discretion on the part of a trial judge. Blocker v. Dearborn & Ewing, 851 S.W.2d 825, 1992 Tenn. App. LEXIS 952 (Tenn. Ct. App. 1992).

Trial court must give proponent of a motion to amend full chance to be heard on the motion, must consider the motion in light of the amendment policy embodied in Tenn. R. Civ. P. 15, that amendments must be freely allowed; and in the event the motion to amend is denied, the trial court must give a reasoned explanation for such action. Henderson v. Bush Bros. & Co., 868 S.W.2d 236, 1993 Tenn. LEXIS 460 (Tenn. Special Workers' Comp. App. Panel 1993).

The trial court properly denied leave to amend a complaint where the futility of the

amendment was clear and granting it would prolong the litigation, but almost certainly not lead to a different ultimate result. Welch v. Thuan, 882 S.W.2d 792, 1994 Tenn. App. LEXIS 144 (Tenn. Ct. App. 1994).

There are several considerations a trial judge should evaluate in determining whether to grant or deny a motion to amend including: undue delay in filing; lack of notice to the opposing party; bad faith by the moving party; repeated failure to cure deficiencies by previous amendments; undue prejudice to the opposing party; and futility of amendment. Clark v. Service Corp. Int'l, 20 S.W.3d 665, 1999 Tenn. App. LEXIS 757 (Tenn. Ct. App. 1999).

The determination of whether to allow an amendment to the pleadings is left to the sound discretion of the trial court; amended pleadings may be filed before trial, after trial, or even after appeal so long as the trial court has jurisdiction and so long as the trial court does not abuse its discretion in allowing the amendment. George v. Bldg. Materials Corp. of Am., 44 S.W.3d 481, 2001 Tenn. LEXIS 375 (Tenn. 2001).

Plaintiff substantially complied with T.C.A. § 20-1-119 and Tenn. R. Civ. P. 15.01 and the denial of a motorcycle escort service's motion to dismiss the amended complaint was not an abuse of discretion where: (1) Plaintiff's one-day delay in filing the motion to amend her complaint was not fatal as the amended complaint was filed, service of process was obtained, and leave to amend was granted within the 90-day time frame required by T.C.A. § 20-1-119; (2) This was plaintiff's first attempt to amend her complaint and the amendment was important in order to resolve the matter with all potentially liable parties before the trial court at once; and (3) Had the trial court denied plaintiff's motion, she could have proceeded by bringing an original complaint in a separate action and the escort service could have been made a party to that suit without permission of the trial court or the parties. Jones v. Prof'l Motorcycle Escort Serv., L.L.C., 193 S.W.3d 564, 2006 Tenn. LEXIS 430 (Tenn. 2006).

Trial court did not abuse its discretion in disallowing the employee's amendments where, at the stage of the litigation when this amendment was sought, the only remaining issues basically had to do with attorney's fees, as the substantive issues regarding the disclosure of documents had been litigated. Moody v. Hutchison, 247 S.W.3d 187, 2007 Tenn. App. LEXIS 581 (Tenn. Ct. App. Sept. 17, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 144 (Tenn. Mar. 3, 2008).

6. Amendment Relating Back to Original Pleading.

Whenever the claim or defense asserted in an amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading and does not constitute a new cause of action barred by the statute of limitations. Karash v. Pigott, 530 S.W.2d 775, 1975 Tenn. LEXIS 571 (Tenn. 1975).

Three primary considerations in determining whether an amendment seeking to add or substitute a new party plaintiff will be allowed to relate back under Tenn. R. Civ. P. 15.03 to the date of the original pleading so as to avoid the statute of limitations are: (1) Whether the defendant received adequate notice of the claim against him; (2) Whether the relation back of such an amendment would unfairly prejudice the defendant; and (3) Whether there is an identity of interest between the original party plaintiff and the new party plaintiff. Osborne Enterprises, Inc. v. Chattanooga, 561 S.W.2d 160, 1977 Tenn. App. LEXIS 262 (Tenn. Ct. App. 1977); Braswell v. Carothers, 863 S.W.2d 722, 1993 Tenn. App. LEXIS 294 (Tenn. Ct. App. 1993).

Where the defendant had fair notice from the original pleadings that the new party's claim was also involved, the defendant suffered no prejudice from relating back the new party's claim to the original pleadings. Osborne Enterprises, Inc. v. Chattanooga, 561 S.W.2d 160, 1977 Tenn. App. LEXIS 262 (Tenn. Ct. App. 1977).

The supreme court is liberal in allowing the addition or substitution of a proper party plaintiff for an improper plaintiff although the statute of limitations would have prevented the filing of a new suit. This liberality has been most evident in wrongful death actions in which a wrong party plaintiff has brought the suit. In such cases, the cause of action is not changed by the substitution and such a substitution does not prejudice the defendant who has had notice, from the beginning of the suit, of the nature of the cause of action and that it was being pressed against him. Chapman v. King, 572 S.W.2d 925, 1978 Tenn. LEXIS 666 (Tenn. 1978).

In a wrongful death action, where married deceased's parents had brought the action but the complaint was dismissed on the ground that the right of action, if any, passed to deceased's husband rather than to her parents, it was proper to allow substitution of deceased's husband as plaintiff in the action under Tenn. R. Civ. P. 17.01 even though the statute of limitations of one year had run prior to the filing of the motion for substitution, since the husband was the real party in interest and he made his application for substitution within a reasonable time after objection was made by defendants to the status of the original plaintiffs as real parties in interest. Chapman v. King, 572 S.W.2d 925, 1978 Tenn. LEXIS 666 (Tenn. 1978).

Where a lawsuit to enforce a materialman's lien was initiated and attachment of wrong property was levied within 90 days of the notice of lien, however, not until after 110 days from the notice of lien was the error in property description corrected by amendment of plaintiff's petition and defendant's improved property properly attached, the amended complaint describing and attaching the correct improved property did not relate back to the time the suit was originally filed, which was within the required 90 days of notice of lien, and thus plaintiff's lien enforcement was dismissed. Sequatchie Concrete Service, Inc. v. Cutter Laboratories, 616 S.W.2d 162, 1980 Tenn. App. LEXIS 424 (Tenn. Ct. App. 1980).

Where a person is made a party, then voluntarily dismissed, then made a party again more than a year later, through an amended complaint in a continuing action against another person, the statute of limitations in T.C.A. § 28-1-105 does not bar the proceedings as to that party; an amended complaint under Tenn. R. Civ. P. 15.03 avoids the impact of the statute of limitations by letting the amendment relate back to the original filing, and therefore T.C.A. § 28-1-105 is inapplicable for the reason that no statutory bar to the amendment exists. Floyd v. Rentrop, 675 S.W.2d 165, 1984 Tenn. LEXIS 829 (Tenn. 1984).

Notice is the critical element involved in determining whether amendments to pleadings relate back. Floyd v. Rentrop, 675 S.W.2d 165, 1984 Tenn. LEXIS 829 (Tenn. 1984); Energy Sav. Products, Inc. v. Carney, 737 S.W.2d 783, 1987 Tenn. App. LEXIS 2799 (Tenn. Ct. App. 1987); Hayes v. Maryville, 747 S.W.2d 346, 1987 Tenn. App. LEXIS 3064 (Tenn. Ct. App. 1987); Rainey Bros. Constr. Co. v. Memphis & Shelby County Bd. of Adjustment, 821 S.W.2d 938, 1991 Tenn. App. LEXIS 385 (Tenn. Ct. App. 1991), cert. denied, Rainey Bros. Constr. Co. v. Memphis & Shelby County Bd. of Adjustment, 504 U.S. 909, 112 S. Ct. 1937, 118 L. Ed. 2d 543, 1992 U.S. LEXIS 2713 (1992).

Tenn. R. Civ. P. 15.03 was not enacted for the purpose of establishing venue. Turpin v. Conner Bros. Excavating Co., 761 S.W.2d 296, 1988 Tenn. LEXIS 242 (Tenn. 1988), overruled in part, Five Star Express v. Davis, 866 S.W.2d 944, 1993 Tenn. LEXIS 413 (Tenn. 1993).

Where plaintiff sought to establish notice to defendant on basis of alleged agency relationship between employees of defendant's insurance company and defendant, court ruled that neither an insurance company nor its employees are agents of the insured for purposes of notice. Smith v. Southeastern Properties, Ltd., 776 S.W.2d 106, 1989 Tenn. App. LEXIS 140 (Tenn. Ct. App. 1989).

Tenn. R. Civ. P. 15.03 applies only to cases brought within a time limited by a rule or statute of limitations; it cannot be extended by successive voluntary dismissals. Bennett v. Town & Country Ford, Inc., 816 S.W.2d 52, 1991 Tenn. App. LEXIS 371 (Tenn. Ct. App. 1991).

A mistake within the meaning of Tenn. R. Civ. P. 15.03 does not exist simply because the party who may be liable for conduct alleged in the original complaint was omitted as a party defendant. Rainey Bros. Constr. Co. v. Memphis & Shelby County Bd. of Adjustment, 821 S.W.2d 938, 1991 Tenn. App. LEXIS 385 (Tenn. Ct. App. 1991), cert. denied, Rainey Bros. Constr. Co. v. Memphis & Shelby County Bd. of Adjustment, 504 U.S. 909, 112 S. Ct. 1937, 118 L. Ed. 2d 543, 1992 U.S. LEXIS 2713 (1992).

Only those claims which relate back to the original pleadings are saved from the effects of the applicable statute of limitations. Where the amendment in substance raises a new cause of action, the amendment does not relate back to the original pleadings and the statute of limitations continues to run until the amendment is filed. Rainey Bros. Constr. Co. v. Memphis & Shelby County Bd. of Adjustment, 821 S.W.2d 938, 1991 Tenn. App. LEXIS 385 (Tenn. Ct. App. 1991), cert. denied, Rainey Bros. Constr. Co. v. Memphis & Shelby County Bd. of Adjustment, 504 U.S. 909, 112 S. Ct. 1937, 118 L. Ed. 2d 543, 1992 U.S. LEXIS 2713 (1992).

Because defendant had fair notice from the original pleadings that the new parties' claim was also involved, and thus suffered no prejudice, and there was clearly "identity of interest" as the parties did not change, but only their capacities did, appellants' amended complaint related back to the date of the original filing and was not time barred. Braswell v. Carothers, 863 S.W.2d 722, 1993 Tenn. App. LEXIS 294 (Tenn. Ct. App. 1993).

Appellants' amended complaint against defendant was not barred by the statute of limitations, notwithstanding fact that he was improperly named in the original complaint as "Jr." and not "III." Braswell v. Carothers, 863 S.W.2d 722, 1993 Tenn. App. LEXIS 294 (Tenn. Ct. App. 1993).

Plaintiffs did not select the wrong defendant but simply mislabeled the right defendant where they approximated the defendant's name in the caption of the complaint as "Jackson-Madison County General Hospital" instead of the correct name, "Jackson-Madison County General Hospital District"; the sole difference was that plaintiffs omitted the word "District." Grantham v. Jackson-Madison County Gen. Hosp. Dist., 954 S.W.2d 36, 1997 Tenn. LEXIS 510 (Tenn. 1997).

The relation back feature of this rule works only when the following conditions exist: (1) The claim must arise out of the same conduct, transaction, or occurrence involved in the original complaint; (2) The party to be brought in by the amendment must not be prejudiced in maintaining its defense; and (3) The party to be brought in by amendment either knew or

should have known it would have been sued had it not been for the misnomer or similar mistake. McCracken v. Brentwood United Methodist Church, 958 S.W.2d 792, 1997 Tenn. App. LEXIS 483 (Tenn. Ct. App. 1997).

Where an amendment does not seek to change a party or name a new party, courts are to determine whether the amendment relates back to the date of an earlier pleading according to the "virtually self-construing" language of Tenn. R. Civ. P. 15.03. Hawk v. Chattanooga Orthopaedic Group, P.C., 45 S.W.3d 24, 2000 Tenn. App. LEXIS 482 (Tenn. Ct. App. 2000), review or rehearing denied, — S.W.3d —, 2001 Tenn. LEXIS 145 (Tenn. Feb. 26, 2001).

If an amendment arises from the conduct, transaction, or occurrence in the original pleading, the amendment relates back to the date of the original pleading and thus avoids the effect of the statute of limitations, and in certain cases, the statute of repose. Hawk v. Chattanooga Orthopaedic Group, P.C., 45 S.W.3d 24, 2000 Tenn. App. LEXIS 482 (Tenn. Ct. App. 2000), review or rehearing denied, — S.W.3d —, 2001 Tenn. LEXIS 145 (Tenn. Feb. 26, 2001).

If an amendment does not arise out of the same conduct, transaction, or occurrence as the original pleading, it does not relate back to the date of the original pleading and thus will be time barred if the limitations or repose period has expired. Hawk v. Chattanooga Orthopaedic Group, P.C., 45 S.W.3d 24, 2000 Tenn. App. LEXIS 482 (Tenn. Ct. App. 2000), review or rehearing denied, — S.W.3d —, 2001 Tenn. LEXIS 145 (Tenn. Feb. 26, 2001).

Amendment of a medical negligence complaint was allowed to include a governmental hospital district as a party where sovereign immunity granted within the statute of limitations of the Governmental Tort Liability Act, T.C.A. §§ 29-20-101 et seq., did not preclude application of the relation back doctrine contained within Tenn. R. Civ. P. 15.03. Doyle v. Frost, 49 S.W.3d 853, 2001 Tenn. LEXIS 564 (Tenn. 2001), superseded by statute as stated in, Cunningham v. Williamson County Hosp. Dist., — S.W.3d —, 2011 Tenn. App. LEXIS 645 (Tenn. Ct. App. Nov. 30, 2011).

The relation back feature of Tenn. R. Civ. P. 15.03 does not permit a plaintiff to renew its suit against a defendant after the plaintiff has voluntarily dismissed its original claims against the defendant in accordance with Tenn. R. Civ. P. 41.01. Townes v. Sunbeam Oster Co., 50 S.W.3d 446, 2001 Tenn. App. LEXIS 68 (Tenn. Ct. App. 2001).

Delinquency in discovery is not an appropriate consideration with regard to the application of Tenn. R. Civ. P. 15.03. Townes v. Sunbeam Oster Co., 50 S.W.3d 446, 2001 Tenn. App. LEXIS 68 (Tenn. Ct. App. 2001).

Courts should construe Tenn. R. Civ. P. 15.03 liberally to promote the consideration of claims on their merits; however, the rule should not be used to breathe life into claims that are plainly time-barred. Townes v. Sunbeam Oster Co., 50 S.W.3d 446, 2001 Tenn. App. LEXIS 68 (Tenn. Ct. App. 2001).

7. —Notice.

A party sought to be added by amendment must receive notice of the lawsuit before the limitation period expires, in order for the amendment to relate back to the filing of the complaint. Allen v. River Edge Motor Lodge, 861 S.W.2d 364, 1993 Tenn. App. LEXIS 316 (Tenn. Ct. App. 1993), rehearing denied, — S.W.2d —, 1993 Tenn. App. LEXIS 388 (Tenn. Ct. App. June 2, 1993), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 324 (Tenn. Sept. 7, 1993).

For purposes of Tenn. R. Civ. P. 15.03, "notice" means notice that a lawsuit has been filed, not awareness of the underlying incident. Allen v. River Edge Motor Lodge, 861 S.W.2d 364, 1993 Tenn. App. LEXIS 316 (Tenn. Ct. App. 1993), rehearing denied, — S.W.2d —, 1993 Tenn. App. LEXIS 388 (Tenn. Ct. App. June 2, 1993), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 324 (Tenn. Sept. 7, 1993).

The focus of the relation back feature is on the content of the notice, the time within which the notice must be received, and the persons who must receive the notice. Accordingly, the notice must be notice of the lawsuit rather than merely notice of the underlying injury, and the notice must be received before the running of the applicable statute of limitations. It should be remembered that the rule requires notice, not service. McCracken v. Brentwood United Methodist Church, 958 S.W.2d 792, 1997 Tenn. App. LEXIS 483 (Tenn. Ct. App. 1997).

Because the plaintiff has a "reasonable time within which to plead to the original process" once the identity of a "John Doe" motorist becomes known, expiration of the time limits in Tenn. R. Civ. P. 3 and 15 cannot affect the plaintiff's remedy against a newly identified motorist under an action that was properly commenced in the first instance. Lipscomb v. Doe, 32 S.W.3d 840, 2000 Tenn. LEXIS 663 (Tenn. 2000).

District court properly determined that the Class Action Fairness Act (CAFA), Pub. L. No. 109-2, 119 Stat. 4 (2005), applied to a breach of contract action that was filed against an insurance company by an automobile owner whose vehicle was damaged in an accident with the company's insured; the amended complaint, which was filed after CAFA's effective date, did not relate back to the owner's original individual complaint under Tenn. R. Civ. P. 15.03 because the company was neither afforded adequate notice of the generic identity of the proposed class, nor provided adequate notice of claims of all plaintiffs who might someday fall within the putative class by virtue of the original complaint that was filed pursuant to Tenn.

R. Civ. P. 3. Smith v. Nationwide Prop. & Cas. Ins. Co., 505 F.3d 401, 2007 FED App. 400P, 2007 U.S. App. LEXIS 22974 (6th Cir. Oct. 1, 2007).

8. Amendment After Responsive Pleadings.

Where a motion to amend pleadings is submitted after responsive pleadings have been filed in a case, the grant or denial of the motion is within the sound discretion of the trial judge; once decided, such matters are seldom adversely reviewed on appeal unless abuse of discretion has been shown, or failure to allow amendment will result in injustice. Wilson v. Ricciardi, 778 S.W.2d 450, 1989 Tenn. App. LEXIS 432 (Tenn. Ct. App. 1989).

9. —Dismissal for Failure to State a Claim.

When the court grants a motion to dismiss for failure to state a claim, only extraordinary circumstances would prohibit the plaintiff from exercising the right to amend its complaint. Richland Country Club, Inc. v. CRC Equities, Inc., 832 S.W.2d 554, 1991 Tenn. App. LEXIS 987 (Tenn. Ct. App. 1991).

Where at the time plaintiff moved for leave to file an amended complaint, a motion to dismiss the original complaint had been filed, but no answer had been filed, plaintiff should have been allowed to amend her complaint. Lester v. Walker, 907 S.W.2d 812, 1995 Tenn. App. LEXIS 305 (Tenn. Ct. App. 1995).

10. Denial of Motion to Amend Held Proper.

In an action brought by plaintiff to recover balance of finder's fee allegedly due under contract involving sale of group of blood banks, where defendants had not set forth affirmatively in short and plain terms the defense of statute of frauds, and where defendants had not given reasonable notice that they intended to prove the law of New York as required by T.C.A. § 24-6-204, the trial judge correctly refused to grant defendants' motion to amend their answer to plead the New York statute of frauds which was filed after the proof was concluded and the case had been taken under advisement. Barrton Scientific, Inc. v. Moss, 542 S.W.2d 375, 1975 Tenn. App. LEXIS 182 (Tenn. Ct. App. 1975).

Plaintiff was not prejudiced by the trial court's refusal to allow him to amend his complaint where, although the trial court never expressly ruled on the motion to amend, the memorandum opinion indicated that the amendment was not denied but was considered by the court, and the record indicated that the trial court considered that a later motion to amend had been granted. Taylor v. Nashville Banner Publishing Co., 573 S.W.2d 476, 1978 Tenn. App. LEXIS 313 (Tenn. Ct. App. 1978), cert. denied, 441 U.S. 923, 99 S. Ct. 2032, 60 L. Ed. 2d 396, 1979 U.S. LEXIS 1645 (1979).

Plaintiff would not have been unfairly prejudiced if his motion to amend his complaint had been denied, since the substance of the amendment had been pleaded and considered. Taylor v. Nashville Banner Publishing Co., 573 S.W.2d 476, 1978 Tenn. App. LEXIS 313 (Tenn. Ct. App. 1978), cert. denied, 441 U.S. 923, 99 S. Ct. 2032, 60 L. Ed. 2d 396, 1979 U.S. LEXIS 1645 (1979).

Where the substance of plaintiff's proposed amendment of his complaint was not attached to the motion to amend, nor did it appear in the record at all until the very end, where it was attached to plaintiff's petition to rehear; where nowhere in the record was there a ruling of the trial court on the motion; and where the transcript of a hearing held on another motion contained reference to a motion to amend by plaintiff, but again the substance was lacking and no ruling appeared in these circumstances, it was impossible for the court of appeals to reverse the trial court for failing to allow the amendment, even if it had been clear that the court did fail to do so, since the court of appeals could not determine what was before the trial court or whether the trial court acted properly on the motion to amend. Taylor v. Nashville Banner Publishing Co., 573 S.W.2d 476, 1978 Tenn. App. LEXIS 313 (Tenn. Ct. App. 1978), cert. denied, 441 U.S. 923, 99 S. Ct. 2032, 60 L. Ed. 2d 396, 1979 U.S. LEXIS 1645 (1979).

Absent a showing of undue prejudice to the plaintiffs, the trial court did not abuse its discretion in allowing defendants to amend their answer to raise the defense of lack of capacity on the first day of trial, three and one half years after the defendants' initial answer. Kemmons Wilson, Inc. v. Allied Bank of Texas, 836 S.W.2d 104, 1992 Tenn. App. LEXIS 10 (Tenn. Ct. App. 1992).

An amendment to add a new party-defendant does not relate back to the date of the original complaint in instances where the added party receives notice after the statute of limitations has run. Duke v. Repogle Enters., 891 S.W.2d 205, 1994 Tenn. LEXIS 378 (Tenn. 1994); Legleu v. Clarksville Dep't of Elec., 944 S.W.2d 364, 1995 Tenn. App. LEXIS 255 (Tenn. Ct. App. 1995).

In an action alleging violation of the Teacher Tenure Act, the trial court properly denied plaintiff's post-trial motion to amend her pleadings on the basis that a certain issue had been tried by consent where the court found that amendment was unnecessary because the issue was essentially covered by the complaint. Childs v. Roane County Bd. of Educ., 929 S.W.2d 364, 1996 Tenn. App. LEXIS 235 (Tenn. Ct. App. 1996), appeal denied, — S.W.2d —, 1996 Tenn. LEXIS 575 (Tenn. Sep. 9, 1996).

The trial court did not abuse its discretion in denying the motion to amend, where the pro-

posed amended complaint was 28 pages in length and there was nothing to indicate that, even if allowed, it would change the correctness of the trial court's conclusion. Messer Griesheim Indus. v. Cryotech of Kingsport, Inc., 45 S.W.3d 588, 2001 Tenn. App. LEXIS 26 (Tenn. Ct. App. 2001), review or rehearing denied, Messer Griesheim Indus., Inc. v. Cryotech of Kingsport, Inc., — S.W.3d —, 2001 Tenn. LEXIS 421 (Tenn. May 14, 2001).

Dismissal of the individual's action against the state after she fell into a hole in a state park was proper where she failed to show what injustice she suffered after not being permitted to amend her complaint on the day of the trial. Cornell v. State, 118 S.W.3d 374, 2003 Tenn. App. LEXIS 299 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 968 (Tenn. Oct. 6, 2003).

Where litigation had been ongoing for years and the vast majority of the discovery as well as two appeals had been concluded, the trial court did not err by denying plaintiff's motion to amend its complaint to assert a very belated negligence per se claim. Messer Griesheim Indus. v. Eastman Chem. Co., 194 S.W.3d 466, 2005 Tenn. App. LEXIS 711 (Tenn. Ct. App. 2005), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 330 (Tenn. Apr. 24, 2006).

There was no error in the trial court's denial of the plaintiffs' oral motion to amend the complaint where the appellate court could not make an independent determination on the merits since the proposed amendment was not included in the record, and nothing in the record provided any indication that the trial court's decision was against logic or reasoning that caused an injustice to the complaining party. Kincaid v. Southtrust Bank, 221 S.W.3d 32, 2006 Tenn. App. LEXIS 711 (Tenn. Ct. App. 2006), appeal denied, Kincaid v. Southtrust Bank, — S.W.3d —, 2007 Tenn. LEXIS 166 (Tenn. 2007).

There was nothing in the record to show that the insured was ever granted leave to file a second amended complaint as required by Tenn. R. Civ. P. 15.01; given that the insured had already amended her complaint once, she was required to obtain defendants' written consent or leave of court to further amend her complaint, and she did neither. Elliot v. Life of the South Ins. Co., 296 S.W.3d 64, 2008 Tenn. App. LEXIS 192 (Tenn. Ct. App. Mar. 31, 2008).

Finding against tenant in landlord's action for termination of lease and damages due to alleged breaches was proper because the trial court correctly denied tenant's motion to amend answer as untimely; additionally, tenant had not established that the bank had actually satisfied an obligation by paying the money owed and there was no question that the notice of default was sent to the mortgagee, and tenant admitted these facts in his answer. Holcomb v. Cagle, 277 S.W.3d 393, 2008 Tenn. App. LEXIS 232 (Tenn. Ct. App. Apr. 21, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 933 (Tenn. Dec. 8, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 943 (Tenn. Dec. 15, 2008).

11. Denial of Motion to Amend Held Improper.

Where homeowner brought suit on contract for construction of home after defects appeared and this action was barred by the statute of limitations, the trial court erred in denying motions to amend the complaint to include claims of implied warranty and assurances of remedy of the defects. Branch v. Warren, 527 S.W.2d 89, 1975 Tenn. LEXIS 637 (Tenn. 1975).

In suit for injunction chancellor erred in refusing to permit plaintiff to amend his pleadings to seek monetary damages in the event injunctive relief was denied. Douglass v. Rowland, 540 S.W.2d 252, 1976 Tenn. App. LEXIS 241 (Tenn. Ct. App. 1976).

The filing of a motion to dismiss did not deprive the plaintiff of the absolute right to amend his complaint before an answer was served, and it was error for the trial court to strike the amended complaint. McBurney v. Aldrich, 816 S.W.2d 30, 1991 Tenn. App. LEXIS 194 (Tenn. Ct. App. 1991), rehearing denied, — S.W.2d —, 1991 Tenn. App. LEXIS 228 (Tenn. Ct. App. Apr. 5, 1991).

Where proposed amendments were not untimely, and there was no showing that the proposed amendments alleged facts to the surprise of defendants or caused undue prejudice, nor were the proposed amendments filed in bad faith or to harass the defendants, the motion should have been granted. Blocker v. Dearborn & Ewing, 851 S.W.2d 825, 1992 Tenn. App. LEXIS 952 (Tenn. Ct. App. 1992).

Although the chancellor erred by failing to grant a motion to amend before entering judgment to add an alternative theory of defensive adverse possession under T.C.A. § 28-2-102 and T.C.A. § 28-2-103, the error was harmless because the Tennessee supreme court held that the neighboring land owner had acquired title by common law adverse possession. Cumulus Broadcasting, Inc. v. Shim, 226 S.W.3d 366, 2007 Tenn. LEXIS 371 (Tenn. Apr. 27, 2007).

12. Granting of Motion to Amend Held Improper.

Allowing addition of wrongful death claim to in rem proceeding was improper. March v. Levine, 115 S.W.3d 892, 2003 Tenn. App. LEXIS 219 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 771 (Tenn. Sept. 2, 2003).

Although the parents were convinced that the husband murdered the absentee, their amendment adding a wrongful death action to their original intervening petition was improperly granted because: (1) There was no justifiable reason why the parents did not allege their

wrongful death claim in their original intervening petition; (2) The wrongful death action introduced an entirely separate proceeding into a statutory in rem case; and (3) Without the conservator being a party to the wrongful death action, the conservator was not bound by the finding of death, wrongful or otherwise, which would leave the appellate court with the strange paradox that the absentee was alive for the purpose of the absentee estate but deceased for the purpose of the wrongful death action against the husband. March v. Levine, 115 S.W.3d 892, 2003 Tenn. App. LEXIS 219 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 771 (Tenn. Sept. 2, 2003).

13. Granting of Motion to Amend Held Proper.

Trial court did not err in allowing amendment of investors' complaints to add an unregistered securities claim because: (1) the seller was not unfairly surprised by the amended claim since he had been aware that the sale of the contracts was considered a sale of unregistered securities for two years, and at least one investor had alleged that the seller had violated the Tennessee securities act of 1980; and (2) the amendment did not unduly complicate the case, require additional discovery, or require other trial preparation. Hardcastle v. Harris, 170 S.W.3d 67, 2004 Tenn. App. LEXIS 827 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2005 Tenn. LEXIS 500 (Tenn. May 23, 2005).

Where a seller gave repeated assurances to purchasers of unregistered securities that civil claims were being filed on their behalf and persuaded the purchasers not to file individual actions, equitable estoppel was properly applied to allow amendment of a complaint in order to add a cause of action under the Tennessee securities act. Hardcastle v. Harris, 170 S.W.3d 67, 2004 Tenn. App. LEXIS 827 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2005 Tenn. LEXIS 500 (Tenn. May 23, 2005).

14. Issues Tried by Consent.

When issues not raised by the pleadings are tried by the express or implied consent of the parties, those issues will be treated in all respects as if they had been raised in the pleadings. Chisholm v. Bohannon, 558 S.W.2d 446, 1977 Tenn. App. LEXIS 313 (Tenn. Ct. App. 1977).

Generally speaking, trial by implied consent will be found where the party opposed to the amendment knew or should reasonably have known of the evidence relating to the new issue, did not object to this evidence, and was not prejudiced thereby. Zack Cheek Builders, Inc. v. McLeod, 597 S.W.2d 888, 1980 Tenn. LEXIS 448 (Tenn. 1980), rehearing denied, 597 S.W.2d 888, 1980 Tenn. LEXIS 449 (Tenn. 1980).

Implied consent for purposes of Tenn. R. Civ. P. 15 generally is found when evidence is introduced without objection, or when the party opposing the motion to amend himself produced evidence bearing on the new issue. Zack Cheek Builders, Inc. v. McLeod, 597 S.W.2d 888, 1980 Tenn. LEXIS 448 (Tenn. 1980), rehearing denied, 597 S.W.2d 888, 1980 Tenn. LEXIS 449 (Tenn. 1980).

The determination of whether there was implied consent for purposes of Tenn. R. Civ. P. 15 rests in the discretion of the trial judge, whose determination can be reversed only upon a finding of abuse. Zack Cheek Builders, Inc. v. McLeod, 597 S.W.2d 888, 1980 Tenn. LEXIS 448 (Tenn. 1980), rehearing denied, 597 S.W.2d 888, 1980 Tenn. LEXIS 449 (Tenn. 1980).

In a motion to amend the complaint to conform to the proof, the most important question is whether the new issues were tried by the parties' express or implied consent and whether the defendant would be prejudiced by the implied amendment, i.e., whether he had a fair opportunity to defend and whether he could offer any additional evidence if the case were to be retried on a different theory. Zack Cheek Builders, Inc. v. McLeod, 597 S.W.2d 888, 1980 Tenn. LEXIS 448 (Tenn. 1980), rehearing denied, 597 S.W.2d 888, 1980 Tenn. LEXIS 449 (Tenn. 1980).

In an action by purchasers of property against vendors alleging fraudulent misrepresentation in the sale or property, where there was no notice to the defendants that plaintiffs were proceeding against them for breach of contract, the issue was not tried with the implied consent of defendants. Hiller v. Hailey, 915 S.W.2d 800, 1995 Tenn. App. LEXIS 536 (Tenn. Ct. App. 1995).

In a divorce action, even though adultery was not alleged in the husband's complaint and the pleading was never amended, where the wife made no objection, the issue was clearly tried by the implied consent of the parties. Varley v. Varley, 934 S.W.2d 659, 1996 Tenn. App. LEXIS 459 (Tenn. Ct. App. 1996).

Breach of contract claim was not tried by the express or implied consent of the parties to an action based on breach of a promissory note where defendant objected to trial of the contract issue, and evidence admitted at trial concerning the contract was relevant to the claim on the promissory note. McLemore v. Powell, 968 S.W.2d 799, 1997 Tenn. App. LEXIS 541 (Tenn. Ct. App. 1997), rehearing denied, — S.W.2d —, 1997 Tenn. App. LEXIS 571 (Tenn. Ct. App. 1997).

Where subsequent to the dissolution of the parties' marriage, it was discovered that the wife's counter-complaint, upon which the divorce was granted, failed to allege any grounds for divorce, the trial court properly allowed wife to amend her counter-complaint to conform to the evidence presented without objection at trial. Hobbs v. Hobbs, 987 S.W.2d 844, 1998 Tenn. App. LEXIS 707 (Tenn. Ct. App. 1998),

cert. denied, 526 U.S. 1075, 119 S. Ct. 1476, 143 L. Ed. 2d 559, 1999 U.S. LEXIS 2726 (1999).

15. —Timing of Amendment.

Tenn. R. Civ. P. 15 clearly states that amendment may occur "at any time, even after judgment," and although there is some indication in the authorities that the amendment may occur only while the case is "in" the trial court, the commentators also emphasize that there is no realistic time limitation and that the amendment can even be made on appeal. Zack Cheek Builders, Inc. v. McLeod, 597 S.W.2d 888, 1980 Tenn. LEXIS 448 (Tenn. 1980), rehearing denied, 597 S.W.2d 888, 1980 Tenn. LEXIS 449 (Tenn. 1980).

While amendment adding counterclaim was granted shortly before trial, plaintiffs were well aware for a substantial length of time prior to the granting of the motion to amend that the counterclaim expenses and damages had been sustained by counter-plaintiffs, plaintiffs failed to show how they were deprived of making a defense to the suit because of the addition of party as a counter-plaintiff to the suit, and thus no prejudice caused by the addition of party as a counter-plaintiff was shown. Arcata Graphics Co. v. Heidelberg Harris, 874 S.W.2d 15, 1993 Tenn. App. LEXIS 445 (Tenn. Ct. App. 1993), rehearing denied, Arcata Graphics Co. v. Heidelberg Harris, Inc., — S.W.2d —, 1993 Tenn. App. LEXIS 569 (Tenn. Ct. App. Aug. 26, 1993), appeal denied, Arcata Graphics Co. v. Heidelberg Harris, Inc., — S.W.2d —, 1994 Tenn. LEXIS 85 (Tenn. Mar. 7, 1994).

A motion under Tenn. R. Civ. P. 15.02 must by its very nature be filed following presentation of evidence concerning the issue in question. George v. Bldg. Materials Corp. of Am., 44 S.W.3d 481, 2001 Tenn. LEXIS 375 (Tenn. 2001).

16. Procedure.

The proper way to request the court for leave to amend under Tenn. R. Civ. P. 15 is to attach a copy of the proposed amendment to the motion so that it becomes part of the record at that time, regardless of what action the trial court takes or fails to take on it. This procedure ensures that the appellate courts know exactly what amendment the trial court was asked to allow. It is only with such knowledge that the trial court's decision can be reviewed. Taylor v. Nashville Banner Publishing Co., 573 S.W.2d 476, 1978 Tenn. App. LEXIS 313 (Tenn. Ct. App. 1978), cert. denied, 441 U.S. 923, 99 S. Ct. 2032, 60 L. Ed. 2d 396, 1979 U.S. LEXIS 1645 (1979).

In all situations other than the one-time right to amend before a responsive pleading is served, the right to amend under Tenn. R. Civ. P. 15.01 is governed by the second sentence of the rule, which permits amendments "only by written consent of the adverse party or by leave of court," with the understanding that leave is to be freely given when justice so requires; since T.C.A. § 20-1-119 is always invoked by the filing of a responsive pleading, the Tennessee Supreme Court concludes that its reference to Tenn. R. Civ. P. 15 is a reference specifically to the second sentence of Tenn. R. Civ. P. 15.01 and that a plaintiff's right to amend a complaint to add a defendant in a comparative fault action under T.C.A. § 20-1-119 requires written consent of the adverse parties or leave of court. Jones v. Prof'l Motorcycle Escort Serv., L.L.C., 193 S.W.3d 564, 2006 Tenn. LEXIS 430 (Tenn. 2006).

17. Federal Rules.

Federal Rule 15(c) is identical to Tenn. R. Civ. P. 15. Chapman v. King, 572 S.W.2d 925, 1978 Tenn. LEXIS 666 (Tenn. 1978); Gamble v. Hospital Corp. of America, 676 S.W.2d 340, 1984 Tenn. App. LEXIS 3415 (Tenn. Ct. App. 1984).

18. Ouster Proceedings.

The ouster act in T.C.A. § 8-47-115 provides that if the complaint is insufficient in form it shall be amended at once but it does not expressly deal with amendments that involve substance and therefore such amendments are governed by Tenn. R. Civ. P. 15. State ex rel. Leech v. Wright, 622 S.W.2d 807, 1981 Tenn. LEXIS 496 (Tenn. 1981).

T.C.A. § 8-47-119(b), which expressly authorizes continuances for good cause shown, is consistent with Tenn. R. Civ. P. 15.02, which expressly authorizes a continuance where the party objecting to an amendment shows prejudice to the maintenance of his action or defense. State ex rel. Leech v. Wright, 622 S.W.2d 807, 1981 Tenn. LEXIS 496 (Tenn. 1981).

19. Supplemental Pleadings.

Tenn. R. Civ. P. 15.04 did not apply in the case of a supplemental complaint filed by a plaintiff asserting new causes of action against defendants other than those against whom he had earlier obtained a final judgment. Williams v. Sugar Cove Ltd. Pshp., 955 S.W.2d 75, 1997 Tenn. App. LEXIS 301 (Tenn. Ct. App. 1997), appeal denied, 1997 Tenn. LEXIS 514 (Tenn. Oct. 27, 1997).

20. Disciplinary Proceeding.

Consolidation of six complaints of misconduct against an attorney, which were filed in three separate petitions for discipline, was not unfairly prejudicial to the attorney. Furthermore, the attorney's argument that the attorney was unfairly prejudiced by the hearing panel's decisions to grant the Tennessee Board of Professional Responsibility's motions to amend its petition for discipline lacked merit. Skouteris v. Bd. of Prof'l Responsibility of the Supreme Court of Tenn., 430 S.W.3d 359, 2014 Tenn. LEXIS 120 (Tenn. Feb. 21, 2014).

RULE 16

SCHEDULING AND PLANNING, PRETRIAL, AND FINAL PRETRIAL CONFERENCES AND ORDERS

16.01. Scheduling and Planning Conferences and Orders. (1) In any action, the court may in its discretion, or upon motion of any party, conduct a conference with the attorneys for the parties and any unrepresented parties, in person or by telephone, mail, or other suitable means, and thereafter enter a scheduling order that limits the time:

(A) to join other parties and to amend the pleadings;

(B) to file and hear motions; and

(C) to complete discovery.

(2) The scheduling order also may include:

(A) the date or dates for conferences before trial, a final pretrial conference, and trial;

(B) provisions for the discovery of electronically stored information;

(C) any agreements the parties reach for asserting claims of privilege or of protection as to trial-preparation material after production, or in reference to electronically stored information; and

(D) any other matters appropriate in the circumstances of the case.

(3) In deciding the content of any scheduling order, the court shall give consideration to minimizing the time that jurors are not directly involved in the trial or deliberations. A schedule once ordered shall not be modified except by leave of the judge upon a showing of good cause. [As amended by order entered January 31, 2003, effective July 1, 2003; and by order entered January 8, 2009, effective July 1, 2009.]

Advisory Commission Comments [2009]. The amendment to Rule 16.01 is designed to alert the court to the possible need to address the handling of discovery of electronically stored information early in the litigation if such discovery is expected to occur. Rule 26.06 is amended to direct the parties to discuss discovery of electronically stored information if such discovery is contemplated in the action. In many instances, the court's involvement early in the litigation will help avoid difficulties that might otherwise arise. Rule 16.01 is also amended to include among the topics that may be addressed in the scheduling order any agreements that the parties reach to facilitate discovery by minimizing the risk of waiver of privilege or work-product protection. Rule 26.06 is amended to add to the discovery plan the parties' proposal for the court to enter a case-management or other order adopting such an agreement. The parties may agree to various arrangements. For example, they may agree to initial provision of requested materials without waiver of privilege or protection to enable the party seeking production to designate the materials desired or protection for actual production, with the privilege review of only those materials to follow. Alternatively, they may agree that if privileged or protected information is inadvertently produced, the producing party may by timely notice assert the privilege or protection and obtain return of the materials without waiver. Other arrangements are possible. In most circumstances, a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege or of protection as trial-preparation material.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 8, 2009, was ratified and approved by 2009 House Resolution 18 and Senate Resolution 19. The order promulgating the amendment of this rule provided that it take effect July 1, 2009.

16.02. Pretrial Conferences; Objectives. In any action, the court may in its discretion, or upon motion of any party, direct the attorneys for the parties and any unrepresented parties to participate in a pretrial conference or conferences in person or by telephone, mail, or other suitable means, for such purposes as:

(1) expediting the disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) encouraging more thorough trial preparation;

(5) facilitating the settlement of the case; and

(6) minimizing the time that jurors are not directly involved in the trial or deliberations. [As amended by order entered January 31, 2003, effective July 1, 2003.]

16.03. Subjects to be Discussed at Pretrial Conferences. The participants at any conference under this rule may consider and take action with respect to:

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents that will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unnecessary proof and of cumulative evidence;

(5) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

(6) the advisability of referring matters to a master;

(7) the possibility of settlement or the use of extrajudicial procedures, including alternative dispute resolution, to resolve the dispute;

(8) the form and substance of the pretrial order;

(9) the disposition of pending motions;

(10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and

(11) such other matters as may aid in the disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. If appropriate, the court may require that a party or a representative with authority to settle the action be present or reasonably available by telephone in order to consider possible settlement of the dispute.

16.04. Final Pretrial Conference. Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The court may order the participants at any such conference to formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

16.05. Pretrial Order. After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only for good cause shown.

16.06. Sanctions. If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37.02. In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust. [As amended by order filed February 1, 1995, effective July 1, 1995; and by order effective July 1, 1997; and by order entered January 29, 1999, effective July 1, 1999.]

Advisory Commission Comments. The rule introduces into state practice the familiar pre trial procedures used in the federal courts. The use of the procedure lies within the discretion of the court.

Advisory Commission Comments [1995]. The revisions here are similar to the 1983 revisions to Fed. R. Civ. P. 16, which were designed to make the rule more effective in encouraging and enabling judges to manage the pretrial stages of litigation. Subsection 16.01 provides for scheduling and planning conference and orders, but unlike the federal rule, the judge's use of these devices is not mandatory. Subsections 16.02 and 16.03 expand the purposes of pretrial conferences beyond the current rule's focus on the trial to include various issues of pretrial practice. The final two sentences of subsection 16.03 clarify the authority of the judge to require the participation of persons having authority to enter into stipulations and, in an appropriate case, authority to settle the dispute. Subsection 16.03 recognizes that it is not always feasible, particularly when a governmental entity is a party, for the court to require the presence of a person with on the spot settlement authority, in which case the court may choose to require the participation only of a person who has a major role in recommending settlement. Subsection 16.06 specifies the judge's authority to sanction parties for failure to participate appropriately in pretrial conferences.

Advisory Commission Comments [1997]. The new language allows a party to request a pretrial conference if the trial judge does not otherwise schedule one.

Advisory Commission Comments [2003]. The new language in the next to last sentence of Rule 16.01 is designed to encourage judges to make serious efforts to reduce the time that jurors are required to be at the courthouse when not directly involved in the case. When entering scheduling orders, judges should take this factor into consideration.

The new language in Rule 16.02(6) is designed to encourage judges to make serious efforts to reduce the time that jurors are required to be at the courthouse when not directly involved in the case. Pretrial conferences may greatly facilitate the efficient use of juror time by encouraging the pretrial resolution of evidentiary and other issues and the early preparation of jury instructions and juror notebooks.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 31, 2003, was ratified and approved by 2003 House Resolution 21 and Senate Resolution 8. The order promulgating the 2003 amendment of this rule provided that it take effect on July 1, 2003.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-16-1, 1-26.06-1.

Tennessee Jurisprudence. 20 Tenn. Juris., Pleading, § 18.

Law Reviews. A Survey of Civil Procedure in Tennessee — 1977, IV. Pretrial Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 308.

Alternative Dispute Resolution Through an Unprecedented Joint State and Federal Summary Jury Trial (Bruce C. Bailey), 25 No. 4 Tenn. B.J. 18 (1989).

Better, Happier Juries (Neil P. Cohen), 39 No. 6 Tenn. B.J. 16 (2003).

Yesterday's Vision, Tomorrow's Challenge: Case Management and Alternative Dispute Resolution in Tennessee, 26 U. Mem. L. Rev. 957 (1996).

NOTES TO DECISIONS

ANALYSIS

1. Sanctions.
2. Noncompliance with Order.

1. Sanctions.

In an action for breach of contract, the chancellor's striking of defendant's jury demand as a sanction for failing to file jury instructions in accordance with a pretrial order was an abuse of discretion. However, as the defendants did not establish in the record that there were material facts in dispute that would trigger the right to a jury trial, the chancellor's error was deemed harmless. McInturff v. Neeseman, 986 S.W.2d 11, 1998 Tenn. App. LEXIS 648 (Tenn. Ct. App. 1998), review or rehearing denied, — S.W.3d —, 1999 Tenn. LEXIS 140 (Tenn. 1999).

In a divorce case, a court properly entered a default judgment against a husband for failing to appear at a scheduled trial management conference where the court concluded that his nonappearance was part of his "obstructive" and "defiant" behavior which had been exhibited throughout the course of the proceedings. Orten v. Orten, 185 S.W.3d 825, 2005 Tenn. App. LEXIS 543 (Tenn. Ct. App. 2005), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 74 (Tenn. 2006).

2. Noncompliance with Order.

In an action seeking to establish that a public road extended to a company's northern property line, two witnesses were properly excluded because the adjoining property owners and the city failed to comply with the scheduling order in accordance with Tenn. R. Civ. P. 16.01. Brandy Hills Estates, LLC v. Reeves, 237 S.W.3d 307, 2006 Tenn. App. LEXIS 794 (Tenn. Ct. App. Dec. 15, 2006), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 607 (Tenn. June 25, 2007).

RULE 17

PARTIES PLAINTIFF AND DEFENDANT; CAPACITY

17.01. Real Party in Interest. Every action shall be prosecuted in the name of the real party in interest; but an executor, administrator, guardian, bailee, trustee of an express trust, a party to whose rights another is subrogated, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his or her own name without joining the party for whose benefit the action is brought; and when a statute so provides an action for the use or benefit of another shall be brought in the name of this state. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification or commencement by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

17.02. Capacity to Sue or Be Sued. (1) The capacity of any party to sue or be sued shall be determined by the law of this state.

(2) Any partnership or other unincorporated association may sue and be sued in the name which it has assumed or by which it is known. [As amended July 1, 1979; and amended by order entered January 28, 2000, effective July 1, 2000.]

17.03. Infants or Incompetent Persons. Whenever an infant or incompetent person has a representative, such as a general guardian, conservator, or other like fiduciary, the representative may sue or defend on behalf of the infant or incompetent person. If an infant or incompetent person does not have

a duly appointed representative, or if justice requires, he or she may sue by next friend. The court shall at any time after the filing of the complaint appoint a guardian ad litem to defend an action for an infant or incompetent person who does not have a duly appointed representative, or whenever justice requires. The court may in its discretion allow the guardian ad litem a reasonable fee for services, to be taxed as costs. [As amended July 1, 1979.]

Advisory Commission Comments. 17.01: Rule 17.01 generally requires that actions be brought in the name of the real party in interest. Certain persons may sue in their own names without having to join the party for whose benefit the suit was brought; the list of such persons expressly includes executors, administrators, guardians, bailees, trustees or an express trust, persons to whose rights others have been subrogated, and any other persons authorized by statute to sue in their own names. The Rule is similar to Federal Rule 17(a), but unlike the federal rule, Rule 17.01 authorizes suit by a party in the party's own name even though another has been subrogated to the right which the party seeks to enforce.

17.02: This Rule deals with capacity, and not with standing to sue, which is the subject of Rule 17.01.

17.03: Rule 17.03 establishes a uniform practice regarding suits brought on behalf of an infant or incompetent person, and, when justice requires, allows suit by next friend and requires that the court appoint a guardian ad litem.

Advisory Commission Comments [2000]. The addition of subsection (2) to Rule 17.02 merely recognizes the holding of Tennessee decisions applying Tennessee statutory law. *See, e.g., Fain v. O'Connell*, 909 S.W.2d 790, 794 (1995). The enforceability of judgments continues to be governed by the substantive law. *See Federal Deposit Insurance Corp. v. Tyree*, 698 S.W.2d 353 (Tenn. Ct. App. 1985).

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 48, 56, 59, 61, 63, 69.

Pritchard on Wills and Administration of Estates (4th ed., Phillips and Robinson), §§ 690, 698, 738, 899.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-10.01.5, 1-17.01-1, 1-17.03-1.

Tennessee Jurisprudence. 1 Tenn. Juris., Accounts and Accounting, § 14; 1 Tenn. Juris., Agency, § 70; 1 Tenn. Juris., Amendments, § 8; 4 Tenn. Juris., Bankruptcy, § 27; 18 Tenn. Juris., Mentally Ill and Other Incompetents, §§ 11, 15; 18 Tenn. Juris., Minors, §§ 15, 17; 20 Tenn. Juris., Parties, §§ 1, 3-5, 11.

Law Reviews. An Exegesis of the Ejectment Statutes of Tennessee (R.D. Cox), 18 Mem. St. U.L. Rev. 581 (1988).

Symposium: Parties and Claims: Developments Under the Tennessee Rules of Civil Procedure, 9 Mem. St. U.L. Rev. 453.

Amending Tennessee's Incapacity Statute: It "May Not Be a Sexy Story, But It's One, Frankly, That ... Will Help People", 49 U. Mem. L. Rev. 575 (Winter 2018).

NOTES TO DECISIONS

Analysis

1. Scope of Rule.
2. Construction with Other Provisions.
3. Evidence.
4. Guardian Ad Litem.
5. Federal Rules.
6. Amendment Allowing Substitution of Real Party in Interest.
7. Priorities Between Fiduciaries.
8. Interspousal Tort Immunity Abolished.
9. Waiver.
10. Judgment Set Aside.
11. Subrogation.
12. Agency.
13. Transfer.

1. Scope of Rule.

Tenn. R. Civ. P. 17 concerns the right of a party to bring an action rather than the requirement of that party to appear in court. Jacoway v. Palmer, 753 S.W.2d 675, 1987 Tenn. App. LEXIS 2888 (Tenn. Ct. App. 1987).

Tenn. R. Civ. P. 17.01 clearly authorizes an insurance company to bring an action in the name of the party to whose rights it is subrogated without being named itself as a party to the lawsuit. Aetna Ins. Co. v. Little Giant Mfg. Co., 958 S.W.2d 749, 1997 Tenn. App. LEXIS 80 (Tenn. Ct. App. 1997), appeal denied, — S.W.2d —, 1997 Tenn. LEXIS 482 (Tenn. Oct. 6, 1997).

2. Construction with Other Provisions.

It was not the legislative intent to curb the discretion afforded the trial court in awarding fees and costs under the provisions of T.C.A. § 20-12-119 and Tenn. R. Civ. P. 17.03 and 54.04 by the subsequent enactment of T.C.A. § 34-4-115 [repealed]. In re Webb, 675 S.W.2d 176, 1984 Tenn. App. LEXIS 2724 (Tenn. Ct. App. 1984).

In a conservatorship action in which an attorney ad litem was appointed to represent

respondent, the trial court did not have discretion to charge any portion of the attorney ad litem's fees to any party but respondent pursuant to T.C.A. § 34-1-125(b) because fees of an attorney ad litem were not listed as allowable costs under Tenn. R. Civ. P. 54.04; and the legislature's specific statutory mandate in T.C.A. § 34-1-125(b) to charge the cost of the attorney ad litem to respondent would prevail over the general provisions in Tenn. R. Civ. P. 17.03 and 54.04. In re Allen, — S.W.3d —, 2020 Tenn. App. LEXIS 160 (Tenn. Ct. App. Apr. 15, 2020).

3. Evidence.

Nephew failed to carry his burden of proof to establish that his uncle lacked the mental capacity to commence or maintain the action; the nephew presented no medical records or expert medical testimony indicating that the uncle was mentally incapacitated. Ralston v. Hobbs, 306 S.W.3d 213, 2009 Tenn. App. LEXIS 311 (Tenn. Ct. App. June 4, 2009), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 223 (Tenn. Jan. 25, 2010).

4. Guardian Ad Litem.

Appointment of guardian ad litem was matter for trial judge's discretion based on the requirements of justice and will not be overruled except for abuse of discretion. Gann v. Burton, 511 S.W.2d 244, 1974 Tenn. LEXIS 492 (Tenn. 1974).

Failure to appoint a guardian ad litem for an incompetent will not avoid a judgment unless substantial rights of the incompetent have been affected or actual prejudice is shown. Gann v. Burton, 511 S.W.2d 244, 1974 Tenn. LEXIS 492 (Tenn. 1974).

Where a guardian ad litem was not appointed for an incompetent the person may appear by his chosen attorney. Gann v. Burton, 511 S.W.2d 244, 1974 Tenn. LEXIS 492 (Tenn. 1974).

In an inverse condemnation proceeding, although the appointment of a guardian ad litem was not necessary for a valid decree, the trial court did not err in appointing the guardian ad litem nor in refusing to discharge him on motion of defendants where the trial court acted within its discretion in appointing such guardian for plaintiffs under legal disability. Anderson v. Memphis Housing Authority, 534 S.W.2d 125, 1975 Tenn. App. LEXIS 189 (Tenn. Ct. App. 1975).

The trial judge did not err in his division of the guardian ad litem costs, since such matter was in wide discretion of the judge and he did not abuse such discretion. Anderson v. Memphis Housing Authority, 534 S.W.2d 125, 1975 Tenn. App. LEXIS 189 (Tenn. Ct. App. 1975).

Where plaintiffs brought a successful action for a declaratory judgment granting them the authority to order that a comatose patient be removed from a life-sustaining respirator, and where patient's physician was joined as a necessary defendant, the court held that the equities of the case required that all costs, including the guardian ad litem's fee, be paid by the plaintiffs who initiated the action, rather than by the physician. Dockery v. Dockery, 559 S.W.2d 952, 1977 Tenn. App. LEXIS 309 (Tenn. Ct. App. 1977).

In a proceeding to terminate parental rights, the fee allowed the guardian ad litem for the mother and the fee in the amount allowed the guardian ad litem of the child cannot be assessed against the department of human services, unless it is found that the parents were indigent and the petition was based on grounds set forth in T.C.A. § 37-1-403. In re Harris, 849 S.W.2d 334, 1993 Tenn. LEXIS 56 (Tenn. 1993).

In a custody dispute, the trial court based its decision to reject a fee request by a guardian ad litem (GAL) on findings that the GAL's services as a guardian ad litem were of no assistance, and that the GAL's services as counsel for the children were not compensable because the trial court had no authority to appoint counsel in a civil matter; the appellate court held that the first reason was an appropriate factor to consider, since the trial court was in the best position to determine whether the GAL's services were of assistance to the court, but the latter observation was erroneous, in that it ignored the specific language in Tenn. R. Civ. P. 17.03, which gave the trial court authority to appoint a GAL for a minor child and to award the guardian a reasonable fee for the services provided. Keisling v. Keisling, 196 S.W.3d 703, 2005 Tenn. App. LEXIS 747 (Tenn. Ct. App. 2005), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 474 (Tenn. 2006).

5. Federal Rules.

Tenn. R. Civ. P. 17 is for practical purposes identical to Rule 17(a) of the Federal Rules of Civil Procedure. Chapman v. King, 572 S.W.2d 925, 1978 Tenn. LEXIS 666 (Tenn. 1978).

The "relation back" provisions of Tenn. R. Civ. P. 17.01 are precisely the same as the federal rule. Hartman v. University of Tennessee, 38 S.W.3d 570, 2000 Tenn. App. LEXIS 166 (Tenn. Ct. App. 2000).

6. Amendment Allowing Substitution of Real Party in Interest.

In a wrongful death action, where married deceased's parents had brought the action but the complaint was dismissed on the ground that the right of action, if any, passed to deceased's husband rather than to her parents, it was proper to allow substitution of deceased's husband as plaintiff in the action under Tenn. R. Civ. P. 17.01 even though the statute of limitations of one year had run prior to the filing of the motion for substitution, since the husband was the real party in interest and he made his application for substitution within a reasonable time after objection was made by

defendants to the status of the original plaintiffs as real parties in interest. Chapman v. King, 572 S.W.2d 925, 1978 Tenn. LEXIS 666 (Tenn. 1978).

The supreme court is liberal in allowing the addition or substitution of a proper party plaintiff for an improper plaintiff although the statute of limitations would have prevented the filing of a new suit. This liberality has been most evident in wrongful death actions in which a wrong party plaintiff has brought the suit. In such cases, the cause of action is not changed by the substitution and such a substitution does not prejudice the defendant who has had notice, from the beginning of the suit, of the nature of the cause of action and that it was being pressed against him. Chapman v. King, 572 S.W.2d 925, 1978 Tenn. LEXIS 666 (Tenn. 1978).

7. Priorities Between Fiduciaries.

A court-appointed general guardian or next friend may sue for minors as provided in Tenn. R. Civ. P. 17.03, since a minor cannot maintain a suit in his own name; however, a general guardian or next friend does not have priority over an administrator in the prosecution of wrongful death actions on behalf of persons under disability. The minor is the real plaintiff, not the fiduciary in whose name he sues. Busby v. Massey, 686 S.W.2d 60, 1984 Tenn. LEXIS 906 (Tenn. 1984).

8. Interspousal Tort Immunity Abolished.

Interspousal tort immunity is totally abolished in this state and all decisions to the contrary are overruled. Davis v. Davis, 657 S.W.2d 753, 1983 Tenn. LEXIS 723 (Tenn. 1983).

9. Waiver.

Defendants waived the real-party-in-interest objection by failing to raise the issue in their pleadings or properly at any stage of the trial. Yarbrough v. Stiles, 717 S.W.2d 886, 1986 Tenn. App. LEXIS 3105 (Tenn. Ct. App. 1986).

10. Judgment Set Aside.

Trial court's failure to appoint guardian ad litem, investigate into facts of incident, or determine whether settlement was in infant's best interests supported setting judgment approving settlement aside. Thomas v. R.W. Harmon, Inc., 760 S.W.2d 212, 1988 Tenn. App. LEXIS 372 (Tenn. Ct. App. 1988).

Parents, who were not attorneys, could not file a pro se complaint that asserted claims on their child's behalf or appear in court as a legal advocate for the child. Because neither the child nor her claims were before the trial court, its judgment was void to the extent it ruled on the merits of the child's purported claims. Vandergriff v. Parkridge E. Hosp., 482 S.W.3d 545, 2015 Tenn. App. LEXIS 671 (Tenn. Ct. App. Aug. 21, 2015), appeal denied, Vandergriff v. Parkridge East Hosp., — S.W.3d —, 2015 Tenn. LEXIS 1014 (Tenn. Dec. 11, 2015).

Although a parent may sue or defend on behalf of their minor child, a parent who is not "duly licensed" may not engage in the "practice of law" on behalf of their minor child. A claim asserted in a pleading by a person who is not entitled to practice law is a nullity. Vandergriff v. Parkridge E. Hosp., 482 S.W.3d 545, 2015 Tenn. App. LEXIS 671 (Tenn. Ct. App. Aug. 21, 2015), appeal denied, Vandergriff v. Parkridge East Hosp., — S.W.3d —, 2015 Tenn. LEXIS 1014 (Tenn. Dec. 11, 2015).

11. Subrogation.

Tennessee cases construing Tenn. R. Civ. P. 17.01 presuppose that the action in issue is brought not by the subrogor but rather by the subrogee in the name of the subrogor. Hartman v. University of Tennessee, 38 S.W.3d 570, 2000 Tenn. App. LEXIS 166 (Tenn. Ct. App. 2000).

12. Agency.

Trial court did not err in finding that plaintiff employer, who brought suit for a debt due him resulting from his agent's business activities, had standing as a real party in interest where the agreement between the parties was made by the employer, on the one hand through his licensed salesman, and the debtor on the other hand. Wilson v. Chapman, 164 S.W.3d 580, 2004 Tenn. App. LEXIS 435 (Tenn. Ct. App. 2004), review or rehearing denied, — S.W.3d —, 2004 Tenn. LEXIS 1286 (Tenn. 2004).

13. Transfer.

Trial court erred in granting summary judgment for defendant doctors in wrongful death case where plaintiff nephew voluntarily dismissed the claim but refiled the action within one year of nonsuiting but beyond the expiration of the original statute of limitations, adding the decedent's husband as a plaintiff; in light of the Tennessee supreme court's avowed liberality in permitting the substitution of a proper party plaintiff for an improper party plaintiff, even after the statute of limitations has passed, it was error for the trial court to find that the original lawsuit was a nullity. The claim was not void but, rather, merely voidable, because the savings statute applied. Foster v. St. Joseph Hosp., 158 S.W.3d 418, 2004 Tenn. App. LEXIS 491 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2005 Tenn. LEXIS 82 (Tenn. Jan. 31, 2005).

RULE 18

JOINDER OF CLAIMS AND REMEDIES

18.01. Joinder of Claims. A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third party claim, may join, either as independent or as alternate claims, as many claims, legal or equitable, in contract or tort, as the party has against an opposing party.

18.02. Joinder of Remedies. Whenever a claim is one heretofore cognizable only after another claim has been prosecuted to a conclusion, the two (2) claims may be joined in a single action; but the court shall grant relief in that action only in accordance with the relative substantive rights of the parties. In particular, a plaintiff may state a claim for money and a claim to have set aside a fraudulent conveyance as to the plaintiff, without first having obtained a judgment establishing the claim for money. The plaintiff may state a claim for money and a claim to discover and subject to the satisfaction of the claim for money, the property of the defendant which cannot be reached by execution, without first having obtained a judgment establishing the claim for money.

Advisory Commission Comments. 18.01: Rule 18.01 allows any party to assert in the pleading all claims which the party may have against an opposing party. As these rules provide for a common procedure in circuit and chancery courts, the joinder of legal and equitable claims is made possible, except where jurisdictional limitations prevent such joinder. **18.02:** Rule 18.02 is designed to allow a party to accomplish in a single action a result which under prior law required that two or more actions be taken in proper sequence. The particular cases set out in the Rule are illustrative; e.g., if a party has a claim against a debtor, and the debtor has conveyed his or her assets in fraud of the claimant, the claimant can sue for the debt and sue to set aside the fraudulent conveyance at the same time. The court would grant the second remedy – setting aside the conveyance – only if it found that the claimant was entitled to the money judgment sought. (Actually, this particular result was permitted by prior statute (Tenn. Code Ann. § 29-12-101), but it illustrates the purposes of the Rule.)

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 56, 69, 105.

Pritchard on Wills and Administration of Estates (4th ed., Phillips and Robinson), §§ 694, 701.

Tennessee Forms (Robinson, Ramsey and Harwell), No. 1-18-1.

Tennessee Jurisprudence. 1 Tenn. Juris., Actions, §§ 19-24; 1 Tenn. Juris., Accounts and Accounting, § 8; 1 Tenn. Juris., Amendments, § 15; 9 Tenn. Juris., Dismissal, Discontinuance and Nonsuit, § 7; 10 Tenn. Juris., Election of Remedies, §§ 1, 4; 11 Tenn. Juris., Equity, § 35; 13 Tenn. Juris., Fraud and Deceit, § 24; 20 Tenn. Juris., Pleading, § 18.

Law Reviews. A Survey of Tennessee Labor Cases Since 1954 (D. Bruce Shine and Shelburne Ferguson, Jr.), 47 Tenn. L. Rev. 323.

An Exegesis of the Ejectment Statutes of Tennessee (R.D. Cox), 18 Mem. St. U.L. Rev. 581 (1988).

1985 Tennessee Survey: Selected Developments in Tennessee Law, 53 Tenn. L. Rev. 291 (1986).

RULE 19

JOINDER OF PERSONS NEEDED FOR JUST ADJUDICATION

19.01. Persons to Be Joined if Feasible. A person who is subject to service of process shall be joined as a party if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest, or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reasons of

the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person properly should join as a plaintiff but refuses to do so, he or she may be made a defendant, or in a proper case, an involuntary plaintiff. [As amended by order entered January 28, 2000, effective July 1, 2000; and by order entered January 6, 2005, effective July 1, 2005.]

NOTES TO DECISIONS

ANALYSIS

1. Indispensable Party.
2. Necessary Party.
3. Declaratory Judgment Action.
4. Joinder Unnecessary.

1. Indispensable Party.

Nephew failed to establish any of the requisite criteria in Tenn. R. Civ. P. 19.01 to show that his mother was an indispensable party; to the contrary, the simple fact was that the uncle may obtain complete relief against the nephew without making the mother a party, as the mere fact that her name appeared on one of the accounts to which the nephew transferred the uncle's funds was of no consequence. Ralston v. Hobbs, 306 S.W.3d 213, 2009 Tenn. App. LEXIS 311 (Tenn. Ct. App. June 4, 2009), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 223 (Tenn. Jan. 25, 2010).

Driver, as an injured plaintiff, had a sufficiently direct interest in a declaratory judgment action between an insurer and an insureds o as to render her an indispensable party under the Declaratory Judgment Act, and thus, the trial court maintained no subject matter jurisdiction to render a declaratory judgment in her absence; the driver's impact on the outcome of the action was irrelevant as to whether the trial court had subject matter jurisdiction when the suit was initially filed. Tenn. Farmers Mut. Ins. Co. v. Debruce, 586 S.W.3d 901, 2018 Tenn. App. LEXIS 457 (Tenn. Ct. App. Aug. 9, 2018), rev'd, Tenn. Farmers Mut. Ins. Co. v. DeBruce, 586 S.W.3d 901, 2019 Tenn. LEXIS 452 (Tenn. Oct. 16, 2019).

Court of appeals had to vacate the judgment dismissing a widower's partition action for failure to join an indispensable party because all ownership interest of the parties derived from the warranty deed, and substantial portions of that deed were missing from the record; the trial court did not specifically address any of the factors listed the rule to determine whether the decedent's daughter should have been joined as a party. Love v. McDowell, — S.W.3d —, 2019 Tenn. App. LEXIS 414 (Tenn. Ct. App. Aug. 26, 2019).

Pursuant to the requirements of the rule, the trial court must initially apply the listed factors to determine whether a person should be joined as a party. Love v. McDowell, — S.W.3d —, 2019 Tenn. App. LEXIS 414 (Tenn. Ct. App. Aug. 26, 2019).

Trial court in an action wherein a corporation claimed an ownership interest in a limited liability company (LLC) was correct to require the joinder of additional parties claiming an ownership interest in the LLC to determine the proper allocation of interests in the LLC with all involved parties present. Without joinder of the additional parties, a member of the LLC could have been left subject to inconsistent obligations by reason of the claimed interests by way of subsequent lawsuits brought by the additional parties. Romglobal, Inc. v. Miller, — S.W.3d —, 2020 Tenn. App. LEXIS 37 (Tenn. Ct. App. Jan. 29, 2020), appeal dismissed, — S.W.3d —, 2020 Tenn. LEXIS 442 (Tenn. July 17, 2020).

2. Necessary Party.

Trial court erred in denied a lessee's motion to intervene and that it was a necessary party because, although the trial court denied the lessee's motion on the basis of prior suit pending and the intervention rules, it did not address the lessee's argument that it was a necessary party, and, until the trial court ruled on the lessee's argument, that issue was not ripe for review. Dialysis Clinic, Inc. v. Medley, — S.W.3d —, 2019 Tenn. App. LEXIS 245 (Tenn. Ct. App. May 20, 2019).

3. Declaratory Judgment Action.

In a declaratory judgment case concerning the settlement proceeds of a personal injury case in which the surviving children of the deceased argued that the trial court should have dismissed the case on the procedural issue of non joinder of necessary parties and the failure to present a justiciable issue, the trial court did not abuse its discretion in not dismissing the case. The court believed that the more proper method, the more fair method would be to give the deceased's grandson leave to amend his complaint and to continue to consider the surviving children's claim with regard to dismissing it on the substantive issues. Timmins v. Lindsey, 310 S.W.3d 834, 2009 Tenn. App. LEXIS 731 (Tenn. Ct. App. Oct. 28, 2009), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 238 (Tenn. Mar. 15, 2010).

4. Joinder Unnecessary.

Child's putative father was not an indispensable party to the divorce action because only the husband and wife had to be parties to the action. Pruitt v. Pruitt, — S.W.3d —, 2019 Tenn. App. LEXIS 67 (Tenn. Ct. App. Feb. 5, 2019).

Adoption statute had no application in this case because although the end goal was adoption of the child, the only remedy sought by the department was the termination of the mother's rights, and the department could be afforded complete relief without the father's participation; his rights were terminated before this trial, he had no interest to protect, and the mother failed to show that the father had to be joined. In re Josiah T., — S.W.3d —, 2019 Tenn. App. LEXIS 482 (Tenn. Ct. App. Oct. 2, 2019).

19.02. Determination by Court Whenever Joinder Not Feasible. If a person as described in Rule 19.01(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it; or should be stayed or dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether or not a judgment rendered in the person's absence will be adequate; and (4) whether or not the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

NOTES TO DECISIONS

ANALYSIS

1. Declaratory Judgment Action.
2. Dismissal.

1. Declaratory Judgment Action.

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19.03. Pleading Reasons for Nonjoinder. A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in Rule 19.01(1)-(2) hereof who are not joined, and the reasons why they are not joined.

19.04. Exception of Class Actions. This rule is subject to the provisions of Rule 23.

Advisory Commission Comments [2000]. The original version of 19.01 contained the following language: "This rule shall be construed to allow joint tortfeasors and obligors on obligations that are joint and several to be sued either jointly or severally." The Supreme Court's adoption of comparative fault, where tort liability is several rather than joint, makes the sentence incorrect in part. *Samuelson v. McMurtry*, 962 S.W.2d 473 (Tenn. 1998), requires that comparative tortfeasors be joined in a single lawsuit.

Advisory Commission Comments [2005]. The first sentence of Rule 19.01 is changed to refer to "service of process" rather than "jurisdiction" to make clear that personal rather than subject matter jurisdiction is intended.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 6, 2005, was ratified and approved by 2005 House Resolution 12 and Senate Resolution 7. The order promulgating the amendment of this rule provided that it take effect July 1, 2005.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 50, 53, 58, 69.

Pritchard on Wills and Administration of Estates (4th ed., Phillips and Robinson), §§ 690, 710, 714, 738.

Tennessee Forms (Robinson, Ramsey and Harwell), No. 1-19.01-2.

Tennessee Jurisprudence. 1 Tenn. Juris., Amendments, § 8; 11 Tenn. Juris., Equity, § 35; 20 Tenn. Juris., Parties, § 3; 21 Tenn. Juris., Process, § 4.

Law Reviews. A Survey of Civil Procedure in Tennessee — 1977, IV. Pretrial Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 308.

An Exegesis of the Ejectment Statutes of Tennessee (R.D. Cox), 18 Mem. St. U.L. Rev. 581 (1988).

NOTES TO DECISIONS

Analysis

1. Purpose.
2. Construction with Other Sections.
3. Party Not Deemed Necessary.
4. Party Deemed Necessary.
5. Declaratory Relief.

1. Purpose.

Tenn. R. Civ. P. 19 is designed to protect the interests of absent persons as well as those already before the court from multiple litigation and inconsistent judicial determinations. Citizens Real Estate & Loan Co. v. Mountain States Development Corp., 633 S.W.2d 763, 1981 Tenn. App. LEXIS 601 (Tenn. Ct. App. 1981).

2. Construction with Other Sections.

Tenn. R. Civ. P. 19.01 and 19.02 establish general procedural rules for requiring the joinder of indispensable parties in all types of cases; however, parties seeking declaratory relief must also satisfy the more specific requirements of T.C.A. § 29-14-101, before the courts have jurisdiction to grant declaratory relief. Huntsville Utility Dist. of Scott County v. General Trust Co., 839 S.W.2d 397, 1992 Tenn. App. LEXIS 238 (Tenn. Ct. App. 1992).

3. Party Not Deemed Necessary.

Where an insurance contract authorized any person who has secured a judgment against the insured to recover "to the extent of the insurance afforded under this policy," a policy provision entitles a judgment creditor of an insured to bring a direct action against the insurer predicated upon the judgment alleged to be within the coverage of the policy without joinder of the insured. Thus, the insured is not a necessary party under Tenn. R. Civ. P. 19. Kelly v. Cherokee Ins. Co., 574 S.W.2d 735, 1978 Tenn. LEXIS 684 (Tenn. 1978).

Bank holding insured's loan was not necessary party to action against insurer. Estate of Wilson v. Arlington Auto Sales, Inc., 743 S.W.2d 923, 1987 Tenn. App. LEXIS 2764 (Tenn. Ct. App. 1987).

Where plaintiff ambulance service franchise sought permanent injunction against unfranchised ambulance service it was not necessary for plaintiff's wholly owned subsidiary to be joined as a necessary party to the suit where subsidiary's authority to operate was derived from plaintiff's franchise and nothing in the record suggested that subsidiary's interest would not be protected by virtue of its exclusion from the action. Morristown Emergency & Rescue Squad, Inc. v. Volunteer Dev. Co., 793 S.W.2d 262, 1990 Tenn. App. LEXIS 251 (Tenn. Ct. App. 1990), appeal denied, — S.W.2d —, 1990 Tenn. LEXIS 272 (Tenn. July 2, 1990).

Husband whose parental rights had been terminated was not an indispensable party to a paternity action brought by his former wife against a third party. Shell v. Law, 935 S.W.2d 402, 1996 Tenn. App. LEXIS 321 (Tenn. Ct. App. 1996).

City was not an indispensable party in an action for breach of a residential building contract, where the city had issued a building permit to an unlicensed contractor posing as a subcontractor of a licensed contractor. Mires v.

Clay, 3 S.W.3d 463, 1999 Tenn. App. LEXIS 564 (Tenn. Ct. App. 1999).

In a motor vehicle accident case, the trial court erred in granting summary judgment to a corporate defendant based on plaintiffs' failure to join the tortfeasors in a single proceeding; plaintiffs were not required to join all of the defendants in a single complaint as indispensable parties. McNabb v. Highways, Inc., 98 S.W.3d 649, 2003 Tenn. LEXIS 163 (Tenn. 2003).

In a boundary dispute, a court did not err by failing to join necessary parties, Tenn. R. Civ. P. 19.01, where defendants' assertion that "their neighbors to the west" were persons whose real property interests were potentially affected by the outcome of the case was belied by the specificity of the trial court's ruling which pertained solely to the boundary line dividing the properties of plaintiff from that of defendants. No other property rights were determined by reference to the common boundary between the property of plaintiff and that of defendants. Brummitte v. Lawson, 182 S.W.3d 320, 2005 Tenn. App. LEXIS 400 (Tenn. Ct. App. 2005), review or rehearing denied, — S.W.3d —, 2005 Tenn. LEXIS 1065 (Tenn. Dec. 5, 2005).

Trial court did not err by declining the join the original conservator of the wife's estate as a party to her parents' action to recover her personal property from her husband's family because the original conservator never claimed a personal interest in the subject of the litigation and the interests he asserted on her behalf were being asserted by her parents who were parties to the litigation. Levine v. March, 266 S.W.3d 426, 2007 Tenn. App. LEXIS 728 (Tenn. Ct. App. Nov. 27, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 352 (Tenn. Apr. 28, 2008).

4. Party Deemed Necessary.

The joinder of all parties claiming title to properties in a disputed area is required for a just adjudication. Citizens Real Estate & Loan Co. v. Mountain States Development Corp., 633 S.W.2d 763, 1981 Tenn. App. LEXIS 601 (Tenn. Ct. App. 1981).

Where complete relief in comparative fault action could not be accorded all parties without joinder, it was error to dismiss and sever claim against one party. Samuelson v. McMurtry, 962 S.W.2d 473, 1998 Tenn. LEXIS 61 (Tenn. 1998).

Where suit against one defendant in comparative negligence suit was dismissed and severed, and payment was accepted from others, there was no right to new trial since justice could not be done to all parties. Samuelson v. McMurtry, 962 S.W.2d 473, 1998 Tenn. LEXIS 61 (Tenn. 1998).

5. Declaratory Relief.

Because of the nature of declaratory relief, T.C.A. § 29-14-101 makes it incumbent that every person having an affected interest be given notice and an opportunity to be heard before declaratory relief may be granted. Huntsville Utility Dist. of Scott County v. General Trust Co., 839 S.W.2d 397, 1992 Tenn. App. LEXIS 238 (Tenn. Ct. App. 1992).

RULE 20

PERMISSIVE JOINDER OF PARTIES

20.01. Permissive Joinder. All persons may join in one (1) action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all these persons will arise in the action. All persons may be joined in one (1) action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

20.02. Separate Trials. The court may make such orders as will prevent a party from being embarrassed, delayed, or put to expense by the inclusion of another party against whom the party asserts no claim and who asserts no claim against the party, and may order separate trials or may make other orders to prevent delay or prejudice.

Advisory Commission Comments. Rule 19 deals with situations where certain parties must be joined. Rule 20 deals with permissive joinder. The rule is designed to allow a single suit to determine the rights and liabilities of all persons when those rights and liabilities arose out of the same transaction or occurrence and when a common question of law or fact exists among all parties. Where the liberality of the permissive joinder provisions works a hardship on a particular party or parties, the court is empowered to order separate trials or make other orders necessary to prevent delay or prejudice.

Cross-References. Several parties, judgments for or against, T.C.A. § 25-1-104.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 53, 56, 60, 69, 219.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-20.01-1, 1-20.02-1, 1-21-1.

Tennessee Jurisprudence. 1 Tenn. Juris., Actions, § 22; 11 Tenn. Juris., Equity, § 35.

Law Reviews. A Survey of Tennessee Labor Cases Since 1954 (D. Bruce Shine and Shelburne Ferguson, Jr.), 47 Tenn. L. Rev. 323.

An Exegesis of the Ejectment Statutes of Tennessee (R.D. Cox), 18 Mem. St. U.L. Rev. 581 (1988).

NOTES TO DECISIONS

ANALYSIS

1. Verdicts.
2. Joinder Proper.
3. Venue.

1. Verdicts.

Nothing in Tenn. R. Civ. P. 20 indicates that anything other than separate verdicts should be returned where there are multiple plaintiffs. Henry County Board of Education v. Burton, 538 S.W.2d 394, 1976 Tenn. LEXIS 490 (Tenn. 1976).

2. Joinder Proper.

Where: (1) Separate accidents involving the same plaintiff which were reasonably close in point of time resulted in injuries to the same parts of the body; and (2) In the trial of the case against either of the tortfeasors the question of the extent of the injuries received in the other accident would be one of the issues, the conditions of Tenn. R. Civ. P. 20 allowing joinder were met and the court's action was proper. Carr v. Higdon, 665 S.W.2d 382, 1983 Tenn. App. LEXIS 636 (Tenn. Ct. App. 1983).

Where there was a logical relationship between plaintiff's suit to establish paternity for purposes of intestate succession under T.C.A. § 31-2-105, and her claim to impose a constructive trust on the funds received for the wrongful death of her natural father, the "logical relationship" test which permits reasonably related claims for relief by or against different parties to be joined was met. Woods v. Fields, 798 S.W.2d 239, 1990 Tenn. App. LEXIS 216 (Tenn. Ct. App. 1990), rehearing denied, 798 S.W.2d 239, 1990 Tenn. App. LEXIS 285 (Tenn. App. 1990).

3. Venue.

The issues of proper venue are contingent upon whether there is proper joinder of parties. Fred's Finance Co. v. Fred's of Dyersburg, Inc., 741 S.W.2d 903, 1987 Tenn. App. LEXIS 3203 (Tenn. Ct. App. 1987).

Proper joinder of parties under Tenn. R. Civ. P. 20 does not change the venue analysis; the fact that there are multiple defendants from multiple counties did not change the fact that if the plaintiff was suing only the defendant, the proper venue would have been pursuant to T.C.A. § 20-40-101(b). Mills v. Wong, 39 S.W.3d 188, 2000 Tenn. App. LEXIS 626 (Tenn. Ct. App. 2000).

RULE 21

MISJOINDER AND NONJOINDER OF PARTIES

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

Advisory Commission Comments. Rule 21 allows misjoinder and nonjoinder to be corrected at any stage of the action upon motion of any party or upon the initiative of the court, and removes misjoinder as a ground for dismissal of an action.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 67, 69.

Pritchard on Wills and Administration of Estates (4th ed., Phillips and Robinson), §§ 738, 741.

Tennessee Forms (Robinson, Ramsey and

Harwell), Nos. 1-20.02-1, 1-21-1.

Tennessee Jurisprudence. 1 Tenn. Juris., Abatement, Survival and Revival, § 13; 9 Tenn. Juris., Dismissal, Discontinuance and Nonsuit, § 7; 11 Tenn. Juris., Equity, § 35; 18 Tenn. Juris., Mines and Minerals, § 3; 20 Tenn. Juris., Parties, § 6; 21 Tenn. Juris., Process, § 4.

Law Reviews. Symposium: Parties and Claims: Developments Under the Tennessee Rules of Civil Procedure, 9 Mem. St. U.L. Rev. 453.

NOTES TO DECISIONS

1. Party Not Necessary.

Trial court did not err in dismissing a landowner who had transferred the property that was the subject of a proposed development from a lawsuit brought by a neighbor under either Tenn. R. Civ. P. 12.02(6) or under Tenn. R. Civ. P. 21, because the landowner had lost any control over the property to his successor in interest; any claim for injunctive relief against the prior owner was moot. Steppach v. Thomas, 346 S.W.3d 488, 2011 Tenn. App. LEXIS 91 (Tenn. Ct. App. Feb. 28, 2011), appeal denied, — S.W.3d —, 2011 Tenn. LEXIS 736 (Tenn. July 15, 2011).

RULE 22

INTERPLEADER

22.01. Generally. Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that the claims of the several claimants or the titles on which their claims depend do not have a common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that he or she is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim. The provisions of this rule supplement and do not in any way limit the joinder of the parties permitted in Rule 20.

NOTES TO DECISIONS

1. Appellate Review.

Delaware corporation legitimately feared multiple vexation directed against a single limited fund when it was threatened with an attachment action by appellee. Accordingly, the trial court did not err in permitting the Delaware corporation to interplead the disputed funds. C & C N. Am. Inc. v. Natural Stone Distribs., LLC, 571 S.W.3d 254, 2018 Tenn. App. LEXIS 462 (Tenn. Ct. App. Aug. 14, 2018).

Although appellee was entitled to a judgment for $155,941.26, the trial court should not have ordered the judgment in favor of appellee to be paid from interpleaded funds. C & C N. Am. Inc. v. Natural Stone Distribs., LLC, 571 S.W.3d 254, 2018 Tenn. App. LEXIS 462 (Tenn. Ct. App. Aug. 14, 2018).

22.02. Procedure. Any property or amount involved as to which the party seeking interpleader admits liability may, upon order of the court, be deposited with the court or otherwise preserved, or secured by bond in amount sufficient to assure payment of the liability admitted. The court may thereafter enjoin all parties before it from commencing or prosecuting any other action regarding the subject matter of the interpleader action. Upon hearing, the court may order the party seeking interpleader discharged from liability as to property deposited or secured before determining the rights of the claimants thereto.

Advisory Commission Comments. Rule 22.01 provides for interpleader of persons having claims against the plaintiff and specifies that it also is available to a defendant by way of cross claim or counterclaim. Rule 22.02 provides for deposit with the court of any property

or amount involved as to which the party seeking interpleader admits liability. By depositing the property or amount claimed with the court, or making bond to secure payment of an admitted liability, a party may be protected against suit by any of the claimants, and may upon the hearing, be discharged from liability before the rights of the interpleaded parties have been determined.

Cross-References. Applicability of Rule 22 to actions in the nature of interpleader, T.C.A. § 16-15-731.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 538-540.

Tennessee Jurisprudence. 11 Tenn. Juris., Equity, § 35; 16 Tenn. Juris., Interpleader, §§ 1, 2.

Law Reviews. Symposium: Parties and Claims: Developments Under the Tennessee Rules of Civil Procedure, 9 Mem. St. U.L. Rev. 453.

NOTES TO DECISIONS

Analysis

1. Governmental Entities as Defendants.
2. Interpleaded Insurance Funds.

1. Governmental Entities as Defendants.

Where plaintiff filed an action in Benton County to recover damages for the wrongful death of his wife who was killed in a collision between the ambulance in which she was riding and a tractor trailer rig in the town of Huntington, Carroll County, and the owner of the ambulance was Benton County, where two or more governmental entities or their agents and officials are material defendants, the plaintiff may bring his action at the situs of either governmental entity. Baker v. Hughes, 532 S.W.2d 223, 1975 Tenn. LEXIS 608 (Tenn. 1975).

2. Interpleaded Insurance Funds.

Where the proceeds from a life insurance policy are the subject of interpleader, the fees of counsel for an unsuccessful claimant are not properly chargeable against the interpleaded funds. Brooks v. Thompson, 521 S.W.2d 563, 1975 Tenn. LEXIS 687 (Tenn. 1975).

RULE 23

CLASS ACTIONS

23.01. Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interest of the class.

Law Reviews. Mass Tort–Class Action Certification–The Unavailability of Class Certification under the Tennessee Consumer Protection Act and the Appropriateness of Class Claims Alleging Common Law Fraud and Misrepresentation in Tennessee (Sarah-Katherine Adams Wright), 76 Tenn. L. Rev. 491 (2009).

NOTES TO DECISIONS

1. Review.

In order for an appellate court to conduct a meaningful review of a trial court's discretionary decision on class certification, the trial court must identify sufficient facts upon which it based its decision. Am. Heritage Apts., Inc. v. Hamilton County Water & Wastewater Treatment Auth., 494 S.W.3d 31, 2016 Tenn. LEXIS 269 (Tenn. Apr. 8, 2016).

Trial court's ruling on class certification was vacated because the trial court did not decide the class action issue with sufficient specificity to allow for meaningful appellate review; with no factual findings and no record of the evidence submitted at any hearing, it was difficult to determine whether or to what extent the trial court actually engaged in the appropriate analysis in its ruling. Am. Heritage Apts., Inc. v. Hamilton County Water & Wastewater Treatment Auth., 494 S.W.3d 31, 2016 Tenn. LEXIS 269 (Tenn. Apr. 8, 2016).

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Trial court did not err by denying the patrons' application for class certification of their negligence action against a restaurant because the patrons failed to carry their burden with regard to typicality because there were two separate course of conduct, when patrons became ill by consuming water from the private well and when patrons came into contact with a contagious employee, and therefore the modes of transmissions were different, the causation proof was different, and the facts surrounding the alleged negligence would be different. Rogers v. Adventure House LLC, — S.W.3d —, 2020 Tenn. App. LEXIS 382 (Tenn. Ct. App. Aug. 24, 2020).

Trial court did not err by denying the patrons' application for class certification of their negligence action against a restaurant because the patron was not an adequate representative of the class, as multiple pathogens, multiple dates of transmission, multiple methods of transmission, multiple patrons, multiple duties, and multiple defendants precluded representative plaintiffs from protecting the interests of every member in the proposed class. Rogers v. Adventure House LLC, — S.W.3d —, 2020 Tenn. App. LEXIS 382 (Tenn. Ct. App. Aug. 24, 2020).

Trial court did not err by denying the patrons' application for class certification of their negligence action against a restaurant because the patrons failed to carry their burden with regard to commonality, as the county health department concluded that there were likely various modes of transmission for the patrons' illnesses and it was inconclusive whether the patrons' illnesses, as well as their contact with E. coli and norovirus, derived form the same source. Rogers v. Adventure House LLC, — S.W.3d —, 2020 Tenn. App. LEXIS 382 (Tenn. Ct. App. Aug. 24, 2020).

23.02. Class Actions Maintainable. An action may be maintainable as a class action if the prerequisites of 23.01 are satisfied, and in addition:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of

(a) Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for a party opposing the class, or

(b) Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or would substantially impair or impede their ability to protect their interest; or

(2) The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) The court finds that the question of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (a) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (b) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (c) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (d) the difficulties likely to be encountered in the management of a class action.

Law Reviews. Mass Tort–Class Action Certification–The Unavailability of Class Certification under the Tennessee Consumer Protection Act and the Appropriateness of Class Claims Alleging Common Law Fraud and Misrepresentation in Tennessee (Sarah-Katherine Adams Wright), 76 Tenn. L. Rev. 491 (2009).

NOTES TO DECISIONS

Analysis

1. Class Action Properly Certified.
2. Decertification Properly Denied.

1. Class Action Properly Certified.

Trial court did not abuse its discretion in finding that common issues predominated and that a class action was the superior method for proceeding with the case where the central issue was whether a funeral home had a duty beyond dropping off human remains at the cemetery, that issue was common to all parties in the case, and it was better to proceed toward adjudicating that question as a class action. Wofford v. M.J. Edwards & Sons Funeral Home Inc., 528 S.W.3d 524, 2017 Tenn. App. LEXIS 214 (Tenn. Ct. App. Mar. 29, 2017), appeal denied, — S.W.3d —, 2017 Tenn. LEXIS 483 (Tenn. Aug. 18, 2017).

2. Decertification Properly Denied.

Trial court did not err in refusing to decertify a class pursuant to Tenn. R. Civ. P. 23.02(3) where the court was not persuaded by the new postulate that presentation of an aggregate number representing the damages of the entire class would run afoul of Rule 23.02(3). Highlands Physicians, Inc. v. Wellmont Health Sys., — S.W.3d —, 2020 Tenn. App. LEXIS 430 (Tenn. Ct. App. Sept. 25, 2020).

23.03. Determination by Order Whether Class Action to Be Maintained — Notice, Judgment — Actions Conducted. (1) As soon as practicable after the commencement of an action brought as a class action, but never in a hearing without all representative plaintiffs and all defendants having been given an opportunity to be present, the court shall determine by order whether the action is to be so maintained.

(2) In any class action maintained under Rule 23.02(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including publication when appropriate or individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (a) the court will exclude the member from the class if the member so requests by a specified date; (b) the judgment, whether favorable or not, will include all members who do not request exclusion; and (c) any member who does not request exclusion may, if the member desires, enter an appearance.

(3) The judgment in an action maintained as a class action under Rule 23.02(1) or Rule 23.02(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under Rule 23.02(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in Rule 23.03(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (a) an action may be brought or maintained as a class action with respect to particular issues, or (b) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly. [As amended by order entered December 10, 2003, effective July 1, 2004.]

Law Reviews. Mass Tort–Class Action Certification–The Unavailability of Class Certification under the Tennessee Consumer Protection Act and the Appropriateness of Class Claims

Alleging Common Law Fraud and Misrepresentation in Tennessee (Sarah-Katherine Adams Wright), 76 Tenn. L. Rev. 491 (2009).

NOTES TO DECISIONS

1. Illustrative Cases.

Where city employees filed a class action lawsuit pursuant to Tenn. R. Civ. P. 23 seeking step raise promotions based upon merit, the Court of Appeals of Tennessee held that the city violated its ordinances by failing to pay the raises. The employees did not have remedy under a breach of contract theory, because the employee handbook did not mandate that the city pay raises. Ussery v. City of Columbia, 316 S.W.3d 570, 2009 Tenn. App. LEXIS 363 (Tenn. Ct. App. June 1, 2009), rehearing denied, 316 S.W.3d 570, 2009 Tenn. App. LEXIS 490 (Tenn. Ct. App. June 30, 2009), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 246 (Tenn. Mar. 15, 2010).

23.04. Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

Law Reviews. Mass Tort–Class Action Certification–The Unavailability of Class Certification under the Tennessee Consumer Protection Act and the Appropriateness of Class Claims Alleging Common Law Fraud and Misrepresentation in Tennessee (Sarah-Katherine Adams Wright), 76 Tenn. L. Rev. 491 (2009).

23.05. Dismissal or Compromise. A certified class action shall not be voluntarily dismissed or compromised without approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If attorney fees are sought as part of a compromise, a motion for fees must be filed and served on all parties and, for motions by class counsel, directed to class members in a reasonable manner. A class member, or a party from whom payment is sought, may object to the motion. [As amended by order filed December 29, 2005, effective July 1, 2006.]

Law Reviews. Mass Tort–Class Action Certification–The Unavailability of Class Certification under the Tennessee Consumer Protection Act and the Appropriateness of Class Claims Alleging Common Law Fraud and Misrepresentation in Tennessee (Sarah-Katherine Adams Wright), 76 Tenn. L. Rev. 491 (2009).

23.06. Derivative Actions by Shareholders. In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege that the plaintiff was a shareholder or member at the time of the transaction of which the plaintiff complains or that the plaintiff's share of membership thereafter devolved on the plaintiff by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action desired from the directors or comparable authority and, if necessary, from the shareholders, or members, and the reasons for the plaintiff's failure to obtain the action or for not making the effort. The derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be voluntarily dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

Law Reviews. Mass Tort–Class Action Certification–The Unavailability of Class Certification under the Tennessee Consumer Protection Act and the Appropriateness of Class Claims Alleging Common Law Fraud and Misrepresentation in Tennessee (Sarah-Katherine Adams Wright), 76 Tenn. L. Rev. 491 (2009).

NOTES TO DECISIONS

Analysis

1. Demand for Action.
2. Standing.

1. Demand for Action.

Shareholder failed to meet demand-futility standard because shareholder failed to demonstrate majority of board was interested and not independent; at best, allegations made out that one board member's disinterest and independence may have been compromised, but did not allege any specifics regarding other board members. Lukas v. McPeak, 730 F.3d 635, 2013 FED App. 280P, 2013 U.S. App. LEXIS 19295 (6th Cir. Sept. 19, 2013).

Proper demand-futility standard is version of two-pronged *Aronson* test. Lukas v. McPeak, 730 F.3d 635, 2013 FED App. 280P, 2013 U.S. App. LEXIS 19295 (6th Cir. Sept. 19, 2013).

2. Standing.

Chancery court properly granted summary judgment to an intervening nonprofit organization and its directors and dismissed all of the members' claims because the members lacked standing inasmuch as they could not fairly and adequately represent the interest of the organization's remaining members where they voluntarily surrendered their memberships in the organization according to the organization's constitution, and exhibited an overriding antagonistic relationship between the members and the organization, and the trial court allowed the members a reasonable opportunity to engage in discovery related to the issue of standing both before and after the organization intervened in the case. United Supreme Council AASR SJ v. McWilliams, 586 S.W.3d 373, 2019 Tenn. App. LEXIS 142 (Tenn. Ct. App. Mar. 21, 2019), appeal denied, United Supreme Council v. McWilliams, — S.W.3d —, 2019 Tenn. LEXIS 432 (Tenn. Aug. 20, 2019).

23.07. Actions Relating to Unincorporated Associations. An action brought by or against the members of an unincorporated association as a class by naming certain members as representative parties may be maintained only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members. In the conduct of the action

the court may make appropriate orders corresponding with those described in Rule 23.04, and the procedure for dismissal or compromise of the action shall correspond with that provided in Rule 23.05.

Law Reviews. Mass Tort–Class Action Certification–The Unavailability of Class Certification under the Tennessee Consumer Protection Act and the Appropriateness of Class Claims Alleging Common Law Fraud and Misrepresentation in Tennessee (Sarah-Katherine Adams Wright), 76 Tenn. L. Rev. 491 (2009).

23.08. Disposition of Residual Funds. Any order entering a judgment or approving a proposed compromise of a class action certified under this rule may provide for the disbursement of residual funds. Residual funds are funds that remain after the payment of all approved: class member claims, expenses, litigation costs, attorneys' fees, and other court-approved disbursements to implement the relief granted. Nothing in this rule is intended to limit the parties to a class action from suggesting, or the trial court from approving, a settlement or order entering a judgment that does not create residual funds.

It shall be within the discretion of the court to approve the timing and method of distribution of residual funds and to approve the recipient(s) of residual funds. A distribution of residual funds to a program or fund which serves the pro bono legal needs of Tennesseans including, but not limited to, the Tennessee Voluntary Fund for Indigent Civil Representation is permissible but not required.

Upon motion of any party to a settlement or judgment of a class action certified under this rule or upon the court's own initiative, orders may be entered after an approved settlement or judgment to address the disposition and disbursement of residual funds in a manner consistent with this rule. [Added by order entered January 8, 2009, effective July 1, 2009.]

Advisory Commission Comments. Rule 23 makes the class action available in all fields of civil litigation. The court is required to make an affirmative determination as to whether or not a class action is proper in any given set of circumstances; this determination is subject to alteration at any time prior to judgment on the merits. Criteria governing the court's determination are spelled out in detail. The rule seeks to secure to the courts and litigants the advantages of the class action while clothing the court with power to protect all members of the class against a miscarriage of justice.

23.06: Tenn. Code Ann. § 48-718 [repealed] contains the provisions of the General Corporation Act relating to shareholders' derivative suits. Rule 23.06 does not conflict with the provisions of Tenn. Code Ann. § 48-718 [repealed] and will not repeal any of its provisions. The Rule adds a provision, not found in the statute, requiring that the complaint contain an allegation that plaintiff is a holder of shares at the time of bringing the suit, but the Rule does not change the requirement that the plaintiff actually be a shareholder as of that time. The Rule adds a requirement that the complaint set out the reasons that plaintiff's efforts to obtain desired action from the directors or comparable authority were unsuccessful. The Rule adds a provision that the derivative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated.

Advisory Commission Comments [2004]. The amendment to Rule 23.03(1) abolishes ex parte class action certifications.

Advisory Commission Comments [2006]. The second and third sentences of Rule 23.05 are new. Objections can be made to attorney fees sought as part of a settlement.

Advisory Commission Comments [2007]. T.C.A. § 27-1-125 gives the Court of Appeals discretion to permit an appeal of a trial court's grant or denial of class action certification. Permission from the trial court is unnecessary

Advisory Commission Comments [2009]. The Tennessee Voluntary Fund for Indigent Civil Representation is established in Tenn. Code Ann. § 16-3-821.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated December 10, 2003, was ratified and approved by 2004 House

Resolution 233 and Senate Resolution 115. The order promulgating the amendment of this rule provided that it take effect July 1, 2004.

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated December 29, 2005, was ratified and approved by 2006 House Resolution 200 and Senate Resolution 95. The order promulgating the amendment of this rule provided that it take effect July 1, 2006.

The amendment of the Advisory Commission Comments, which added the 2007 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated January 2, 2007, was ratified and approved by House Resolution 18 and Senate Resolution 11. The order promulgating the amendment of the Advisory Commission Comments provided that it take effect July 1, 2007.

The amendment of Rule 23, which added § 23.08, as promulgated and adopted by the Supreme Court in its order dated January 8, 2009, was ratified and approved by 2009 House Resolution 15 and Senate Resolution 16. The order promulgating the amendment of this rule provided that it take effect July 1, 2009.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 52, 55, 57, 227, 570-572.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-19.01-2, 1-23-1, 1-23.03-1, 1-23.03-2, 1-23.06-1.

Tennessee Jurisprudence. 7 Tenn. Juris., Corporations, §§ 50, 90; 11 Tenn. Juris., Equity, § 35; 20 Tenn. Juris., Parties, § 10.

Law Reviews. A Survey of Tennessee Labor Cases Since 1954 (D. Bruce Shine and Shelburne Ferguson, Jr.), 47 Tenn. L. Rev. 323.

Class Counsel, Self-Interest and Other People's Money (Louis W. Hensler III), 35 U. Mem. L. Rev. 53 (2004).

From "Predominance" to "Resolvability": A New Approach to Regulating Class Actions (Allan Erbsen), 58 Vand. L. Rev. 995 (2005).

Mass Tort — Class Action Certification–The Unavailability of Class Certification under the Tennessee Consumer Protection Act and the Appropriateness of Class Claims Alleging Common Law Fraud and Misrepresentation in Tennessee (Sarah-Katherine Adams Wright), 76 Tenn. L. Rev. 491 (2009).

Rethinking Place of Business as Choice of Law in Class Action Lawsuits, 58 Vand. L. Rev. 1925 (2005).

The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues (Theodore Eisenberg and Geoffrey Miller), 57 Vand. L. Rev. 1529 (2004).

Trial, 4 Mem. St. U.L. Rev. 335.

NOTES TO DECISIONS

Analysis

1. In General.
2. Construction with Other Sections.
3. Practicability of Joinder.
4. Procedural Rights.
5. Requirements of Rule Not Met.
6. Procedural Privilege.
7. Burden of Showing Prerequisites.
8. Common Questions of Law and Fact.
9. Derivative Actions.
10. Suit by Association in Own Name for Benefit of Members.
11. Certification.

1. In General.

The determination of whether an action should proceed as a class action is a matter which is left to the sound discretion of the trial judge; only upon a finding of an abuse of that discretion should the trial judge's decision be modified on appeal. Meighan v. U.S. Sprint Communs. Co., 924 S.W.2d 632, 1996 Tenn. LEXIS 264 (Tenn. 1996), rehearing denied, 924 S.W.2d 632, 1996 Tenn. LEXIS 435 (Tenn. 1996).

Applying Davidson county, Tenn., R. § 26.14 to the case at bar, because the previous plaintiffs did not move for class certification within 60 days after their action was remanded to the circuit court, nor did they seek class certification in the six years before they settled their suit with defendants, the plaintiffs in this case were not protected as potential class members, the statutes of limitations began to run upon the expiration of the 60 days, and their contract action was time barred. Tigg v. Pirelli Tire Corp., 232 S.W.3d 28, 2007 Tenn. LEXIS 641 (Tenn. Aug. 16, 2007).

Class plaintiff, a riverside landowner, satisfied the typicality requirement of Tenn. R. Civ. P. 23.01(3) because class plaintiff's and the other class members' claims arose from the same course of conduct, i.e., the paper company discharging pollutants into the river; class plaintiff and the other class members also shared the same legal rights, i.e., the right of the waters' flow past their land for ordinary domestic, manufacturing, and other lawful purposes, without injurious or prejudicial interference by an upper proprietor. Freeman v. Blue Ridge Paper Prods., 229 S.W.3d 694, 2007 Tenn. App. LEXIS 48 (Tenn. Ct. App. Jan. 25, 2007), appeal denied, Freeman v. Blue Ridge Paper Prods., Inc., — S.W.3d —, 2007 Tenn. LEXIS 623 (Tenn. June 25, 2007).

Trial court did not err in admitting the testimony of a real estate expert in a class action based on the claims of nuisance by riverside landowners caused by an upstream paper company's pollutants, because the expert's testimony regarding the loss in value of the riverside land employed the same level of

intellectual rigor that characterized the practice of an expert in the field of real estate appraisal. Freeman v. Blue Ridge Paper Prods., 229 S.W.3d 694, 2007 Tenn. App. LEXIS 48 (Tenn. Ct. App. Jan. 25, 2007), appeal denied, Freeman v. Blue Ridge Paper Prods., Inc., — S.W.3d —, 2007 Tenn. LEXIS 623 (Tenn. June 25, 2007).

Trial court did not err in admitting the testimony of an occupational health physician specializing in internal medicine and clinical toxicology in a class action based on claims of nuisance by riverside landowners caused by an upstream paper company's pollutants because the thrust of the testimony was that class members should have reasonable concern, because in part so little was known about the amounts of chemicals released into the river and the company itself admitted that it did not know the amount of each chemical discharged into the river on a daily basis. Freeman v. Blue Ridge Paper Prods., 229 S.W.3d 694, 2007 Tenn. App. LEXIS 48 (Tenn. Ct. App. Jan. 25, 2007), appeal denied, Freeman v. Blue Ridge Paper Prods., Inc., — S.W.3d —, 2007 Tenn. LEXIS 623 (Tenn. June 25, 2007).

Tennessee Consumer Protection Act (TCPA) provides consumers with numerous avenues to seek and receive relief, fully satisfying the statute's stated purpose of protecting consumers without including class actions, and the attorney general's power to bring actions on behalf of consumers was akin to a class action pursuant to T.C.A. § 47-18-108; read together, the provisions demonstrated that the legislature provided several clearly articulated avenues by which the TCPA could fully protect and benefit consumers. Walker v. Sunrise Pontiac-GMC Truck, 249 S.W.3d 301, 2008 Tenn. LEXIS 102 (Tenn. Feb. 13, 2008).

2. Construction with Other Sections.

Tenn. R. Civ. P. 23.06 is broader than § 48-718 [repealed], but they are not in conflict. Section 48-718 [repealed] does not affirmatively bar derivative suits, while Tenn. R. Civ. P. 23.06 does include them. Hannewald v. Fairfield Communities, Inc., 651 S.W.2d 222, 1983 Tenn. App. LEXIS 701 (Tenn. Ct. App. 1983), superseded by statute as stated in, Brady v. Calcote, — S.W.3d —, 2005 Tenn. App. LEXIS 8 (Tenn. Ct. App. Jan. 11, 2005), superseded by statute as stated in, House v. Edmondson, — S.W.3d —, 2006 Tenn. App. LEXIS 320 (Tenn. Ct. App. May 16, 2006), superseded by statute as stated in, House v. Estate of Edmondson, 245 S.W.3d 372, 2008 Tenn. LEXIS 16 (Tenn. Jan. 25, 2008).

3. Practicability of Joinder.

Practicability of joinder should not depend on mere numbers, but upon all the circumstances surrounding the case. Albriton v. Hartsville Gas Co., 655 S.W.2d 153, 1983 Tenn. App. LEXIS 549 (Tenn. Ct. App. 1983).

4. Procedural Rights.

Provisions of the rules as to class actions simply regulate procedure and do not create substantive rights. Bennett v. Stutts, 521 S.W.2d 575, 1975 Tenn. LEXIS 689 (Tenn. 1975).

Trial court's instruction in a nuisance class action, brought against an upstream paper company for chemical pollution, which stated that in order for the class action plaintiffs to recover for reasonable fear, annoyance, discomfort, stress or anxiety, the jury had to be shown that those feelings were reasonable, was a correct statement of the law and fears and feelings common to most of the community could be considered and could make an interference a nuisance, although there might not be a foundation in scientific fact. Freeman v. Blue Ridge Paper Prods., 229 S.W.3d 694, 2007 Tenn. App. LEXIS 48 (Tenn. Ct. App. Jan. 25, 2007), appeal denied, Freeman v. Blue Ridge Paper Prods., Inc., — S.W.3d —, 2007 Tenn. LEXIS 623 (Tenn. June 25, 2007).

5. Requirements of Rule Not Met.

Even though a class action does not meet the requirements of Tenn. R. Civ. P. 23, it is not subject to dismissal if it also states a claim for relief against the defendant or defendants named individually. Bohlinger v. American Credit Co., 594 S.W.2d 710, 1979 Tenn. App. LEXIS 378 (Tenn. Ct. App. 1979).

6. Procedural Privilege.

Prosecution of a class action is not a matter of right which may be demanded but is, more accurately, a procedural privilege to be utilized within the sound discretion of the trial judge. First American Nat'l Bank v. Hunter, 581 S.W.2d 655, 1978 Tenn. App. LEXIS 349 (Tenn. Ct. App. 1978).

7. Burden of Showing Prerequisites.

A party invoking Tenn. R. Civ. P. 23 has the burden of showing that all the prerequisites to utilize the class action procedure have been satisfied, and the determination by the trial judge on this issue will not be disturbed unless there was an abuse of discretion. Bohlinger v. American Credit Co., 594 S.W.2d 710, 1979 Tenn. App. LEXIS 378 (Tenn. Ct. App. 1979); Albriton v. Hartsville Gas Co., 655 S.W.2d 153, 1983 Tenn. App. LEXIS 549 (Tenn. Ct. App. 1983). See Hamilton v. Gibson County Utility Dist., 845 S.W.2d 218, 1992 Tenn. App. LEXIS 728 (Tenn. Ct. App. 1992).

The person seeking certification of a class has the burden of proof. Warren v. Scott, 845 S.W.2d 780, 1992 Tenn. App. LEXIS 779 (Tenn. Ct. App. 1992).

Trial court did not err in admitting the testimony of an occupational health physician specializing in internal medicine and clinical toxicology in a class action based on claims of nuisance by riverside landowners caused by an

upstream paper company's pollutants because the *McDaniel v. CSX Transp., Inc.*, 955 S.W.2d 257, 1997 Tenn. LEXIS 471, factors indicated that the doctor's testimony regarding the chemicals' potentially adverse health effects was reliable. Freeman v. Blue Ridge Paper Prods., 229 S.W.3d 694, 2007 Tenn. App. LEXIS 48 (Tenn. Ct. App. Jan. 25, 2007), appeal denied, Freeman v. Blue Ridge Paper Prods., Inc., — S.W.3d —, 2007 Tenn. LEXIS 623 (Tenn. June 25, 2007).

8. Common Questions of Law and Fact.

The removal of one common legal question prior to trial is not sufficient grounds for decertifying the class if other common questions of law or fact remain. Meighan v. U.S. Sprint Communs. Co., 924 S.W.2d 632, 1996 Tenn. LEXIS 264 (Tenn. 1996), rehearing denied, 924 S.W.2d 632, 1996 Tenn. LEXIS 435 (Tenn. 1996).

Record contained material evidence to support the verdict finding an upstream paper company committed a nuisance because of its mill's chemical pollution; the company admitted to discharging certain compounds into the river, a clinical toxicologist testified that many of the chemicals could cause adverse health effects and opined that individuals should have reasonable concern regarding the water in the river, and the class members' real estate expert opined that the river's pollution was the only reason that an overnight rental industry had not developed along the river. Freeman v. Blue Ridge Paper Prods., 229 S.W.3d 694, 2007 Tenn. App. LEXIS 48 (Tenn. Ct. App. Jan. 25, 2007), appeal denied, Freeman v. Blue Ridge Paper Prods., Inc., — S.W.3d —, 2007 Tenn. LEXIS 623 (Tenn. June 25, 2007).

9. Derivative Actions.

Members, as opposed to stockholders, of a not-for-profit corporation can bring a derivative action in Hannewald v. Fairfield Communities, Inc., 651 S.W.2d 222, 1983 Tenn. App. LEXIS 701 (Tenn. Ct. App. 1983), superseded by statute as stated in, Brady v. Calcote, — S.W.3d —, 2005 Tenn. App. LEXIS 8 (Tenn. Ct. App. Jan. 11, 2005), superseded by statute as stated in, House v. Edmondson, — S.W.3d —, 2006 Tenn. App. LEXIS 320 (Tenn. Ct. App. May 16, 2006), superseded by statute as stated in, House v. Estate of Edmondson, 245 S.W.3d 372, 2008 Tenn. LEXIS 16 (Tenn. Jan. 25, 2008).

All jurisdictions impose threshold preconditions on derivative suits in order to allow the directors to occupy their normal status as the conductors of the corporation's affairs, to encourage informal resolution of intracorporate disputes, and to guard against misuse of the derivative remedy. The most common precondition requires the shareholder to first make a written demand on the corporation's directors requesting them to prosecute the suit or to take other suitable corrective action. This precondition is commonly known as the "demand requirement." Lewis on behalf of Citizens Sav. Bank & Trust Co. v. Boyd, 838 S.W.2d 215, 1992 Tenn. App. LEXIS 471 (Tenn. Ct. App. 1992).

Courts in some jurisdictions like Tennessee that do not require a precomplaint demand in every case have segregated derivative actions into two categories. "Demand refused" cases are those in which the corporation's directors have refused to take action in response to a shareholder's demand. "Demand excused" cases are those in which a shareholder is not required to make a demand because doing so would be futile. Lewis on behalf of Citizens Sav. Bank & Trust Co. v. Boyd, 838 S.W.2d 215, 1992 Tenn. App. LEXIS 471 (Tenn. Ct. App. 1992).

A single shareholder had standing to bring a derivative action on behalf of the corporation against another shareholder, despite the fact that plaintiff was the only affected shareholder and had brought an independent action against the corporation. Hall v. Tennessee Dressed Beef Co., 957 S.W.2d 536, 1997 Tenn. LEXIS 627 (Tenn. 1997).

Under Tenn. R. Civ. P. 23, the circuit court did not err by approving the settlement agreement resolving a shareholder's class action and derivative suit brought against the board of directors of a Delaware corporation after a merger and acquisition was approved. An estimate of potential recovery in the event of successful litigation was not a prerequisite to approval; the award of attorney's fees was not unreasonable. Denver Area Meat Cutters v. Clayton, 209 S.W.3d 584, 2006 Tenn. App. LEXIS 302 (Tenn. Ct. App. 2006), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 1017 (Tenn. Oct. 30, 2006), cert. denied, Hayes v. Denver Area Meat Cutters & Emplrs. Pension Plan, 549 U.S. 1339, 127 S. Ct. 2036, 167 L. Ed. 2d 765, 2007 U.S. LEXIS 3972 (2007).

10. Suit by Association in Own Name for Benefit of Members.

Tenn. R. Civ. P. 23.07 applies only to class actions and not to parent and teacher association suing in its own name for the benefit of its members to enforce the Curve Elementary School Parent & Teacher's Organization v. Lauderdale County School Board, 608 S.W.2d 855, 1980 Tenn. App. LEXIS 397 (Tenn. Ct. App. 1980).

11. Certification.

Proposed class of all persons and entities who have had at least $1,000 on deposit with any of the clerks of court for at least eight days was properly denied certification. Warren v. Scott, 845 S.W.2d 780, 1992 Tenn. App. LEXIS 779 (Tenn. Ct. App. 1992).

A decision to certify a class or to deny certification is within the sound discretion of the trial judge. Warren v. Scott, 845 S.W.2d 780, 1992 Tenn. App. LEXIS 779 (Tenn. Ct. App. 1992).

Trial court did not err in certifying a class of downstream riverside landowners under Tenn. R. Civ. P. Rule 23.02(3) in their nuisance claim against an upstream paper company claiming that the company's pollutants had substantially diminished the quality of the waters, environment, and resources downstream of and along the river thereby causing a private nuisance. Freeman v. Blue Ridge Paper Prods., 229 S.W.3d 694, 2007 Tenn. App. LEXIS 48 (Tenn. Ct. App. Jan. 25, 2007), appeal denied, Freeman v. Blue Ridge Paper Prods., Inc., — S.W.3d —, 2007 Tenn. LEXIS 623 (Tenn. June 25, 2007).

Due to the individualized nature of the alleged common law fraud and misrepresentation claims, class certification should not have been granted by the trial court; without hearing from each customer and salesperson, it was unknowable whether the dealer-incurred costs were the subject of discussion between them and if so, what representations, if any, were made by the salespersons. Walker v. Sunrise Pontiac-GMC Truck, 249 S.W.3d 301, 2008 Tenn. LEXIS 102 (Tenn. Feb. 13, 2008).

RULE 24

INTERVENTION

24.01. Intervention as of Right. Upon timely motion any person shall be permitted to intervene in an action: (1) when a statute confers an unconditional right to intervene; or (2) when the movant claims an interest relating to the property or transaction which is the subject of the action and the movant is so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest, unless the movant's interest is adequately represented by existing parties; or (3) by stipulation of all the parties. [As amended by order filed January 8, 2018, effective July 1, 2018.]

Compiler's Notes. In its order filed January 8, 2018, the Supreme Court adopted amendments to this rule, effective July 1, 2018, subject to approval by resolution of the General Assembly.

The amendment of Rule 24, which amended subdivision 24.01, 24.02 and 24.03 and added subdivision 24.05 and added the [2018] Advisory Comments, as promulgated and adopted by the Supreme Court in its order dated January 8, 2018, was ratified and approved by 2018 House Resolution 202 and Senate Resolution 163. The order promulgating the amendment of subdivisions 24.01 through 24.03, addition of subdivision 24.05 and addition of the [2018] Advisory Comments, provided that it take effect July 1, 2018.

NOTES TO DECISIONS

1. Denial of Motion to Intervene.

Trial court erred in denied a lessee's motion to intervene and that it was a necessary party because, although the trial court denied the lessee's motion on the basis of prior suit pending and the intervention rules, it did not address the lessee's argument that it was a necessary party, and, until the trial court ruled on the lessee's argument, that issue was not ripe for review. Dialysis Clinic, Inc. v. Medley, — S.W.3d —, 2019 Tenn. App. LEXIS 245 (Tenn. Ct. App. May 20, 2019).

Appellate court could not make a determination as to whether trial court erred in denying a motion filed by a judgment creditor's assignee to intervene, to be substituted for the named defendant, and to correct the mislabeling of the defendant because the trial court's order merely stated its denial of the motion for intervention, but provided no information from which the appellate court could discern the trial court's reasoning. Regions Bank v. Blumberg Trust, — S.W.3d —, 2020 Tenn. App. LEXIS 378 (Tenn. Ct. App. Aug. 21, 2020).

24.02. Permissive Intervention. Upon timely motion any person may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an movant's claim or defense and the main action have a question of law or fact in common. In exercising discretion the court shall consider whether or not the intervention will unduly delay or prejudice the adjudication of the rights of the original parties. [As amended by order filed January 8, 2018, effective July 1, 2018.]

Compiler's Notes. In its order filed January 8, 2018, the Supreme Court adopted amendments to this rule, effective July 1, 2018, subject to approval by resolution of the General Assembly.

The amendment of Rule 24, which amended subdivision 24.01, 24.02 and 24.03 and added subdivision 24.05 and added the [2018] Advisory Comments, as promulgated and adopted by the Supreme Court in its order dated January 8, 2018, was ratified and approved by 2018 House Resolution 202 and Senate Resolution 163. The order promulgating the amendment of subdivisions 24.01 through 24.03, addition of subdivision 24.05 and addition of the [2018] Advisory Comments, provided that it take effect July 1, 2018.

NOTES TO DECISIONS

ANALYSIS

1. Motion to Intervene Denied.
2. Permissive Intervention Improper.

1. Motion to Intervene Denied.

Where plaintiff outdoor advertising company sued defendant real estate development company for a declaration that defendant did not have the right to terminate plaintiff's leases, defendant counterclaimed for damages suffered as a result of the plaintiff's failure to remove its billboards; and a third-party outdoor advertising company that was supposed to purchase the property filed a motion to intervene alleging that the plaintiff was interfering with its contractual relations with defendant. While the trial court's order contained no language explicitly granting the motion to intervene, the trial court set the matter for a special hearing on the issue of damages owed to both defendant and the third party; therefore, the order implicitly granted the motion to intervene under Tenn. R. Civ. P. 24. Lamar Adver. Co. v. By-pass Partners, 313 S.W.3d 779, 2009 Tenn. App. LEXIS 468 (Tenn. Ct. App. July 22, 2009), appeal denied, Lamar Adver. Co. v. By-Pass Partners, — S.W.3d —, 2010 Tenn. LEXIS 287 (Tenn. Mar. 15, 2010).

Trial court erred in denied a lessee's motion to intervene and that it was a necessary party because, although the trial court denied the lessee's motion on the basis of prior suit pending and the intervention rules, it did not address the lessee's argument that it was a necessary party, and, until the trial court ruled on the lessee's argument, that issue was not ripe for review. Dialysis Clinic, Inc. v. Medley, — S.W.3d —, 2019 Tenn. App. LEXIS 245 (Tenn. Ct. App. May 20, 2019).

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In a dispute between family members over the decedents' estates, the trial court erred in denying appellant's motion for intervention in both estate actions because its finding that intervention would cause undue delay was illogical as resolution of the matters within the actions continued despite appellant's efforts to unseal the records. In re Estate of Thompson, — S.W.3d —, 2021 Tenn. App. LEXIS 137 (Tenn. Ct. App. Apr. 6, 2021).

2. Permissive Intervention Improper.

Trial court did not abuse its discretion in denying victims' petition to intervene in an estate's wrongful death action against a city because the victims had no properly asserted claim sharing questions of facts or law with the claims the estate asserted against the city; the victims had not filed a claim against the estate to recover damages for the injuries the decedent caused them, and thus, they had no legal right to recover any property from the decedent, his estate, or his descendants. White v. Johnson, 522 S.W.3d 417, 2016 Tenn. App. LEXIS 474 (Tenn. Ct. App. July 7, 2016).

Trial court did not abuse its discretion in denying victims' petition to intervene in an estate's wrongful death action against a city because T.C.A. § 30-1-109 specifically gave the victims the right to have an administrator ad litem appointed for the limited purpose of defending against their claim that they were injured by the decedent, nothing in the victims' petition to intervene or elsewhere in the record suggested that they followed the procedure. White v. Johnson, 522 S.W.3d 417, 2016 Tenn. App. LEXIS 474 (Tenn. Ct. App. July 7, 2016).

Trial court did not abuse its discretion in denying victims' petition to intervene in an estate's wrongful death action against a city because filing of an intervening complaint was not a substitute for a properly filed tort action directly against the estate under the Survival Statute; because the victims did not follow the statute's procedure, they had no claim against the decedent's estate for the damages he allegedly caused prior to his death. White v. Johnson, 522 S.W.3d 417, 2016 Tenn. App. LEXIS 474 (Tenn. Ct. App. July 7, 2016).

24.03. Procedure. Any person desiring to intervene shall file and serve a motion to intervene upon the parties as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute gives a right to intervene. [As amended by order filed January 8, 2018, effective July 1, 2018.]

Compiler's Notes. In its order filed January 8, 2018, the Supreme Court adopted amendments to this rule, effective July 1, 2018, subject to approval by resolution of the General Assembly.

The amendment of Rule 24, which amended subdivision 24.01, 24.02 and 24.03 and added subdivision 24.05 and added the [2018] Advisory Comments, as promulgated and adopted by the Supreme Court in its order dated January 8, 2018, was ratified and approved by 2018 House Resolution 202 and Senate Resolution 163. The order promulgating the amendment of subdivisions 24.01 through 24.03, addition of subdivision 24.05 and addition of the [2018] Advisory Comments, provided that it take effect July 1, 2018.

24.04. Notice to Attorney General When Statute, Rule or Regulation Is Questioned. When the validity of a statute of this state or an administrative rule or regulation of this state is drawn in question in any action to which the state or an officer or agency is not a party, the court shall require that notice be given the attorney general, specifying the pertinent statute, rule or regulation.

24.05. Finality of Judgment. Any order granting or denying a motion to intervene filed pursuant to this rule shall be a final judgment for purposes of Tenn. R. App. P. 3. [Adopted by order filed January 8, 2018, effective July 1, 2018.]

Advisory Commission Comments. 24.01: By statute, persons not made parties to a suit, but who have an interest in the matter at issue, can intervene in the suit as a matter of right in a number of situations (e.g., person interested in property which is subject of a suit to recover property (Tenn. Code Ann. § 20-1-115); person interested in property which is subject of eminent domain proceeding (Tenn. Code Ann. § 29-17-610). Rule 24.01 preserves all statutory rights of intervention, and adds the grounds set out in clauses (2) and (3) of the Rule.

24.02: Rule 24.02 preserves all statutory conditional rights of intervention and adds the right to intervene when the applicant's claim or defense and the main action have a common question of law or fact. Original parties are protected against undue delay or prejudice by empowering the court to deny intervention where necessary to protect these parties.

24.03: Rule 24.03 establishes a uniform procedure for intervention in all cases. If any prior statute specifies a different procedure, the provisions of the Rule will prevail.

24.04: When a declaratory judgment is sought to declare a statute, ordinance, or franchise of statewide effect unconstitutional, it is necessary to serve the Attorney General with a copy of the proceeding and to afford him or her a chance to be heard (Tenn. Code Ann. § 29-14-107(b)). The object of the statute is to protect the public's interest in the result of the suit [*Cummins v. Shipp*, 156 Tenn. 595, 38 S.W.2d 1062 (1928)].

Rule 24.04 extends this protection to actions of any type. If the Attorney General feels that the State's interest so requires, he or she will be in a position to intervene or take other appropriate action.

Advisory Commission Comment [2018]: The 2018 amendment adds subsection 24.05, which, in conjunction with the changes to Rule 54, Tennessee Rules of Civil Procedure, and Rules 3 and 4, Tennessee Rules of Appellate Procedure, provides for an appeal as of right from a trial court's order granting or denying a motion to intervene. Effective July 1, 2018, any order granting or denying a motion to intervene shall be a final judgment, and a timely appeal of that final judgement shall be the only method to appeal the grant or denial of a motion to intervene. The 2018 amendment also makes terminological updates, substituting the term "motion" for the prior term "application" and the term "movant" for "applicant" throughout the rule (for consistency with Tennessee Civil Procedure Rule 7 terminology).

Compiler's Notes. In its order filed January 8, 2018, the Supreme Court adopted this rule,

effective July 1, 2018, subject to approval by resolution of the General Assembly.

The amendment of Rule 24, which amended subdivision 24.01, 24.02 and 24.03 and added subdivision 24.05 and added the [2018] Advisory Comments, as promulgated and adopted by the Supreme Court in its order dated January 8, 2018, was ratified and approved by 2018 House Resolution 202 and Senate Resolution 163. The order promulgating the amendment of subdivisions 24.01 through 24.03, addition of subdivision 24.05 and addition of the [2018] Advisory Comments, provided that it take effect July 1, 2018.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 72, 225, 350, 365, 436, 438, 439, 549.

Pritchard on Wills and Administration of Estates (4th ed., Phillips and Robinson), § 331.

Tennessee Criminal Practice and Procedure (Raybin), § 6.19.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-24.01-1, 1-24.01-2, 1-24.02-1.

Tennessee Jurisprudence. 11 Tenn. Juris., Equity, § 35; 20 Tenn. Juris., Parties, § 7.

Law Reviews. An Exegesis of the Ejectment Statutes of Tennessee (R.D. Cox), 18 Mem. St. U.L. Rev. 581 (1988).

Dual Standards for Third-Party Intervenors: Distinguishing Between Public-Law and Private-Law Intervention, 66 Vand. L. Rev. 645 (2013).

The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure, VI. Hearing of Appeals (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 86.

NOTES TO DECISIONS

Analysis

1. Intervention as of Right.
2. Permissive Intervention.
3. Conditions on Permissive Intervention.
4. Notice of Constitutional Challenge.
5. Standing.

1. Intervention as of Right.

The interest required to intervene as of right does not include a mere contingent, remote or conjectural possibility of being affected as a result of the suit, but must involve a direct claim on the subject matter of the suit such that the intevenor will either gain or lose by direct operation of the judgment. State v. Brown & Williamson Tobacco Corp., 18 S.W.3d 186, 2000 Tenn. LEXIS 194 (Tenn. 2000), rehearing denied, State v. Brown & Williamson Tobacco Co., — S.W.3d —, 2000 Tenn. LEXIS 272 (Tenn. May 24, 2000).

A party seeking to intervene as of right must establish that: (1) The application for intervention was timely; (2) The proposed intervenor has a substantial legal interest in the subject matter of the pending litigation; (3) The proposed intervenor's ability to protect that interest is impaired; and (4) The parties to the underlying suit do not adequately represent the intervenor's interest. State v. Brown & Williamson Tobacco Corp., 18 S.W.3d 186, 2000 Tenn. LEXIS 194 (Tenn. 2000), rehearing denied, State v. Brown & Williamson Tobacco Co., — S.W.3d —, 2000 Tenn. LEXIS 272 (Tenn. May 24, 2000).

The standard of review for the denial of a motion to intervene as of right is an abuse of discretion. American Materials Techs., LLC v. City of Chattanooga, 42 S.W.3d 914, 2000 Tenn. App. LEXIS 359 (Tenn. Ct. App. 2000), review or rehearing denied, American Materials Techs. v. Adams Litho. Co., — S.W.3d —, 2001 Tenn. LEXIS 104 (Tenn. 2001).

In determining whether an intervention is timely, courts consider the following factors: (1) The point to which the suit has progressed; (2) The purpose for which intervention is sought; (3) The length of time preceding the application during which the proposed intervener knew or reasonably should have known of the intervener's interest in the case; (4) The prejudice to the original parties due to the proposed intervener's failure after the intervener knew or reasonably should have know of the intervener's interest in the case to apply promptly for intervention; and (5) The existence of unusual circumstances militating against or in favor of intervention. American Materials Techs., LLC v. City of Chattanooga, 42 S.W.3d 914, 2000 Tenn. App. LEXIS 359 (Tenn. Ct. App. 2000), review or rehearing denied, American Materials Techs. v. Adams Litho. Co., — S.W.3d —, 2001 Tenn. LEXIS 104 (Tenn. 2001).

A judgment or decree entered by consent of the original parties is a final judgment or decree and accordingly, in the absence of special circumstances, precludes intervention under the general rule against intervention after entry of a final judgment or decree. American Materials Techs., LLC v. City of Chattanooga, 42 S.W.3d 914, 2000 Tenn. App. LEXIS 359 (Tenn. Ct. App. 2000), review or rehearing denied, American Materials Techs. v. Adams Litho. Co., — S.W.3d —, 2001 Tenn. LEXIS 104 (Tenn. 2001).

In a termination of parental rights case, a court properly denied grandparents' motion to intervene, where the grandparental relationship did not alone support intervention, and intervention as of right was not appropriate, because there was a party in the underlying suit, the child's father, who could adequately

represent the grandparents' interests. Gonzalez v. Tenn. Dep't of Children's Servs., 136 S.W.3d 613, 2004 Tenn. LEXIS 566 (Tenn. 2004).

Jurisdiction to terminate parental or guardianship rights resides concurrently in the chancery, circuit, and juvenile courts under T.C.A. § 36-1-113(a); standing to intervene in a termination proceeding in juvenile court should be analyzed under Tenn. R. Civ. P. 24. Gonzalez v. Tenn. Dep't of Children's Servs., 136 S.W.3d 613, 2004 Tenn. LEXIS 566 (Tenn. 2004).

2. Permissive Intervention.

In the case of permissive intervention, the party seeking to intervene must show that there is a common question of law or fact between the intervenor's claim and the main action. State v. Brown & Williamson Tobacco Corp., 18 S.W.3d 186, 2000 Tenn. LEXIS 194 (Tenn. 2000), rehearing denied, State v. Brown & Williamson Tobacco Co., — S.W.3d —, 2000 Tenn. LEXIS 272 (Tenn. May 24, 2000).

If an intervenor's claim or defense contains a common question of law or fact between the intervenor's claim and the main action, the requirement of Tenn. R. Civ. P. 24.02 is satisfied and the trial court is afforded discretion to permit intervention. State v. Brown & Williamson Tobacco Corp., 18 S.W.3d 186, 2000 Tenn. LEXIS 194 (Tenn. 2000), rehearing denied, State v. Brown & Williamson Tobacco Co., — S.W.3d —, 2000 Tenn. LEXIS 272 (Tenn. May 24, 2000).

Permissive intervention is generally not proper when the intervenor seeks to raise new claims or issues against the existing parties. State v. Brown & Williamson Tobacco Corp., 18 S.W.3d 186, 2000 Tenn. LEXIS 194 (Tenn. 2000), rehearing denied, State v. Brown & Williamson Tobacco Co., — S.W.3d —, 2000 Tenn. LEXIS 272 (Tenn. May 24, 2000).

The decision to allow a permissive intervention is a matter entrusted to the trial court's discretion; absent a showing that the trial court abused its discretion, the appellate court will not reverse the trial court's decision. Manufacturers Consolidation Serv., Inc. v. Rodell, 42 S.W.3d 846, 2000 Tenn. App. LEXIS 148 (Tenn. Ct. App. 2000).

3. Conditions on Permissive Intervention.

Even highly restrictive conditions may be appropriately placed on a permissive intervenor, because such a party has by definition neither a statutory right to intervene nor any interest at stake that the other parties will not adequately protect or that it could not adequately protect in another proceeding. Manufacturers Consolidation Serv., Inc. v. Rodell, 42 S.W.3d 846, 2000 Tenn. App. LEXIS 148 (Tenn. Ct. App. 2000).

Where former shareholder's successor failed to meet the condition for intervention by failing to post a $1.6 million bond, the trial court did not abuse its discretion in dismissing complaint against former shareholder. Manufacturers Consolidation Serv., Inc. v. Rodell, 42 S.W.3d 846, 2000 Tenn. App. LEXIS 148 (Tenn. Ct. App. 2000).

4. Notice of Constitutional Challenge.

Tenn. R. Civ. P. 24.04 makes it clear that the trial court sits as gatekeeper to inquire whether notice has been provided to the attorney general by the challenger and to suspend the proceeding on the constitutional challenge until such notice has been provided and a response from the attorney general received. In re Adoption of E.N.R., 42 S.W.3d 26, 2001 Tenn. LEXIS 287 (Tenn. 2001).

A trial court is not expected to suspend a proceeding upon the untimely mention by counsel that a statute is unconstitutional; where a challenge is untimely raised, the trial court has no obligation under Tenn. R. Civ. P. 24.04. In re Adoption of E.N.R., 42 S.W.3d 26, 2001 Tenn. LEXIS 287 (Tenn. 2001).

5. Standing.

Deputy Sheriff's Association and individual deputies have no standing to intervene in sheriff's petition filed pursuant to T.C.A. § 8-20-101 et seq. seeking salary increases for deputies because the statute allows no such intervention and the intervenors have sustained no cognizable injury sufficient to grant them standing under Tenn. R. Civ. P. 24.02. Shelby County Deputy Sheriff's Ass'n v. Gilless, 972 S.W.2d 683, 1997 Tenn. App. LEXIS 724 (Tenn. Ct. App. 1997).

RULE 25

SUBSTITUTION OF PARTIES

25.01. Death. (1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of process. Unless the motion for

substitution is made not later than ninety (90) days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

NOTES TO DECISIONS

1. Compliance.

Denial of motions filed by the administrator ad litem for the estate of a third-party plaintiff was appropriate because, after a suggestion of death was properly served, the administrator ad litem inexcusably failed to move to substitute and failed to move for an enlargement of time to substitute. Likewise, the administrator ad litem failed to timely file a motion for reconsideration or to alter or amend. Pearson v. Koczera, — S.W.3d —, 2018 Tenn. App. LEXIS 246 (Tenn. Ct. App. May 7, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 619 (Tenn. Sept. 17, 2018), cert. denied, Dry v. Steele, 203 L. Ed. 2d 205, 139 S. Ct. 1205, — U.S. —, 2019 U.S. LEXIS 1346 (U.S. Feb. 19, 2019).

When a trial court held that the decedent's claims passed automatically on the decedent's death from unrelated causes after the commencement of a medical malpractice action to the surviving spouse without need to substitute parties, remand was necessary because the court erroneously ruled—that the co-executors of the estate were the appropriate parties to revive the action—and was to determine whether the response to the health care providers' motion to dismiss was to be construed as a motion for enlargement of time to substitute parties. Joshlin v. Halford, — S.W.3d —, 2019 Tenn. App. LEXIS 537 (Tenn. Ct. App. Nov. 6, 2019).

When a trial court held that the decedent's claims passed automatically on the decedent's death from unrelated causes after the commencement of a medical malpractice action to the surviving spouse without need to substitute parties, remand was necessary because the court erroneously ruled—as the co-executors of the estate were the appropriate parties to revive the action—and was to determine whether the response to the health care providers' motion to dismiss was to be construed as a motion for enlargement of time to substitute parties. Joshlin v. Halford, — S.W.3d —, 2019 Tenn. App. LEXIS 537 (Tenn. Ct. App. Nov. 6, 2019).

Trial court did not abuse its discretion in denying a motion to dismiss when a substitute plaintiff was not timely named following the death of original plaintiff and in granting a late-filed motion for substitution on the basis of excusable neglect because there was a delay in the issuance of a death certificate, there were procedural delays in the appointment of the executor, no prejudice resulted, the delay had little effect on the litigation as the original trial judge entered an order of recusal, and there was no allegation of bad faith. Valentine v. Holt, — S.W.3d —, 2020 Tenn. App. LEXIS 25 (Tenn. Ct. App. Jan. 22, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 328 (Tenn. June 3, 2020).

Appellate court found no abuse of discretion with permitting the estate of a deceased attorney to be substituted for the attorney as a party because, in the absence of a transcript or statement of the evidence, the appellate court had to presume that whatever statements were made or facts presented at the hearing on the motion established that the delay in filing the motion was due to excusable neglect. Furthermore, the burden was on the attorney's former clients to show an abuse of discretion on the part of the trial judge. Cordova ex rel. Alfredo C. v. Nashville Ready Mix, Inc., — S.W.3d —, 2020 Tenn. App. LEXIS 225 (Tenn. Ct. App. May 19, 2020).

25.02. Incompetency. If a party becomes incompetent, the court upon motion served as provided in Rule 25.01 may allow the action to proceed by or against the party's representative.

25.03. Transfer of Interest. In case of any transfer of interest the action may proceed by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in Rule 25.01.

25.04. Public Officers — Death or Separation from Office. (1) When an officer of the state, a county, a city or other governmental agency is a party to an action in the officer's official capacity and during its pendency dies, resigns, or otherwise ceases to hold the office, the action does not abate and the officer's successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When an officer of the state, a county, a city or other governmental agency sues or is sued in the officer's official capacity, he or she may be described as a party by the officer's official title rather than by name; but the court may require that the officer's name be added.

Advisory Commission Comments. 25.01: Prior law, whether common law or statute, (Tenn. Code Ann. §§ 20-5-101 – 20-5-120), governing survival of actions after death of a party is not changed by this rule. Rule 25.01 allows substitution of the proper parties upon motion and notice.

Rule 25.01 provides that suit will be dismissed unless a motion for substitution of party is made not later than 90 days after the death is suggested upon the record.

25.02: Rule 25.02 covers those cases in which a party, competent at the beginning of an action, later becomes incompetent. In such cases, the rule empowers the court, on motion, to allow the action to proceed by or against the incompetent's representative.

25.04: When a public officer sues or is sued in his or her official capacity, the real party in interest is normally the governmental institution or agency which the officer represents. Rule 25.04 recognizes this fact and provides for automatic substitution of a successor officer in case of the death, resignation or other vacation of office by the named officer. To avoid the whole problem, the Rule also allows the suit to be brought against a public officer in an official capacity by describing the officer by official title rather than by name.

Cross-References. Revivor of actions, T.C.A. title 20, ch. 5, § 30-2-320.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 71, 72, 239, 318, 319.

Pritchard on Wills and Administration of Estates (4th ed., Phillips and Robinson), §§ 707-709, 711-713, 857.

Tennessee Forms (Robinson, Ramsey and Harwell), No. 1-25.01-1.

Tennessee Jurisprudence. 1 Tenn. Juris., Abatement, Survival and Revival, §§ 10-30, 34, 35; 11 Tenn. Juris., Equity, § 35; 20 Tenn. Juris., Parties, § 8; 20 Tenn. Juris., Pleading, § 4.

Law Reviews. Judicial Review and the Uniform Administrative Procedures Act (Toxey H. Sewell), 6 Mem. St. U.L. Rev. 253.

Substitution (Shaun P. Martin), 73 Tenn L. Rev. 545 (2006).

NOTES TO DECISIONS

ANALYSIS

1. Substitution Not Authorized.
2. Substitution After Deadline.
3. Order of Revivor.
4. Filing Order of Substitution.

1. Substitution Not Authorized.

None of the provisions of Tenn. R. Civ. P. 25 authorized the substitution in a wrongful death action of the husband of deceased as plaintiff for the parents of deceased, the motion for substitution having been filed after the statute

of limitations had run but within a reasonable time after objection was made by the defendants to the status of the parents as real parties in interest. Chapman v. King, 572 S.W.2d 925, 1978 Tenn. LEXIS 666 (Tenn. 1978).

2. Substitution After Deadline.

Tenn. R. Civ. P. 25.01 should be construed to allow substitution of parties after the 90-day period has run if the failure to move within the period is the result of excusable neglect. Wagner v. Frazier, 712 S.W.2d 109, 1986 Tenn. App. LEXIS 2762 (Tenn. Ct. App. 1986).

3. Order of Revivor.

T.C.A. § 30-2-320 is good, valid and binding law in this state. Any references in that statute, or in any other part of the code, to an "order of revivor" shall be construed as references to an order of substitution of parties under Tenn. R. Civ. P. 25. Revivor of an action therefore requires first, entering an order of substitution of parties and second, filing a copy of that order with the clerk of the court in which the estate of the deceased party is being administered. Mid-South Pavers, Inc. v. Arnco Constr., Inc., 771 S.W.2d 420, 1989 Tenn. App. LEXIS 12 (Tenn. Ct. App. 1989).

The order of revivor mentioned in T.C.A. § 30-2-320 has been construed to mean an order of substitution under Tenn. R. Civ. P. 25. DuVoisin v. Coker (In re Southern Indus. Banking Corp.), 125 B.R. 517, 1991 Bankr. LEXIS 438 (Bankr. E.D. Tenn. 1991).

4. Filing Order of Substitution.

The procedures for substituting and pursuing a representative party in a lawsuit following a defendant's death are similar in both the federal and Tennessee courts since Tenn. R. Civ. P. 25, providing for the substitution of parties, is patterned after Fed. R. Civ. P. 25, but state law requires the additional procedural step of filing the order of substitution in the probate court administering the decedent's estate within the time specified by T.C.A. § 30-2-320. DuVoisin v. Coker (In re Southern Indus. Banking Corp.), 125 B.R. 517, 1991 Bankr. LEXIS 438 (Bankr. E.D. Tenn. 1991).

Where plaintiff failed to file the order of substitution required in T.C.A. § 30-2-320, the bankruptcy court still retained jurisdiction because this requirement is not required by Fed. R. Civ. P. 25. DuVoisin v. Coker (In re Southern Indus. Banking Corp.), 125 B.R. 517, 1991 Bankr. LEXIS 438 (Bankr. E.D. Tenn. 1991).

RULE 26

GENERAL PROVISIONS GOVERNING DISCOVERY

26.01. Discovery Methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property for inspection and other purposes; physical and mental examinations; and, requests for admission. [As amended July 1, 1979; and by order entered January 31, 1984.]

Law Reviews. "Bring Your Own Device" Programs: Employer Control Over Employee Devices in the Mobile E-Discovery Age, 82 Tenn. L. Rev. 443 (2015).

The Litigation Budget, 68 Vand. L. Rev. 855 (2015).

26.02. Discovery Scope and Limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) IN GENERAL. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things, and electronically stored information, i.e. information that is stored in an electronic medium and is retrievable in perceivable form, and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calcu-

lated to lead to the discovery of admissible evidence.

A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden and cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, e.g., where the party requesting discovery shows that the likely benefit of the proposed discovery outweighs the likely burden or expense, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues. The court shall specify conditions for the discovery.

The frequency or extent of use of the discovery methods set forth in subdivision 26.01 and this subdivision shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or, (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision 26.03.

(2) [Reserved.]

(3) TRIAL PREPARATION: MATERIALS. Subject to the provisions of subdivision (4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including an attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37.01(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral

statement by the person making it and contemporaneously recorded.

(4) TRIAL PREPARATION: EXPERTS. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. In addition, upon request in an interrogatory, for each person so identified, the party shall disclose the witness's qualifications (including a list of all publications authored in the previous ten years), a list of all other cases in which, during the previous four years, the witness testified as an expert, and a statement of the compensation to be paid for the study and testimony in the case.

(ii) A party may also depose any other party's expert witness expected to testify at trial.

(B) A party may not discover the identity of, facts known by, or opinions held by an expert who has been consulted by another party in anticipation of litigation or preparation for trial and who is not to be called as a witness at trial except as provided in Rule 35.02 or upon a showing that the party seeking discovery cannot obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (4)(A)(ii) and (4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) CLAIMS OF PRIVILEGE OR PROTECTION OF TRIAL PREPARATION MATERIALS. When a party withholds information otherwise discoverable under the rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege protection.

If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for determination of the claim.

If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved. [As amended July 1, 1979; by order entered January 31, 1984, effective August 20, 1984; and January 29, 1987, effective August 1, 1987; and by order effective July 1, 1997; by order entered January 28, 2000, effective July 1, 2000; by order filed January 31, 2002, effective July 1, 2002; by order filed January 31, 2003, effective July 1, 2003; by order filed January 8, 2009, effective July 1, 2009; and by order filed December 21, 2010, effective July 1, 2011.]

Advisory Commission Comments [2009]. Rule 26.02 is amended to parallel Rule 34.01 by recognizing that a party must disclose electronically stored information as well as documents that it may use to support its claims or defenses. The term "electronically stored information" has the same broad meaning in Rule 26.02 as in Rule 34.01. The term "data compilations" is deleted as unnecessary because it is a subset of both documents and electronically stored information.

Rule 1(3) of the *Uniform Rules Relating to Discovery of Electronically Stored Information*, National Conference of Commissioners On Uniform State Laws (2007), states: "'Electronically stored information' means information that is stored in an electronic medium and is retrievable in perceivable form."

The amendment to Rule 26.02 is designed to address issues raised by difficulties in locating, retrieving, and providing discovery of some electronically stored information. Electronic storage systems often make it easier to locate and retrieve information. These advantages are properly taken into account in determining the reasonable scope of discovery in a particular case. But some sources of electronically stored information can be accessed only with substantial burden and cost. In a particular case, these burdens and costs may make the information on such sources not reasonably accessible.

It is not possible to define in a rule the different types of technological features that may affect the burdens and costs of accessing electronically stored information. Information systems are designed to provide ready access to information used in regular ongoing activities. They also may be designed so as to provide ready access to information that is not regularly used. But a system may retain information on sources that are accessible only by incurring substantial burdens or costs. The amendment is added to regulate discovery from such sources.

Under this rule, a responding party should produce electronically stored information that is relevant, not privileged, and reasonably accessible, subject to the 26.02 limitations that apply to all discovery. The responding party must also identify, by category or type, the sources containing potentially responsive information that it is neither searching nor producing. The identification should, to the extent possible, provide enough detail to enable the requesting party to evaluate the burdens and costs of providing the discovery and the likelihood of finding responsive information on the identified sources.

A party's identification of sources of electronically stored information as not reasonably accessible does not relieve the party of its common-law or statutory duties to preserve evidence. Whether a responding party is required to preserve unsearched sources of potentially responsive information that it believes are not reasonably accessible depends on the circumstances of each case. It is often useful for the parties to discuss this issue early in discovery.

The volume of — and the ability to search — much electronically stored information means that in many cases the responding party will be able to produce information from reasonably accessible sources that will fully satisfy the parties' discovery needs. In many circumstances the requesting party should obtain and evaluate the information from such sources before insisting that the responding party search and produce information contained on sources that are not reasonably accessible. If the requesting party continues to seek discovery of information from sources identified as not reasonably accessible, the parties should discuss the burdens and costs of accessing and retrieving the information, the needs that may establish good cause for requiring all or part of the requested discovery even if the information sought is not reasonably accessible, and conditions on obtaining and producing the information that may be appropriate.

If the parties cannot agree whether, or on what terms, sources identified as not reasonably accessible should be searched and discoverable information produced, the issue may be raised either by a motion to compel discovery or by a motion for a protective order. The parties must confer before bringing either motion. If the parties do not resolve the issue and the court must decide, the responding party must show that the identified sources of information are not reasonably accessible because of undue burden or cost. The requesting party may need

discovery to test this assertion. Such discovery might take the form of requiring the responding party to conduct a sampling of information contained on the sources identified as not reasonably accessible; allowing some form of inspection of such sources; or taking depositions of witnesses knowledgeable about the responding party's information systems.

Once it is shown that a source of electronically stored information is not reasonably accessible, the requesting party may still obtain discovery by showing good cause, considering the limitations of Rule 26.02 that balance the costs and potential benefits of discovery. The decision whether to require a responding party to search for and produce information that is not reasonably accessible depends not only on the burdens and costs of doing so, but also on whether those burdens and costs can be justified in the circumstances of the case. Appropriate considerations may include: (1) the specificity of the discovery request; (2) the quantity of information available from other and more easily accessed sources; (3) the failure to produce relevant information that seems likely to have existed but is no longer available on more easily accessed sources; (4) the likelihood of finding relevant, responsive information that cannot be obtained from other, more easily accessed sources; (5) predictions as to the importance and usefulness of the further information; (6) the importance of the issues at stake in the litigation; and (7) the parties' resources.

The responding party has the burden as to one aspect of the inquiry — whether the identified sources are not reasonably accessible in light of the burdens and costs required to search for, retrieve, and produce whatever responsive information may be found. The requesting party has the burden of showing that its need for the discovery outweighs the burdens and costs of locating, retrieving, and producing the information. In some cases, the court will be able to determine whether the identified sources are not reasonably accessible and whether the requesting party has shown good cause for some or all of the discovery, consistent with the limitations of Rule 26.02, through a single proceeding or presentation. The good-cause determination, however, may be complicated because the court and parties may know little about what information the sources identified as not reasonably accessible might contain, whether it is relevant, or how valuable it may be to the litigation. In such cases, the parties may need some focused discovery, which may include sampling of the sources, to learn more about what burdens and costs are involved in accessing the information, what the information consists of, and how valuable it is for the litigation in light of information that can be obtained by exhausting other opportunities for discovery.

The good-cause inquiry and consideration of the Rule 26.02 limitations are coupled with the authority to set conditions for discovery. The conditions may take the form of limits on the amount, type, or sources of information required to be accessed and produced. The conditions may also include payment by the requesting party of part or all of the reasonable costs of obtaining information from sources that are not reasonably accessible. A requesting party's willingness to share or bear the access costs may be weighed by the court in determining whether there is good cause. But the producing party's burdens in reviewing the information for relevance and privilege may weigh against permitting the requested discovery.

The limitations of Rule 26.02 continue to apply to all discovery of electronically stored information, including that stored on reasonably accessible electronic sources.

The risk of privilege waiver, and the work necessary to avoid it, add to the costs and delay of discovery. When the review is of electronically stored information, the risk of waiver, and the time and effort required to avoid it, can increase substantially because of the volume of electronically stored information and the difficulty in ensuring that all information to be produced has in fact been reviewed. The amendment to Rule 26.02(5) provides a procedure for a party that has withheld information on the basis of privilege or protection as trial-preparation material to make the claim so that the requesting party can decide whether to contest the claim and the court can resolve the dispute. The second paragraph of Rule 26.02(5) is added to provide a procedure for a party to assert a claim of privilege or trial-preparation material protection after information is produced in discovery in the action and, if the claim is contested, permit any party that received the information to present the matter to the court for resolution.

The second paragraph of Rule 26.02(5) does not address whether the privilege or protection that is asserted after production was waived by the production. The courts have developed principles to determine whether, and under what circumstances, waiver results from inadvertent production of privileged or protected information. The second paragraph of Rule 26.02(5) provides a procedure for presenting and addressing these issues. The second paragraph works in tandem with Rule 26.06, which is amended to direct the parties to discuss privilege issues in preparing their discovery plan, and which, with amended Rule 16, allows the parties to ask the court to include in an order any agreements the parties reach regarding issues of privilege or trial-preparation material protection. Agreements reached under Rule 26.06 and orders including such agreements entered under Rule 16 may be considered when a court determines whether a waiver has oc-

curred. Such agreements and orders ordinarily control if they adopt procedures different from those in Rule 26.02(5).

A party asserting a claim of privilege or protection after production must give notice to the receiving party. That notice should be in writing unless the circumstances preclude it. Such circumstances could include the assertion of the claim during a deposition. The notice should be as specific as possible in identifying the information and stating the basis for the claim. Because the receiving party must decide whether to challenge the claim and may sequester the information and submit it to the court for a ruling on whether the claimed privilege or protection applies and whether it has been waived, the notice should be sufficiently detailed so as to enable the receiving party and the court to understand the basis for the claim and to determine whether waiver has occurred. Courts will continue to examine whether a claim of privilege or protection was made at a reasonable time when delay is part of the waiver determination under the governing law.

After receiving notice, each party that received the information must promptly return, sequester, or destroy the information and any copies it has. The option of sequestering or destroying the information is included in part because the receiving party may have incorporated the information in protected trial-preparation materials. No receiving party may use or disclose the information pending resolution of the privilege claim. The receiving party may present to the court the questions whether the information is privileged or protected as trial-preparation material, and whether the privilege or protection has been waived. If it does so, it must provide the court with the grounds for the privilege or protection specified in the producing party's notice, and serve all parties. In presenting the question, the party may use the content of the information only to the extent permitted by the applicable law of privilege, protection for trial-preparation material, and professional responsibility.

If a party disclosed the information to nonparties before receiving notice of a claim of privilege or protection as trial-preparation material, it must take reasonable steps to retrieve the information and to return it, sequester it until the claim is resolved, or destroy it.

Whether the information is returned or not, the producing party must preserve the information pending the court's ruling on whether the claim of privilege or of protection is properly asserted and whether it was waived. As with claims made under Rule 26.02(5), paragraph one, there may be no ruling if the other parties do not contest the claim.

Advisory Commission Comments [2011]. The sentence added to Rule 26.02(4)(A)(i) concerning discovery of information about those intended to be called as expert witnesses at trial is designed to minimize the cost of learning additional information about an opposing party's expert witnesses. The change permitting the discovery of a list of cases where the expert gave testimony during the previous four years includes expert testimony given in a hearing, deposition, trial, administrative or arbitration proceeding. The list should include the case name, docket number and jurisdiction for court and administrative proceedings and, for arbitrations, information sufficient for the recipient to identify the counsel to the parties in the arbitration.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 8, 2009, was ratified and approved by 2009 House Resolution 18 and Senate Resolution 19. The order promulgating the amendment of this rule provided that it take effect July 1, 2009.

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated December 14, 2009, was not ratified and approved by resolutions of the General Assembly. Senate Resolution 177 and 2010 House Resolution 243 were not ratified and approved as required by the provisions of T.C.A. § 16-3-402 et seq.

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated December 21, 2010, was ratified and approved by 2011 House Resolution 34 and Senate Resolution 12. The order promulgating the amendment of this rule provided that it take effect July 1, 2011.

Law Reviews. "Bring Your Own Device" Programs: Employer Control Over Employee Devices in the Mobile E-Discovery Age, 82 Tenn. L. Rev. 443 (2015).

Electronic Surveillance in Family Law, 50 Tenn. B.J. 28 (2014).

ESI Tennessee: At the Intersection of Privilege and E-Discovery (M. James Thomas), 44 Tenn. B.J. 14 (2008).

NOTES TO DECISIONS

ANALYSIS

1. Expert Testimony Admissible.
2. Attorney's Work Product.
3. Failure to Disclose.

1. Expert Testimony Admissible.

In a medical malpractice case, it was not error to allow a physician's experts to testify about opinions that a hospital's nursing staff was at fault, when those opinions were alleg-

edly not disclosed in the physician's expert disclosures, because: (1) The testimony of the experts as to the actions of the nursing staff was adequately disclosed, as the disclosures stated that the nursing staff was required to notify the physician when a patient's coma score dropped significantly, and (2) The testimony responded to criticisms by opposing experts. Stanfield v. Neblett, 339 S.W.3d 22, 2010 Tenn. App. LEXIS 373 (Tenn. Ct. App. June 4, 2010), appeal denied, — S.W.3d —, 2011 Tenn. LEXIS 39 (Tenn. Jan. 13, 2011).

2. Attorney's Work Product.

Court of criminal appeals erred in reversing the trial court's order dismissing petitioner's application for a writ of error coram nobis because the assistant district attorney's handwritten note petitioner discovered was not newly discovered evidence on which a petition for writ of error coram nobis could be based; the handwritten note recording the assistant prosecutor's impressions as to the credibility of witnesses qualified as a memorandum prepared in anticipation of trial and constituted work product under Tenn. R. Crim. P. 16(a)(2), and thus, the note was neither discoverable nor admissible. Wilson v. State, 367 S.W.3d 229, 2012 Tenn. LEXIS 288 (Tenn. Apr. 20, 2012), writ denied, — S.W.3d —, 2014 Tenn. Crim. App. LEXIS 754 (Tenn. Crim. App. July 30, 2014), overruled in part, Nunley v. State, 552 S.W.3d 800, 2018 Tenn. LEXIS 382 (Tenn. July 19, 2018).

3. Failure to Disclose.

Expert witness was not properly disclosed as an expert on the standard of nursing care and whether the hospital's nurses complied with that standard of care as the hospital's adopted expert disclosures did not state that the expert was expected to offer any opinion with regard to the nursing standard of care and whether the hospital's nurses complied with that standard of care. Mayo v. Shine, 392 S.W.3d 61, 2012 Tenn. App. LEXIS 425 (Tenn. Ct. App. June 25, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 807 (Tenn. Oct. 18, 2012).

26.03. Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37.01(4) apply to the award of expenses incurred in relation to the motion. [As amended July 1, 1979.]

NOTES TO DECISIONS

Analysis

1. Good Cause Shown.
2. Modification.

1. Good Cause Shown.

Good cause was shown for a protective order denying a juvenile court clerk's discovery requests against a juvenile court because the only issue before the juvenile court at the civil contempt hearing below was whether the clerk willfully failed to comply with the juvenile court's straightforward order to produce specified files, and none of the discovery sought related to the clerk's efforts to comply with the order. In re Lineweaver, 343 S.W.3d 401, 2010

Tenn. App. LEXIS 75 (Tenn. Ct. App. Jan. 28, 2010), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 769 (Tenn. Aug. 25, 2010).

2. Modification.

It was error to deny, on res judicata grounds, a petition to modify a protective order, when the petition was filed after a voluntary nonsuit of the underlying case, because the court's power to continue the protective order after the nonsuit implied a power to modify the order. Autin v. Goetz, 524 S.W.3d 617, 2017 Tenn. App. LEXIS 114 (Tenn. Ct. App. Feb. 22, 2017).

Appellate court could consider a trial court's jurisdiction to modify a protective order after a voluntary nonsuit when the issue was not timely raised in the trial court because subject matter jurisdiction could be raised at any time. Autin v. Goetz, 524 S.W.3d 617, 2017 Tenn. App. LEXIS 114 (Tenn. Ct. App. Feb. 22, 2017).

Voluntary nonsuit did not deprive a trial court of jurisdiction to later modify a protective order because (1) nonsuit did not occur until a confirming order was entered, (2) the order expressly did not terminate until further order, and (3) depriving the court of jurisdiction would limit the order's protection and the court's inherent supervisory power over the court's records. Autin v. Goetz, 524 S.W.3d 617, 2017 Tenn. App. LEXIS 114 (Tenn. Ct. App. Feb. 22, 2017).

26.04. Sequence and Timing of Discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery. [As amended July 1, 1979.]

26.05. Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement the party's response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters; and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of that testimony.

(2) A party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which the party (A) knows that the response was incorrect when made; or (B) knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses also may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses. [As amended July 1, 1979; and by order filed January 31, 2002, effective July 1, 2002.]

NOTES TO DECISIONS

1. Opinion Not Permitted.

Expert witness was not properly disclosed as an expert on the standard of nursing care and whether the hospital's nurses complied with that standard of care as the hospital's adopted expert disclosures did not state that the expert was expected to offer any opinion with regard to the nursing standard of care and whether the hospital's nurses complied with that standard of care. Mayo v. Shine, 392 S.W.3d 61, 2012 Tenn. App. LEXIS 425 (Tenn. Ct. App. June 25, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 807 (Tenn. Oct. 18, 2012).

26.06. Discovery Conference. (1) At any time after commencement of an action the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

(A) A statement of the issues as they then appear;

(B) A proposed plan and schedule of discovery;

(C) Any limitations proposed to be placed on discovery;

(D) Any other proposed orders with respect to discovery; and

(E) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and the party's attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than 10 days after service of the motion.

(2) In any case in which an issue regarding the discovery of electronically stored information is raised or is likely to be raised, a judge should encourage counsel to meet and confer in order to voluntarily come to an agreement on the discovery of electronically stored information and on a schedule that will enable discovery to be completed within the time period specified in the Rules of Civil Procedure or by a scheduling order.

(3) In any case in which an issue regarding the discovery of electronically stored information is raised or is likely to be raised, and in which counsel have not reached agreement, a judge upon its own initiative or upon a motion by the attorney for any party may order the attorneys for the parties to appear before it for a conference and, after reasonable notice to and an opportunity to be heard from the parties, may issue an order governing the discovery of electronically stored information.

(4) The judge upon its initiative, or upon a motion by the attorney, may direct the attorneys for the parties to appear before it for a further conference to ascertain whether counsel have reached any agreements and to address any disputes regarding electronic discovery issues, e.g., (a) the electronically stored information to be exchanged including information that is not readily accessible; (b) the form of production; (c) the steps the parties will take to segregate and preserve relevant electronically stored information; (d) the procedures to be used if privileged electronically stored information is inadvertently disclosed; and (e) the allocation of costs.

(5) Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes; establishing a plan and schedule for discovery; setting limitations on discovery, if any; and, determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

(6) The shifting of discovery costs to the requesting party or the sharing of those costs between the requesting and responding party should be considered when electronically stored information sought is not reasonably accessible information and when restoration and production of responsive electronically stored information from a small sample of the requested electronically stored

information would not be sufficient. When these conditions are present, the judge should consider the following factors in determining whether any or all discovery costs should be borne by the requesting party: the extent to which the request is specifically tailored to discover relevant information; the availability of such information from other sources; the total cost of production compared to the amount in controversy; the total cost of production compared to the resources available to each party; the relative ability of each party to control costs and its incentive to do so; the importance of the issues at stake in the litigation; and the relative benefits of obtaining the information.

(7) Subject to the right of a party who properly moves for a discovery conference to a prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16. [Added by order entered January 31, 1984, effective August 20, 1984; amended by order entered January 8, 2009, effective July 1, 2009.]

Advisory Commission Comments [2009]. Rule 26.06 is amended to direct the parties to discuss discovery of electronically stored information during their discovery-planning conference. The rule focuses on "issues relating to discovery of electronically stored information"; the discussion is not required in cases not involving electronic discovery, and the amendment imposes no additional requirements in those cases. When the parties do anticipate discovery of electronically stored information, discussion at the outset may avoid later difficulties or ease their resolution.

When a case involves discovery of electronically stored information, the issues to be addressed during the Rule 26.06 conference depend on the nature and extent of the contemplated discovery and of the parties' information systems. It may be important for the parties to discuss those systems, and accordingly important for counsel to become familiar with those systems before the conference. With that information, the parties can develop a discovery plan that takes into account the capabilities of their computer systems. In appropriate cases, identification of, and early discovery from, individuals with special knowledge of a party's computer systems may be helpful.

The particular issues regarding electronically stored information that deserve attention during the discovery planning stage depend on the specifics of the given case. *See Manual for Complex Litigation (4th)* § 40.25(2) (listing topics for discussion in a proposed order regarding meet-and-confer sessions). For example, the parties may specify the topics for such discovery and the time period for which discovery will be sought. They may identify the various sources of such information within a party's control that should be searched for electronically stored information. They may discuss whether the information is reasonably accessible to the party that has it, including the burden or cost of retrieving and reviewing the information. *See* Rule 26.02(1), paragraph 2. The parties also may discuss the form or forms in which electronically stored information might be produced. The parties may be able to reach agreement on the forms of production, making discovery more efficient. Rule 34.02 is amended to permit a requesting party to specify the form or forms in which it wants electronically stored information produced. If the requesting party does not specify a form, Rule 34.02 directs the responding party to state the forms it intends to use in the production. Early discussion of the forms of production may facilitate the application of Rule 34.02(b) by allowing the parties to determine what forms of production will meet both parties' needs. Early identification of disputes over the forms of production may help avoid the expense and delay of searches or productions using inappropriate forms.

Under amended Rule 26.06, the parties may discuss any issues regarding preservation of discoverable information during their conference as they develop a discovery plan. This topic applies to all sorts of discoverable information, but can be particularly important with regard to electronically stored information. The volume and dynamic nature of electronically stored information may complicate preservation obligations. The ordinary operation of computers involves both the automatic creation and the automatic deletion or overwriting of certain information. Failure to address preservation issues early in the litigation increases uncertainty and raises a risk of disputes.

The parties' discussion should pay particular attention to the balance between the competing needs to preserve relevant evidence and to continue routine operations critical to ongoing activities. Complete or broad cessation of a party's routine computer operations could paralyze the party's activities. *Cf. Manual for Complex Litigation (4th)* § 11.422 ("A blanket preservation order may be prohibitively expensive

and unduly burdensome for parties dependent on computer systems for their day-to-day operations.") The parties should take account of these considerations in their discussions, with the goal of agreeing on reasonable preservation steps.

The reference in 26.06(4) to disputes concerning preservation does not imply that courts should routinely enter preservation orders. A preservation order entered over objections should be narrowly tailored. Ex parte preservation orders should issue only in exceptional circumstances.

Under amended Rule 26.06, the parties should discuss any issues relating to assertions of privilege or of protection as trial-preparation materials, including whether the parties can facilitate discovery by agreeing on procedures for asserting claims of privilege or protection after production and whether to ask the court to enter an order that includes any agreement the parties reach.

These problems often become more acute when discovery of electronically stored information is sought. The volume of such data, and the informality that attends use of e-mail and some other types of electronically stored information, may make privilege determinations more difficult, and privilege review correspondingly more expensive and time consuming. Other aspects of electronically stored information pose particular difficulties for privilege review. For example, production may be sought of information automatically included in electronic files but not apparent to the creator or to readers. Computer programs may retain draft language, editorial comments, and other deleted matter (sometimes referred to as "embedded data" or "embedded edits") in an electronic file but not make them apparent to the reader. Information describing the history, tracking, or management of an electronic file (sometimes called "metadata") is usually not apparent to the reader viewing a hard copy or a screen image. Whether this information should be produced may be among the topics discussed in the Rule 26.06 conference. If it is, it may need to be reviewed to ensure that no privileged information is included, further complicating the task of privilege review.

Parties may attempt to minimize these costs and delays by agreeing to protocols that minimize the risk of waiver. They may agree that the responding party will provide certain requested materials for initial examination without waiving any privilege or protection — sometimes known as a "quick peek." The requesting party then designates the documents it wishes to have actually produced. This designation is the Rule 34 request. The responding party then responds in the usual course, screening only those documents actually requested for formal production and asserting privilege claims as provided in Rule 26.02(5), paragraph one. On other occasions, parties enter agreements sometimes called "clawback agreements" — that production without intent to waive privilege or protection should not be a waiver so long as the responding party identifies the documents mistakenly produced, and that the documents should be returned under those circumstances. Other voluntary arrangements may be appropriate depending on the circumstances of each litigation. In most circumstances, a party who receives information under such an arrangement cannot assert that production of the information waived a claim of privilege or of protection as trial-preparation material.

Although these agreements may not be appropriate for all cases, in certain cases they can facilitate prompt and economical discovery by reducing delay before the discovering party obtains access to documents, and by reducing the cost and burden of review by the producing party. A case-management or other order including such agreements may further facilitate the discovery process. Rule 16.02(b) is amended to recognize that the court may include such an agreement in a case-management or other order. If the parties agree to entry of such an order, their proposal should be included in the report to the court.

Rule 26.06(6) regarding reallocation of costs involved in discovery of electronically stored information is based upon Guideline 7 ("Reallocation of Discovery Costs"), *Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information*, Conference of Chief Justices (2006).

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 8, 2009, was ratified and approved by 2009 House Resolution 18 and Senate Resolution 19. The order promulgating the amendment of this rule provided that it take effect July 1, 2009.

26.07. Signing of Discovery Requests, Responses, and Objections. Every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that the attorney or party has read the request, response,

or objection, and that to the best of that person's knowledge, information and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and, (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee. [Added by order entered January 31, 1984, effective August 20, 1984.]

Advisory Commission Comments. Rules 26 and 30 do not repeal T.C.A. Tit. 24, Ch. 9, but are cumulative thereto.

Rules 26 through 37, inclusive, relating to depositions and discovery, have been amended [in 1979] to conform substantially but not identically to Rules 26 through 37, inclusive, of the Federal Rules of Civil Procedure. Each rule should be compared carefully with its Federal counterpart to determine the differences if any. [1979.]

Subdivisions (3) and (4) of Rule 26.02 provide detailed rules in the heretofore uncharted areas of discovery of work product and expert testimony. [1979.]

Rule 26.05 is a detailed rule dealing with supplementation of responses previously made. [1979.]

26.02(1): A paragraph virtually identical to the 1983 federal amendment is suggested. The Commission is of the view that unbounded discovery can and has led to abuse. The court can limit unnecessary and unduly burdensome discovery under the criteria set forth in the amendment. [1984.]

(4): The [1987] revision should reduce meritless claims and defenses by protecting consultation with experts without fear of disclosing their identity. The Commissioners found in practice that allowing discovery of the identity of a mere consulting expert substantially interfered with trial preparation. Consequently, the amendment would prevent discovery except in rare instances. [1987.]

Depositions of trial experts are now a matter of right. [1997.]

26.04: Rule 26.04 restates the text of T.C.A. § 24-1208 [repealed] with the following differences: The Rule permits the use of the deposition of a managing agent of an individual proprietorship which is a party. The Rule also adds a provision that the deposition of a witness may be used at the trial when: (1) the witness is more than 100 miles from the place of trial, or (2) the witness has a right to claim exemption from attendance at the trial, or (3) when the parties consent to the use. Paragraph (e) of T.C.A. § 24-1208 [repealed] appears as Rule 26.06.

26.05: Rule 26.05 restates the substance of T.C.A. § 24-1210 [repealed].

26.06: The court can order a discovery conference or a party can obtain a conference by a properly detailed motion, including efforts made to reach agreement on planning and scheduling. Note that the court's order must identify – at least tentatively – the "issues for discovery purposes." [1984.]

26.07: This [1984] amendment places a burden on the lawyer to insure that the philosophy of the discovery scope amendment is adhered to. The Commission favors the concept that a lawyer's signature constitutes a certificate as to the enumerated matters, with sanctions sufficient to encourage compliance. [1984.]

Advisory Commission Comments [2000]. The Supreme Court in *Hawkins v. Superior Motors, Inc.*, 999 S.W.2d 769 (1999), noted that — unlike federal procedure — state rules contained no provision for privilege logs. New rule 26.02(5) adopts the federal language, making this mechanism available in state courts.

Advisory Commission Comments [2001]. The Commission is of the opinion that a party

has a duty under the criteria in Rule 26.05(2) to supplement responses made during a deposition.

Advisory Commission Comments [2002]. Addition of the word "also" in Rule 26.05(3) makes clear that subsections (1) and (2) require supplementation without regard to a court order and the like.

Advisory Commission Comments [2003]. The introduction to Rule 26.02 is amended to delete a reference to nonexistent Tennessee Rule of Evidence 412.1, a proposal withdrawn by the Supreme Court during the 2002 legislative session.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 31, 2003, was ratified and approved by 2003 House Resolution 21 and Senate Resolution 8. The order promulgating the 2003 amendment of this rule provided that it take effect on July 1, 2003.

Cross-References. Depositions, T.C.A. title 24, ch. 9.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), § 561.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-26.02-1, 1-26.03-1, 1-26.03-2, 1-26.05-1, 1-26.05-2, 1-26.06-1, 1-30.02-1 — 1-30.02-3, 1-30.02-5, 1-30.02-6, 1-31.01-1, 1-33-3, 1-33-6, 1-37.01-2, 1-37.05-1, 1-45.01-2.

Tennessee Jurisprudence. 1 Tenn. Juris., Amendments, § 12; 8 Tenn. Juris., Criminal Procedure, § 26; 9 Tenn. Juris., Damages, § 34; 9 Tenn. Juris., Discovery, §§ 2, 4-7; 11 Tenn. Juris., Evidence, § 195; 25 Tenn. Juris., Witnesses, § 27.

Tennessee Law of Evidence (Paine, Schaffner, and Ulin), §§ 51-54.

Law Reviews. Amended Rules (Donald F. Paine), 36 No. 6 Tenn. B.J. 13 (2000).

As a Matter of Law: Summary Judgment in Medical Malpractice Litigation in Tennessee, 15 Mem. St. U. L. Rev. 55 (1984).

Can We Talk? The Rest of the Story or Why Defense Attorneys Should Not Talk to the Plaintiff's Doctors (Bobby Russ), 39 No. 2 Tenn. B.J. 29 (2003).

Civil Procedure — Discovery of the Identity of a Nontestifying Expert in Tennessee, 16 Mem. St. U.L. Rev. 271 (1986).

Davis v. Davis: The End of Interspousal Tort Immunity Tips the Scales on the Last Intrafamilial Immunity Stronghold, 14 Mem. St. U.L. Rev. 270 (1984).

Defending Against Discovery in Civil Actions (Maurice Wexler), 21 No. 2 Tenn. B.J. 13 (1985).

Expert Witness Conflicts and Compensation, 67 Tenn. L. Rev. 909 (2000).

Is this deposition for discovery or proof? (Donald F. Paine), 36 No. 5 Tenn. B.J. 20 (2000).

Revised Federal Discovery Rules are an Improvement (Donald F. Paine), 37 No. 3 Tenn. B.J. 31 (2001).

Sanctions For Discovery Abuse, (Donald F. Paine), 27 No. Tenn. B.J. 19 (1991).

Sanctions For Discovery Abuse (Donald F. Paine), 28 No. 1 Tenn. B.J. 23 (1992).

Tennessee and Federal Rules of Civil Procedure (Donald F. Paine), 27 No. 5 Tenn. B.J. 25 (1991).

The Bearman Rule (Donald F. Paine), 39 No. 4 Tenn. B.J. 33 (2003).

"To Have and Not Hold: Applying the Discovery Rule to Loss of Consortium Claims Stemming from Premarital Latent Injuries," 53 Vand. L. Rev. 685 (2000).

When Is Your Work "Work Product"? (Henry D. Finche), 33 No. 1 Tenn. B.J. 22 (1997).

Yesterday's Vision, Tomorrow's Challenge: Case Management and Alternative Dispute Resolution in Tennessee, 26 U. Mem. L. Rev. 957 (1996).

1985 Tennessee Survey: Selected Developments in Tennessee Law, 53 Tenn. L. Rev. 291 (1986).

Attorney General Opinions. Confidential communications between an employee of a sheriff's department and a clergy member are not subject to discovery, OAG 01-009 (1/25/01).

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1. Construction.

The key phrase in the definition to Tenn. R. Civ. P. 26.02(1), "relevant to the subject matter involved in the pending action" has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other

matters that could bear on, any issue that is or may be in the case. Price v. Mercury Supply Co., 682 S.W.2d 924, 1984 Tenn. App. LEXIS 3422 (Tenn. Ct. App. 1984).

Records sealed by protective orders pursuant to the Rules of Civil Procedure are not subject to disclosure under T.C.A. § 10-7-503. State v. Phillips, 924 S.W.2d 662, 1996 Tenn. LEXIS 376 (Tenn. 1996).

The fact that a document is discoverable under Tenn. R. Civ. P. 26.02 does not mean that the opposing party has a separate and independent legal duty to make the document available. Glazer v. First Am. Nat'l Bank, 930 S.W.2d 546, 1996 Tenn. LEXIS 582 (Tenn. 1996), rehearing denied, — S.W.2d —, 1996 Tenn. LEXIS 693 (Tenn. 1996).

2. Federal Rules.

In general, Tenn. R. Civ. P. 26 is identical to Fed. R. Civ. P. 26. Austin v. Memphis, 684 S.W.2d 624, 1984 Tenn. App. LEXIS 3086 (Tenn. Ct. App. 1984), aff'd in part, rev'd in part, Austin v. State, 796 S.W.2d 449, 1990 Tenn. LEXIS 299 (Tenn. 1990).

To show good cause under similar Fed. R. Civ. P. 26(c), the moving party must demonstrate specific examples of harm and not mere conclusory allegations. When confidential commercial information is involved, this standard requires a showing that disclosure will result in a clearly defined and very serious injury to the company's business, or, stated differently, great competitive disadvantage and irreparable harm. Loveall v. American Honda Motor Co., 694 S.W.2d 937, 1985 Tenn. LEXIS 605 (Tenn. 1985).

3. Deposition Law of 1959.

Tenn. R. Civ. P. 26 and Tenn. R. Civ. P. 30 are identical to, but supersede, the Deposition Law of 1959. Ingram v. Phillips, 684 S.W.2d 954, 1984 Tenn. App. LEXIS 3387 (Tenn. Ct. App. 1984).

4. Discovery of Financial Condition Relevant to Punitive Damages.

In a case in which the complaint seeks punitive damages, the plaintiff should be permitted to discover the defendant's financial condition if it appears from the discovery on the merits that a factual basis for punitive damages exists. Breault v. Friedli, 610 S.W.2d 134, 1980 Tenn. App. LEXIS 391 (Tenn. Ct. App. 1980).

If a plaintiff seeking punitive damages is unable to show through discovery that a factual basis for punitive damages exists, the trial court can prohibit discovery of the defendant's financial condition under Tenn. R. Civ. P. 26.03(1). Breault v. Friedli, 610 S.W.2d 134, 1980 Tenn. App. LEXIS 391 (Tenn. Ct. App. 1980).

5. Sanctions Generally.

When the rules do not provide a sanction for those violations which defeat the purpose of the rule, it is mandatory that the trial judge have the authority to take such action as necessary to achieve that purpose. Strickland v. Strickland, 618 S.W.2d 496, 1981 Tenn. App. LEXIS 503 (Tenn. Ct. App. 1981).

The trial judge has the authority to authorize sanctions when a party abuses the discovery process; excluding the party's expert testimony was not an abuse of discretion when the party had failed to name the party's experts earlier and when the order did not allow the party to supplement the party's list of witnesses. Yadon v. Rist (In re Estate of Brock), 63 S.W.3d 729, 2001 Tenn. App. LEXIS 482 (Tenn. Ct. App. 2001), appeal denied, Brock v. Rist, — S.W.3d —, 2002 Tenn. LEXIS 14 (Tenn. 2002).

Denial of discovery sanctions against the state in the individual's action for damages after she fell into a hole in a state park was improper where the photographs of the accident sites were not offered at trial and were taken several months after the accident; although the trial court did not condone a failure to disclose, it was not of the opinion that the error prejudiced the individual's case, Tenn. R. Civ. P. 26.02. Cornell v. State, 118 S.W.3d 374, 2003 Tenn. App. LEXIS 299 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 968 (Tenn. Oct. 6, 2003).

6. Identity and Location of Persons Having Knowledge.

A party may not be questioned on pretrial discovery deposition for the identity of factual witnesses to be used at the trial. Strickland v. Strickland, 618 S.W.2d 496, 1981 Tenn. App. LEXIS 503 (Tenn. Ct. App. 1981).

Where the party willfully, knowingly, and intentionally withheld the name of a person with knowledge of discoverable matter, the imposition of the sanction of not permitting that person to testify is strongly suggested. Strickland v. Strickland, 618 S.W.2d 496, 1981 Tenn. App. LEXIS 503 (Tenn. Ct. App. 1981).

Where a party has not given the name of a person with knowledge of discoverable matter, the court should consider the explanation given for the failure to name the witness, the importance of the testimony of the witness, the need for time to prepare to meet the testimony, and the possibility of a continuance; the court may then permit the witness to testify, or it may exclude the testimony, or it may grant a continuance so that the other side may take the deposition of the witness or otherwise prepare to meet the testimony. Strickland v. Strickland, 618 S.W.2d 496, 1981 Tenn. App. LEXIS 503 (Tenn. Ct. App. 1981); Lyle v. Exxon Corp., 746 S.W.2d 694, 1988 Tenn. LEXIS 172 (Tenn. 1988).

Where defendant violated Tenn. R. Civ. P. 26.02(1) by failing to disclose name of witness, the fact that photographs taken by the witness were introduced into evidence does not render

admissible the testimony of the witness. Strickland v. Strickland, 618 S.W.2d 496, 1981 Tenn. App. LEXIS 503 (Tenn. Ct. App. 1981).

In a negligence action arising from an automobile accident, the defendant was required to disclose the identity of a private investigator and make photographs available in response to plaintiff's request; a local court rule on the exchange of witness lists which excluded rebuttal and impeachment witnesses was not applicable. Pettus v. Hurst, 882 S.W.2d 783, 1993 Tenn. App. LEXIS 735 (Tenn. Ct. App. 1993).

7. Experts.

An expert whose information was not acquired in preparation for trial but rather because he was an actor or viewer of the occurrence should be treated as an ordinary witness and not as an expert. Alessio v. Crook, 633 S.W.2d 770, 1982 Tenn. App. LEXIS 466 (Tenn. Ct. App. 1982), superseded by statute as stated in, Givens v. Mullikin, 75 S.W.3d 383, 2002 Tenn. LEXIS 153 (Tenn. 2002), but see, Givens v. Mullikin, 75 S.W.3d 383, 2002 Tenn. LEXIS 153 (Tenn. 2002); Austin v. Memphis, 684 S.W.2d 624, 1984 Tenn. App. LEXIS 3086 (Tenn. Ct. App. 1984), aff'd in part, rev'd in part, Austin v. State, 796 S.W.2d 449, 1990 Tenn. LEXIS 299 (Tenn. 1990); Airline Constr., Inc. v. Barr, 807 S.W.2d 247, 1990 Tenn. App. LEXIS 847 (Tenn. Ct. App. 1990).

Tenn. R. Civ. P. 26.02(1) permits the discovery of identifying information concerning an adverse party's formally retained expert who is not expected to be called at trial without a demonstration that exceptional circumstances exist. Vythoulkas v. Vanderbilt University Hospital, 693 S.W.2d 350, 1985 Tenn. App. LEXIS 3392 (Tenn. Ct. App. 1985), superseded by statute as stated in, Thomas v. Oldfield, — S.W.3d —, 2007 Tenn. App. LEXIS 680 (Tenn. Ct. App. Nov. 7, 2007).

As to the discovery of nontestifying medical experts who have been retained to assist plaintiffs in medical malpractice review actions, the court found no basis to establish standards for medical malpractice cases higher than those that would be applied in any other case involving experts who have been retained to assist in trial preparation but who are not expected to testify. Vythoulkas v. Vanderbilt University Hospital, 693 S.W.2d 350, 1985 Tenn. App. LEXIS 3392 (Tenn. Ct. App. 1985), superseded by statute as stated in, Thomas v. Oldfield, — S.W.3d —, 2007 Tenn. App. LEXIS 680 (Tenn. Ct. App. Nov. 7, 2007).

A person who is an expert in a trade or science but who is neither retained nor specially employed but merely is, has been and will be an employee of defendant without regard to the pendency of the claim, should not be regarded as an expert for purposes of discovery. Airline Constr., Inc. v. Barr, 807 S.W.2d 247, 1990 Tenn. App. LEXIS 847 (Tenn. Ct. App. 1990).

Retained consulting experts, not expected to testify at trial, are immune from discovery as to facts and opinions developed in their field of expertise prior to their employment, pursuant to Tenn. R. Civ. P. 26.02(4)(B). Downing v. Bowater, Inc., 846 S.W.2d 265, 1992 Tenn. App. LEXIS 792 (Tenn. Ct. App. 1992), rehearing denied, 846 S.W.2d 265, 1992 Tenn. App. LEXIS 865 (Tenn. 1992), appeal denied, — S.W.2d —, 1992 Tenn. LEXIS 679 (Tenn. 1992).

Whether an expert was consulted in anticipation of litigation must be determined from the intent of the party and its attorneys. Arnold v. City of Chattanooga, 19 S.W.3d 779, 1999 Tenn. App. LEXIS 765 (Tenn. Ct. App. 1999), review or rehearing denied, — S.W.3d —, 2000 Tenn. LEXIS 349 (Tenn. 2000).

The designation of experts as testifying witnesses, even if that designation is subsequently withdrawn, takes an opposing party's demand to depose and use the expert at trial out of the requirements of Tenn. R. Civ. P. 26.02(4)(B). White v. Vanderbilt Univ., 21 S.W.3d 215, 1999 Tenn. App. LEXIS 874 (Tenn. Ct. App. 1999).

The Tenn. R. Civ. P. 26.02(4)(A) designation of an expert as a testifying expert does not automatically entitle the opposing party to depose or use another party's experts at trial; rather, the trial court must use its discretion, guided by Tenn. Rule Evid. 403's balancing of probative value against prejudice, to determine whether the opposing party should be permitted to call, depose, or use the other party's expert at trial. White v. Vanderbilt Univ., 21 S.W.3d 215, 1999 Tenn. App. LEXIS 874 (Tenn. Ct. App. 1999).

Tenn. R. Civ. P. 26.02(4)(B) was inapplicable where consulting expert was eventually designated as a testifying expert. White v. Vanderbilt Univ., 21 S.W.3d 215, 1999 Tenn. App. LEXIS 874 (Tenn. Ct. App. 1999).

Trial court correctly found physician was an expert witness on the standard of care issue whose identity should have been disclosed by plaintiff in plaintiff's answers to interrogatories pursuant to Tenn. R. Civ. P. 26.02(4); nevertheless, in the event that the trial court erred in excluding the testimony, it could not be said that the excluded testimony more probably than not affected the judgment. Buckner v. Hassell, 44 S.W.3d 78, 2000 Tenn. App. LEXIS 721 (Tenn. Ct. App. 2000), review or rehearing denied, — S.W.3d —, 2001 Tenn. LEXIS 361 (Tenn. 2001).

Trial court erred in excluding the deposition of plaintiffs' expert witness in plaintiffs' response to defendants' summary judgment motion. An expert deposition taken in accordance with Tenn. R. Civ. P. 26 could be offered by a party to oppose summary judgment to the same extent that an affidavit may be so used. Dial v. Harrington, 138 S.W.3d 895, 2003 Tenn. App. LEXIS 761 (Tenn. Ct. App. 2003), appeal de-

nied, — S.W.3d —, 2004 Tenn. LEXIS 275 (Tenn. Mar. 22, 2004).

8. Literature.

Tenn. R. Civ. P. 26 does not require a party to list the literature expected to be used on cross-examination. Stokes v. Leung, 651 S.W.2d 704, 1982 Tenn. App. LEXIS 500 (Tenn. Ct. App. 1982).

9. Statement Pursuant to Insurance Policy.

The taking of a statement under the cooperation clause in an insurance policy does not rise to the level of taking a deposition under Tenn. R. Civ. P. 26 or 27. Shelter Ins. Cos. v. Spence, 656 S.W.2d 36, 1983 Tenn. App. LEXIS 709 (Tenn. Ct. App. 1983).

10. Effect on Competency of Evidence.

A litigant would be penalized for utilizing discovery if, by the acquisition of information under the discovery rule, it would render incompetent evidence competent; therefore, the taking of discovery depositions does not necessarily render competent evidence otherwise incompetent under T.C.A. § 24-1-203. Ingram v. Phillips, 684 S.W.2d 954, 1984 Tenn. App. LEXIS 3387 (Tenn. Ct. App. 1984).

The rule in Thomas v. Irvin, 90 Tenn. 512, 16 S.W. 1045, 1891 Tenn. LEXIS 33 (1891), that where a defendant takes for use and not for discovery, and files a deposition of a plaintiff after examining him as to transactions and conversations he had with the testator, the defendant waives the Dead Man's Statute, T.C.A. § 24-1-203, and the evidence adduced becomes competent, is not inconsistent with the Tennessee discovery rules. Ingram v. Phillips, 684 S.W.2d 954, 1984 Tenn. App. LEXIS 3387 (Tenn. Ct. App. 1984).

11. Abuse of Discovery Process.

Although the rules do not provide a sanction for abuse of the discovery process, the inherent powers of a trial judge permits the trial judge to take appropriate corrective action against a party for discovery abuse. Lyle v. Exxon Corp., 746 S.W.2d 694, 1988 Tenn. LEXIS 172 (Tenn. 1988).

12. Denial of Discovery.

Where the record does not indicate that plaintiffs ever attempted to conduct discovery as provided by the rules, nor is there any failure on the part of the defendants to comply with established discovery procedures, and the record does not reflect that plaintiffs ever attempted to bring before the courts for a hearing their so-called motions for discovery, it was not error for the trial court not to consider plaintiffs' motion for discovery. Hampton v. Tennessee Bd. of Law Examiners, 770 S.W.2d 755, 1988 Tenn. App. LEXIS 739 (Tenn. Ct. App. 1988), cert. denied, 493 U.S. 975, 110 S. Ct. 498, 107 L. Ed. 2d 501, 1989 U.S. LEXIS 5642 (1989).

Where governmental entity's business relationships with other entities will not alone be sufficient to destroy immunity, and where there is no showing of other relevance to case, there is no entitlement to court ordered discovery. Roberts v. Blount Mem. Hosp., 963 S.W.2d 744, 1997 Tenn. App. LEXIS 66 (Tenn. Ct. App. 1997), appeal denied, 963 S.W.2d 744, 1997 Tenn. LEXIS 484 (Tenn. 1997), overruled in part, Limbaugh v. Coffee Med. Ctr., 59 S.W.3d 73, 2001 Tenn. LEXIS 756 (Tenn. 2001).

Trial judge did not abuse his discretion in denying the citizen's request for discovery, which included records of arrests of all routine traffic stops in Tennessee, as the discovery was unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. Marceaux v. Sundquist, 107 S.W.3d 527, 2002 Tenn. App. LEXIS 942 (Tenn. Ct. App. 2002), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 282 (Tenn. Mar. 17, 2003).

In the context of motions to compel, and in the context of retaliatory discharge claims or discrimination claims against employers, the privacy interests of non-parties is a proper basis upon which to disallow counsel from rooting through personnel files of non-parties. Johnson v. Nissan N. Am., Inc., 146 S.W.3d 600, 2004 Tenn. App. LEXIS 338 (Tenn. Ct. App. 2004).

13. Documents Subject to Discovery.

Where insurance company hired an attorney to represent its insured in an action against the insured, attorney was the attorney for the insured, and correspondence from the attorney to the insurance company and from the insurance company to the attorney was controlled by the attorney-client privilege between the insured and the attorney, and was subject to discovery by the insured after the insurance company denied coverage and discontinued defense of the insured. Blaylock & Brown Constr., Inc. v. AIU Ins. Co., 796 S.W.2d 146, 1990 Tenn. App. LEXIS 338 (Tenn. Ct. App. 1990).

Documents or material withheld pursuant to a claim of privilege or work product protection may be submitted to the trial judge for an in camera inspection, but there is no requirement for a privilege log as required by the Federal Rules of Civil Procedure. Hawkins v. Superior Motors, Inc., 999 S.W.2d 769, 1999 Tenn. LEXIS 340 (Tenn. 1999), rehearing denied, Hawkins v. Superior Motors, — S.W.2d —, 1999 Tenn. LEXIS 410 (Tenn. 1999).

Appellate court reversed the imposition of the administrative fees against the members of a compensation self-insured group trust in liquidation because the liquidator did not meet its

burden under Tenn. R. Civ. P. 26.03 to establish the basis for the protective order, and the members were not allowed to conduct any discovery as to the reasonableness of the fees. State ex rel. Flowers v. Tenn. Trucking Ass'n Self Ins. Group Trust, 209 S.W.3d 602, 2006 Tenn. App. LEXIS 251 (Tenn. Ct. App. 2006), appeal denied, State ex rel. Flowers v. Tenn. Trucking Ass'n Self Ins. Group Trust & Trucking Servs., — S.W.3d —, 2006 Tenn. LEXIS 1010 (Tenn. 2006).

14. Limitation of Discovery.

If the court decides to limit discovery, the reasonableness of its order will depend on the character of the information being sought, the issues involved, and the procedural posture of the case. Duncan v. Duncan, 789 S.W.2d 557, 1990 Tenn. App. LEXIS 46 (Tenn. Ct. App. 1990).

A trial court should decline to limit discovery if the party seeking the limitations cannot produce specific facts to support its request. Duncan v. Duncan, 789 S.W.2d 557, 1990 Tenn. App. LEXIS 46 (Tenn. Ct. App. 1990).

In light of the policy favoring latitude in proof regarding fraud, the trial court should not have limited the scope of discovery to evidence that was "available" at the time of trial. Duncan v. Duncan, 789 S.W.2d 557, 1990 Tenn. App. LEXIS 46 (Tenn. Ct. App. 1990).

An attorney's work product is protected from discovery under the Tennessee Public Records Act, T.C.A. §§ 10-7-503 and 10-7-504. Arnold v. City of Chattanooga, 19 S.W.3d 779, 1999 Tenn. App. LEXIS 765 (Tenn. Ct. App. 1999), review or rehearing denied, — S.W.3d —, 2000 Tenn. LEXIS 349 (Tenn. 2000).

In a retaliatory discharge action, the former employee failed to make a compelling showing of relevance and failed to establish that the value of the discovery sought, which pertained to information contained in the personnel and medical records of current and former employees of the company, outweighed the privacy interests of those individuals who were not parties to the action. Johnson v. Nissan N. Am., Inc., 146 S.W.3d 600, 2004 Tenn. App. LEXIS 338 (Tenn. Ct. App. 2004).

15. Protective Orders.

The issuance of a protective order limiting discovery lies within the sound discretion of the trial judge. Brown v. Brown, 863 S.W.2d 432, 1993 Tenn. App. LEXIS 469 (Tenn. Ct. App. 1993).

In determining whether good cause has been established for a protective order, it is important that trial courts balance one party's need for information against the injury that would allegedly result if disclosure is compelled. Ballard v. Herzke, 924 S.W.2d 652, 1996 Tenn. LEXIS 378 (Tenn. 1996).

Appellate court reversed the imposition of the administrative fees against the members of a compensation self-insured group trust in liquidation because the liquidator did not meet its burden under Tenn. R. Civ. P. 26.03 to establish the basis for the protective order, and the members were not allowed to conduct any discovery as to the reasonableness of the fees. State ex rel. Flowers v. Tenn. Trucking Ass'n Self Ins. Group Trust, 209 S.W.3d 602, 2006 Tenn. App. LEXIS 251 (Tenn. Ct. App. 2006), appeal denied, State ex rel. Flowers v. Tenn. Trucking Ass'n Self Ins. Group Trust & Trucking Servs., — S.W.3d —, 2006 Tenn. LEXIS 1010 (Tenn. 2006).

In a termination of parental rights case, a protective order was too broad because it enabled the birth mother and the adoption agency to avoid answering all questions, even those not aimed at discovering the birth mother's identity; the effect of the order was to prevent the unknown father's attorney from gaining access to information that could have helped him identify the father and formulate a defense to the termination petition. Adoption Place, Inc. v. Doe, 273 S.W.3d 142, 2007 Tenn. App. LEXIS 750 (Tenn. Ct. App. Dec. 5, 2007), appeal denied, The Adoption Place, Inc. v. Doe, — S.W.3d —, 2008 Tenn. LEXIS 90 (Tenn. Feb. 4, 2008).

Finding against a newspaper in an action involving discovery in a lawsuit against a nursing home was proper because there was no abuse of discretion in trial court's order establishing a protocol requiring that all discovery documents initially be sealed pending a later hearing; trial court's implicit finding of good cause to maintain the protective order on unfiled discovery was sufficient and its decision was not erroneous. In re NHC — Nashville Fire Litig., 293 S.W.3d 547, 2008 Tenn. App. LEXIS 688 (Tenn. Ct. App. Nov. 21, 2008).

16. Modification.

Once a party moves to modify a protective order, a trial court must balance the factors initially considered when determining good cause, and in addition, consider the reliance of the original parties to the order, to determine whether good cause still exists for the order. Ballard v. Herzke, 924 S.W.2d 652, 1996 Tenn. LEXIS 378 (Tenn. 1996).

A blanket protective order meant to facilitate discovery was peculiarly subject to modification; where it was not shown that the chancellor abused his discretion in denying the modification, the court of appeals erred in reversing the order. State v. Phillips, 924 S.W.2d 662, 1996 Tenn. LEXIS 376 (Tenn. 1996).

17. Prior Related Litigation.

Work product, privileged during prior litigation, retains that privilege in subsequent related litigation so as to be nondiscoverable pursuant to Tenn. R. Civ. P. 26.02(3) and 26.02(4)(B). Downing v. Bowater, Inc., 846 S.W.2d 265, 1992 Tenn. App. LEXIS 792 (Tenn. Ct. App. 1992), rehearing denied, 846 S.W.2d

265, 1992 Tenn. App. LEXIS 865 (Tenn. 1992), appeal denied, — S.W.2d —, 1992 Tenn. LEXIS 679 (Tenn. 1992).

18. Supplementation of Responses.

In a personal injury action, the trial court did not abuse its discretion in excluding the testimony of plaintiff's experts on the grounds that the plaintiff did not seasonably supplement his answers to interrogatories to reveal the names of the witnesses. Ammons v. Bonilla, 886 S.W.2d 239, 1994 Tenn. App. LEXIS 298 (Tenn. Ct. App. 1994), rehearing denied, — S.W.2d —, 1994 Tenn. App. LEXIS 380 (Tenn. App. 1994).

19. Deposition Part of Record.

Where a lawsuit was heard on oral testimony before a chancellor, the mere filing of a discovery deposition with the clerk and master does not make the deposition a part of the record on review. Nold v. Selmer Bank & Trust Co., 558 S.W.2d 442, 1977 Tenn. App. LEXIS 311 (Tenn. Ct. App. 1977), rehearing denied, Nold v. Selmer Bank, 558 S.W.2d 442, 1977 Tenn. App. LEXIS 312.

20. Discovery Methods Sufficient.

In a medical malpractice action, prohibition of informal interviews with non-party treating physicians will do little to increase the burden on defense attorneys because efficient alternative methods are available, including deposition by written questions. Alsip v. Johnson City Med. Ctr., 197 S.W.3d 722, 2006 Tenn. LEXIS 557 (Tenn. 2006).

Trial Court erred by issuing a tailored discovery order in a medical malpractice lawsuit that allowed ex parte communications between defense counsel and the decedent's non-party treating physicians; such communications violated the implied covenant of confidentiality between physicians and patients and Tenn. R. Civ. P. 26.01 sufficed to provide the physician with the decedent's relevant medical information. Alsip v. Johnson City Med. Ctr., 197 S.W.3d 722, 2006 Tenn. LEXIS 557 (Tenn. 2006).

Because the formal methods of discovery suffice to disclose all medical information relevant in a medical malpractice case, the needs of the trial court system, and hence the dictates of public policy, are fulfilled without ex parte communications. Were the Supreme Court of Tennessee to conclude that a plaintiffs' implied consent included permission to defense counsel to communicate ex parte with non-party physicians, the court would force plaintiffs to risk, unnecessarily, disclosure of irrelevant and confidential medical information. Alsip v. Johnson City Med. Ctr., 197 S.W.3d 722, 2006 Tenn. LEXIS 557 (Tenn. 2006).

Because consent in a medical malpractice case to disclose the decedent's confidential, relevant medical information was implied at law as a consequence of plaintiff family's conduct (i.e., by the filing of the lawsuit), rather than done expressly (e.g., by written waiver), the scope of the family's consent to the revelation of the decedent's health information had to be determined by the express terms of the Tennessee Rules of Civil Procedure, which did not prescribe ex parte communications. Alsip v. Johnson City Med. Ctr., 197 S.W.3d 722, 2006 Tenn. LEXIS 557 (Tenn. 2006).

RULE 27

DEPOSITIONS BEFORE ACTION OR PENDING APPEAL

NOTES TO DECISIONS

1. Requirements.

Trial court properly entered a monetary judgment against the tenants because the trial court found that the tenants left the premises in "deplorable condition" in violation of the lease and statute, there was neither a trial transcript nor a statement of the evidence in the record, their brief failed to conform to Tenn. R. App. P. 27, and nothing in the record supported their allegation that they did not receiver a fair trial due to the landlord's family's influence in the court system, and both the terms of the lease itself and the applicable statutes entitled the landlord to apply the security deposit toward repairing the damages caused by the tenants and to seek recovery for additional physical damage to the premises over and above the amount of the security deposit. Dykes v. Okorie, — S.W.3d —, 2020 Tenn. App. LEXIS 254 (Tenn. Ct. App. May 29, 2020).

27.01. Before Action. (1) PETITION. A person who desires to perpetuate his or her own testimony or that of another person regarding any matter that may be cognizable in any court of Tennessee may file a verified petition in any court of record in the county of the residence of any expected adverse party. The petition shall be entitled in the name of the petitioner and shall show: 1, that

the petitioner expects to be a party to an action cognizable in a court of Tennessee but is presently unable to bring it or cause it to be brought, 2, the subject matter of the expected action and the petitioner's interest therein, 3, the facts which the petitioner desires to establish by the proposed testimony and the reasons for desiring to perpetuate it, 4, the names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known, and 5, the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) NOTICE AND SERVICE. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the notice shall be served in the manner provided in Rule 4.04 for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4.04, an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17.03 apply.

(3) ORDER AND EXAMINATION. If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written questions. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(4) USE OF DEPOSITION. If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, or in the courts of the United States, it may be used in any action involving the same subject matter subsequently brought in a court of this state, in accordance with the provisions of Rule 32.01. [As amended July 1, 1979.]

27.02. Pending Appeal. If an appeal has been taken from a judgment or before the taking of an appeal if the time therefor has not expired, the court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the trial court. In such case the party who desires to perpetuate the testimony may make a motion in the trial court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in that court. The motion shall show (1) the names and addresses of

persons to be examined and the substance of the testimony which the party expects to elicit from each; (2) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the trial court. [As amended July 1, 1979.]

27.03. Perpetuation by Action. This rule does not limit the power of a court to entertain an action to perpetuate testimony. [As amended July 1, 1979.]

27.04. Filing and Recording. When a deposition to perpetuate testimony is taken under these rules, the deposition shall be promptly filed in the office of the clerk of the court in which the action is pending or if no action is pending in the office of the clerk of the court in which the petition was filed. A copy of the deposition may also be sent to the register of the county where the petition was filed, and the register shall spread the same at length upon the records of the register's office. [Added July 1, 1979.]

Advisory Commission Comments. Rule 27.01(3) requires that the judge before granting the petition seeking to take depositions to perpetuate evidence must find that the perpetuation of testimony may prevent a failure or delay of justice. Rule 27.01(4) allows depositions to perpetuate testimony to be used under the same conditions as are other types of depositions under Rule 32.01.

Rule 27.02 permits depositions to perpetuate testimony to be taken pending an appeal, subject to the same conditions and requirements as for depositions taken before action.

Rule 27.04 requires that the depositions be filed with the clerk of the appropriate court, and allows them to be filed also with the register.

Compiler's Notes. For background of the 1979 amendments to this rule, see Advisory Commission Comments to Rule 26.

Cross-References. Depositions, T.C.A. title 24, ch. 9.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 3, 561, 562.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-27.01-1, 1-27.02-1.

Tennessee Jurisprudence. 9 Tenn. Juris., Discovery, §§ 10, 15-17.

Law Reviews. A Survey of Civil Procedure in Tennessee — 1977, IV. Pretrial Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 308.

NOTES TO DECISIONS

1. Statement Pursuant to Insurance Policy.

The taking of a statement under the cooperation clause in an insurance policy does not rise to the level of taking a deposition under either Tenn. R. Civ. P. 26 or 27. Shelter Ins. Cos. v. Spence, 656 S.W.2d 36, 1983 Tenn. App. LEXIS 709 (Tenn. Ct. App. 1983).

RULE 28

PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN

28.01. Within the United States. Within the United States or within a territory or insular possession subject to the dominion of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A person so appointed has power to administer oaths and take testimony. In videotaped

depositions taken pursuant to Rule 30.02(4)(B), any lawyer or lawyer's agent can operate the equipment.

28.02. In Foreign Countries. In a foreign country, depositions may be taken (1) on notice before a person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of the commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate Authority in (here name the country)." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these rules.

28.03. Disqualification for Interest. See Tenn. Code Ann. § 24-9-136. [As amended July 1, 1979; by order effective July 1, 1996; and by order filed January 31, 2002, effective July 1, 2002.]

Advisory Commission Comments. Rule 28.01 allows a deposition to be taken before any officer authorized by federal, state, or territorial law to administer oaths. The provisions of Rule 28.02 governing depositions taken in foreign countries are new to Tennessee law.

Advisory Commission Comments [1996]. A lawyer or agent can operate the equipment at a videotaped deposition.

Advisory Commission Comments [2002]. The cited statute, Tenn. Code Ann. § 24-9-136, adequately covers disqualification of court reporters, so the earlier rule was deleted.

Compiler's Notes. For background of the 1979 amendments to this rule, see Advisory Commission Comments to Rule 26.

Cross-References. Depositions, T.C.A. title 24, ch. 9.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), § 564.

Tennessee Forms (Robinson, Ramsey and Harwell), No. 1-28.02-1.

Tennessee Jurisprudence. 9 Tenn. Juris., Discovery, §§ 9, 20, 21.

Law Reviews. A Survey of Civil Procedure in Tennessee — 1977, IV. Pretrial Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 308.

Attorney General Opinions. Contracts between court reporters and insurance companies, OAG 99-161 (8/26/99).

Unless the parties agree or the court orders otherwise, the safer practice is to have the court reporter and the oath administered at the place where a deponent is located, OAG 01-059 (4/16/01).

An attorney for one of the parties may not administer the oath to a deponent, OAG 01-059 (4/16/01).

RULE 29

STIPULATIONS REGARDING DISCOVERY PROCEDURE

Unless the court specifically orders otherwise, the parties may by written stipulation signed by all parties or counsel (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner, and when so taken may be used like other depositions, and (2) modify

the procedures provided by these rules for other methods of discovery. [As amended July 1, 1979; and by order adopted January 28, 1993, effective July 1, 1993.]

Advisory Commission Comments [1993]. The amendment eliminates the prohibition on stipulated time extensions absent court approval for interrogatory answers, production of documents and things, and responses to requests for admission. The court can "specifically order otherwise."

Compiler's Notes. For background of the 1979 amendments to this rule, see Advisory Commission Comments to Rule 26.

Cross-References. Depositions, T.C.A. title 24, ch. 9.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), No. 1-29-1.

Tennessee Jurisprudence. 9 Tenn. Juris., Discovery, § 22; 23 Tenn. Juris., Stipulations, § 1; 24 Tenn. Juris., Verdict, § 17.

Law Reviews. A Survey of Civil Procedure in Tennessee — 1977, IV. Pretrial Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 308.

Discovery for Paupers (Donald F. Paine), 25 No. 6 Tenn. B.J. 35 (1989).

Hard Blows and Foul Ones: The Limited Bounds on Prosecutorial Summation in Tennessee (Karen E. Holt), 58 Tenn. L. Rev. 117 (1990).

Attorney General Opinions. Deposition stipulation is not limited to notice, time extensions, place, and manner. The disqualification provisions of T.C.A. § 24-9-135(a)(3), (5) may be waived by stipulation, including the disqualification for an employee by one of the parties or of an attorney for one of the parties or someone with a financial interest in the action or its outcome. OAG 14-40, 2014 Tenn. AG LEXIS 39 (3/31/14).

NOTES TO DECISIONS

1. Defective Depositions.

It was error to admit a defective deposition where there were no written stipulations or court orders waiving the technical requirements violated. State Dep't of Human Services v. Neilson, 771 S.W.2d 128, 1989 Tenn. App. LEXIS 6 (Tenn. Ct. App. 1989).

RULE 30

DEPOSITIONS UPON ORAL EXAMINATION

30.01. When Depositions May Be Taken. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under Rule 4.05, except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in Rule 30.02(2). The attendance of witnesses may be compelled by subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes. [As amended July 1, 1979.]

Law Reviews. Depositions of Other Lawyers, 81 Tenn. L. Rev. 47 (2013).

30.02. Notice of Examination: General Requirements; Special Notice; Non-Stenographic Recording; Production of Documents and Things; Deposition of Organization; Deposition by Telephone. (1) A party desiring to take the deposition of any person upon oral examination shall give notice in writing to every other party to the action. The notice shall be served on the other parties at least five days beforehand when the deposition is to be taken in the county in which suit is pending. When the deposition is to

be taken out of the county, at least seven days' notice shall be given. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) Leave of court is not required for the taking of a deposition by plaintiff if the notice (A) states that the person to be examined is about to go out of the state of Tennessee and will be unavailable for examination unless the person's deposition is taken before expiration of the 30-day period, and (B) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and this signature constitutes a certification that to the best of the attorney's knowledge, information, and belief the statement and supporting facts are true. The sanctions provided by Rule 11 are applicable to the certification.

If a party shows that when served with notice under this subdivision (2) the party was unable through the exercise of diligence to obtain counsel to represent him or her at the taking of the deposition, the deposition may not be used against the party.

(3) The court may for cause shown enlarge or shorten the time for taking the deposition.

(4)(A) The parties may stipulate in writing or the court may upon motion order that the testimony at a deposition be recorded by other than stenographic means, in which event the stipulation or order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. A party may arrange to have a stenographic transcription made at the party's own expense. Any objections under Rule 30.03; any changes made by the witness and his or her signature identifying the deposition as the witness's own, or the statement of the officer that is required if the witness does not sign, as provided in Rule 30.05; and the certification of the officer required by Rule 30.06 shall be set forth in writing to accompany a deposition recorded by other than stenographic means.

(B) Notwithstanding paragraph (A), any deposition may be recorded by audio-visual means without a stenographic record. Any party may make at the party's own expense a simultaneous stenographic or audio record of the deposition. Upon a party's request and own expense, any party is entitled to an audio or audio-visual copy of the audio-visual recording. The audio-visual recording is an official record of the deposition. A transcript prepared by a court reporter is also an official record of the deposition. On motion the court, for good cause, may order the party taking, or who took a deposition by audio-visual recording to furnish, at the party's expense, a transcript of the deposition. Any lawyer or lawyer's agent can operate the equipment.

An audio-visual deposition may be used for any purpose and under any circumstances in which a stenographic deposition may be used.

The notice for taking an audio-visual deposition and the subpoena for attendance at that deposition must state that the deposition will be recorded by audio-visual means and whether a simultaneous record will be made.

The following procedure must be observed in recording an audio-visual

deposition:

(i) The deposition must begin with an oral or written statement on camera which includes:

(a) The operator's name and business address;

(b) The name and business address of the operator's employer;

(c) The date, time and place of the deposition;

(d) The caption of the case;

(e) The name of the witness;

(f) The party on whose behalf the deposition is being taken; and

(g) Any stipulations by the parties.

(ii) Counsel shall identify themselves on camera.

(iii) The oath must be administered to the witness on camera.

(iv) If the length of a deposition requires the use of more than one recording unit, the end of each unit and the beginning of each succeeding unit must be announced on camera.

(v) At the conclusion of a deposition, a statement must be made on camera that the deposition is concluded. A statement may be made on camera setting forth any stipulations made by counsel concerning the custody of the audio-visual recording and exhibits or other pertinent matters.

(vi) Depositions must be indexed by a visible time recording device that displays hours, minutes and seconds.

(vii) An objection must be made as in the case of stenographic depositions.

(viii) If the court issues an editing order, the original audio-visual recording must not be altered.

(ix) Unless otherwise stipulated by the parties, the original audio-visual recording of a deposition, any copy edited pursuant to an order of the court, and exhibits must be filed forthwith with the clerk of the court.

(5) The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

(6) A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a nonparty organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subdivision (6) does not preclude taking a deposition by any other procedure authorized in these rules.

(7) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone. Nothing herein shall preclude any party from being represented in person or by counsel at the site of the deponent. [As amended July 1, 1979; by orders entered January 31, 1984, effective August 20, 1984; January 23, 1986, effective August 1, 1986; and by order entered January 18, 1996, effective July 1, 1996.]

30.03. Examination and Cross-Examination; Record of Examination; Oath; Objections. Examination and cross-examination of witnesses may proceed as permitted at the trial under the Tennessee Rules of Evidence. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under the officer's direction and in his or her presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with Rule 30.02(4). If requested by one of the parties, the testimony shall be transcribed.

All objections made at time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A deponent may be instructed not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion to terminate or limit examination. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and that party shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim. [As amended July 1, 1979; and by order entered January 25, 1991, effective July 1, 1991.]

Law Reviews. How to Act During a Deposition (Daniel C. Headrick), 48 Tenn. B.J. 22 (2012).

30.04. Motion to Terminate or Limit Examination. At any time during the taking of the deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26.03. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37.01(4) apply to the award of expenses incurred in relation to the motion. [As amended July 1, 1979.]

Law Reviews. How to Act During a Deposition (Daniel C. Headrick), 48 Tenn. B.J. 22 (2012).

30.05. Submission to Witness; Changes; Signing. When the testimony is fully transcribed the deposition shall be submitted to the witness for examination and shall be read to or by the witness, unless such examination and reading are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission, the officer shall sign it and state on the record the fact of the waiver or of the illness or absence of the witness or the fact of the refusal to sign together with the reason, if any, given therefor; and the deposition may then be used as fully as though signed unless on a motion to suppress under Rule 32.04(4) the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part. [As amended July 1, 1979.]

30.06. Disposition. Once Rule 30.05 is satisfied, the officer shall deliver the deposition plus any exhibited documents and things to the party who requested taking of the deposition. Upon payment of reasonable charges, the officer shall furnish copies to any party or to the deponent. If the deposition contains material relevant to a hearing, the party who requested the taking of the deposition shall have it present in the courtroom along with exhibited documents and things on the day of the hearing unless otherwise stipulated. If any portion is introduced, T.R.Evid. 1003 shall govern.

If a party files a deposition for any purpose, the party filing the deposition shall give notice thereof to all other parties at the time of filing. [As amended July 1, 1979; by order entered January 31, 1984, effective August 20, 1984; by order entered January 18, 1996, effective July 1, 1996; and by order entered December 10, 2003, effective July 1, 2004.]

30.07. Failure to Attend or to Serve Subpoena; Expenses. (1) If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by such other party and his or her attorney in attending, including reasonable attorney's fees.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon the witness and the witness because of such failure does not attend, and if another party attends in person or by attorney because he or she expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable expenses incurred by the other party and his or her attorney in attending, including reasonable attorney's fees. [As amended July 1, 1979; and by order filed February 1, 1995, effective July 1, 1995.]

Advisory Commission Comments. This Rule is designed to provide a comprehensive guide for the taking of depositions upon oral examination. The method of serving notice for depositions taken under these Rules is set out in Rule 5. Rule 30.04 eliminates the reference

"like or similar court in the jurisdiction where the deposition is being taken," found in the Federal Rules.

Rule 30 generally corresponds to the equivalent numbered rule in the Georgia Civil Practice Act and in the Federal Rules of Civil Procedure.

Rule 30.02 contains two important innovations. Subdivision (4) empowers the court to order that a deposition may be taken by other than stenographic means. One example of recording the testimony at a deposition by other than stenographic means is the use of videotape in the taking of depositions. This is relatively new but is apparently being used in some places. It is emphasized that the testimony at a deposition may be recorded by other than stenographic means only upon order of the court. This rule permits but does not require the court to make such an order. Even when such an order is made, the party may arrange to have a stenographic transcription made at the party's own expense. [1979.]

Subdivision (6) permits an organization rather than an individual to be named in a subpoena. The organization shall then designate the person or persons to testify on its behalf in response to the subpoena. [1979.]

30.02: The language permitting written stipulation comes from F.R.Civ.P. 30(b)(4) and constitutes merely a cross-eference to T.R.Civ.P. 29, under which parties may vary any discovery rule by a stipulation in writing. The word "assume" in the Code text is a typographical error; the word should be "assure." The last sentence in the first paragraph, taken from F.R.Civ.P. 30(b)(4) but modified, is needed to cover the procedure incident to depositions taken by other than traditional methods. [1986.]

Beginning with the paragraph (B), T.R.Civ.P. 30.02(4) is new [in 1986]. With few changes, the Commission proposes adoption of the Uniform Audio-isual Deposition Rule. Although a stenographic record of the videotape deposition is optional, an appellant will need to provide a transcribed record for the appellate court. *See* T.R.App.P. 24 and the Advisory Commission Comment. [1986.]

(7): While perhaps not preferable from a tactical standpoint in many instances, there are occasions when great distances and modest funds militate in favor of a deposition by telephone. The [1984] amendment expressly allows this form of "deposition upon oral examination" by stipulation or order; probably it has been implicitly permissible by stipulation under Rule 29. [1984.]

30.03: The added language in the second paragraph of Rule 30.03 admonishes lawyers not to make "speaking" objections, which unethically put lawyers' words in deponents' mouths. "Instructions" to a deponent not to answer a deposition question are made not only without authority but are unethical and sanctionable. *SeeFirst Tennessee Bank v. FDIC*, 108 F.R.D. 640 (E.D. Tenn. 1985). Some courts have reminded the bar that a deposition is a formal judicial proceeding – albeit absent a presiding judge – and consequently consultations between counsel and deponent during questioning are not to be tolerated any more than it would be in the courtroom. *See Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993). [1995.]

30.06: In rare cases, the "party who requested the taking of the deposition" may have been dismissed from the cause prior to the hearing. In such instances, a copy in the possession of a remaining party could be used under Evidence Rule 1003. [1996.]

Advisory Commission Comments [1996]. A lawyer or agent can operate the equipment at a videotaped deposition.

Advisory Commission Comments [2004]. The new second paragraph of Rule 30.06 will require that parties give notice whenever they file a deposition.

Advisory Commission Comments [2016]. Rule 30.03 provides that "[e]xamination and cross-examination of witnesses may proceed as permitted at the trial under the Tennessee Rules of Evidence." This language does not imply that Tenn. R. Evid. 615 is applicable to depositions. Unless otherwise ordered by the court, a lawyer may communicate with a deponent about deposition procedure or the substance of deposition testimony before, during (unless a question is pending) or after the deposition; however, such communications are subject to the Rules of Professional Conduct including, but not limited to, Tenn. Sup. Ct. R. 8, RPC 3.3 and RPC 3.4.

Compiler's Notes. For background of the 1979 amendments to this rule, see Advisory Commission Comments to Rule 26.

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated December 10, 2003, was ratified and approved by 2004 House Resolution 233 and Senate Resolution 115. The order promulgating the amendment of this rule provided that it take effect July 1, 2004.

The amendment of Rule 30 by the addition of [2016] Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 143 and Senate Resolution 81. The order promulgating the amendment of Rule 30 by adding [2016] Advisory Commission Comments, provided that it take effect July 1, 2016.

Cross-References. Depositions, T.C.A. title 24, ch. 9.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 362, 458, 561.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-30.01-1, 1-30.01-2, 1-30.02-1

— 1-30.02-7, 1-30.04-1, 1-30.07-1, 1-31.01-1, 1-37.01-2.

Tennessee Jurisprudence. 8 Tenn. Juris., Criminal Procedure, § 26; 9 Tenn. Juris., Discovery, §§ 10, 23-26.

Law Reviews. A Survey of Civil Procedure in Tennessee — 1977, IV. Pretrial Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 308.

As a Matter of Law: Summary Judgment in Medical Malpractice Litigation in Tennessee, 15 Mem. St. U. L. Rev. 55 (1984).

Constitutional Law — Payne v. Tennessee: The Admissibility of Victim Impact Statements — A Move Toward Less Rational Sentencing, 22 Mem. St. U.L. Rev. 135 (1991).

Deposition Questioning Made Easy — or — CLE at the Office (Robert L. Arrington), 29 No. 5 Tenn. B.J. 22 (1993).

Deposition Tactics and Ethics (Donald F. Paine), 25 No. 3 Tenn. B.J. 21 (1989).

Discovery for Paupers (Donald F. Paine), 25 No. 6 Tenn. B.J. 35 (1989).

Revised Federal Discovery Rules are an Improvement (Donald F. Paine), 37 No. 3 Tenn. B.J. 31 (2001).

Sanctions For Discovery Abuse (Donald F. Paine), 27 No. 6 Tenn. B.J. 19 (1991).

Tennessee and Federal Rules of Civil Procedure (Donald F. Paine), 27 Tenn. B.J. 25.

Attorney General Opinions. Procedure for conducting post-judgment discovery in general sessions court, OAG 98-0124 (7/20/98).

Contracts between court reporters and insurance companies, OAG 99-161 (8/26/99).

NOTES TO DECISIONS

Analysis

1. Deposition Law of 1959.
2. Effect on Competency of Evidence.
3. Defective Depositions.
4. Filing of Excerpts.
5. Worker's Compensation Cases.
6. Harmless Error.

1. Deposition Law of 1959.

Tenn. R. Civ. P. 26 and 30 are identical to, but supersede, The Deposition Law of 1959. Ingram v. Phillips, 684 S.W.2d 954, 1984 Tenn. App. LEXIS 3387 (Tenn. Ct. App. 1984).

2. Effect on Competency of Evidence.

A litigant would be penalized for utilizing discovery if, by the acquisition of information under the discovery rule, it would render incompetent evidence competent; therefore, the taking of discovery depositions does not necessarily render competent evidence otherwise incompetent under T.C.A. § 24-1-203. Ingram v. Phillips, 684 S.W.2d 954, 1984 Tenn. App. LEXIS 3387 (Tenn. Ct. App. 1984).

The rule in Thomas v. Irvin, 90 Tenn. 512, 16 S.W. 1045, 1891 Tenn. LEXIS 33 (1891), that where a defendant takes for use and not for discovery, and files a deposition of a plaintiff after examining him as to transactions and conversations he had with the testator, the defendant waives the Dead Man's Statute, T.C.A. § 24-1-203, and the evidence adduced becomes competent, is not inconsistent with the Tennessee discovery rules. Ingram v. Phillips, 684 S.W.2d 954, 1984 Tenn. App. LEXIS 3387 (Tenn. Ct. App. 1984).

3. Defective Depositions.

It was error to admit a defective deposition where there were no written stipulations or court orders waiving the technical requirements violated. State Dep't of Human Services v. Neilson, 771 S.W.2d 128, 1989 Tenn. App. LEXIS 6 (Tenn. Ct. App. 1989).

4. Filing of Excerpts.

Tenn. R. Civ. P. 30 does not preclude the filing of excerpts of a deposition nor require that an affidavit be attached to deposition excerpts. Seffernick v. St. Thomas Hosp., 969 S.W.2d 391, 1998 Tenn. LEXIS 281 (Tenn. 1998).

5. Worker's Compensation Cases.

Where the employee sought workers' compensation benefits for an injury she sustained while flipping a piece of wood, the medical evidence consisted entirely of the employee's medical records as there were no depositions of medical experts; a local rule of the 24th judicial district, which prohibited the taking of medical depositions in workers compensation cases absent leave of court, was declared invalid as it contradicted Tenn. R. Civ. P. 30.01. Glisson v. Mohon Int'l, Inc., 185 S.W.3d 348, 2006 Tenn. LEXIS 180 (Tenn. 2006).

6. Harmless Error.

In modification of child custody case, although trial court erred when it quashed notices of deposition and subpoenas of the children, error was harmless as trial court allowed the children to testify at trial and explain where they wanted to live and where they wanted to go to school, and their trial testimony was favorable to the father; thus, the father failed to demonstrate how his case was prejudiced by trial court's refusal to allow him to depose the children. Pippin v. Pippin, 277 S.W.3d 398, 2008 Tenn. App. LEXIS 339 (Tenn. Ct. App. June 4, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 954 (Tenn. Dec. 15, 2008).

RULE 31

DEPOSITIONS UPON WRITTEN QUESTIONS

31.01. Serving Questions; Notice. After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with provisions of Rule 30.02(6).

Within 30 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time. [As amended July 1, 1979.]

NOTES TO DECISIONS

1. Redirect Questions.

Hearing Panel of the Board of Professional Responsibility did not err by admitting a paralegal's testimony by written deposition because a lawyer initiated the paralegal's deposition and had notice of it; the lawyer failed to proffer redirect questions after he was served with the Board's cross-examination questions, and that was the proper procedure for initiating redirect when a witness was deposed upon written questions. Bd. of Prof'l Responsibility of the Supreme Court of Tenn. v. Justice, 577 S.W.3d 908, 2019 Tenn. LEXIS 288 (Tenn. July 2, 2019), cert. denied, 206 L. Ed. 2d 187, 140 S. Ct. 1212, — U.S. —, 2020 U.S. LEXIS 944 (U.S. Feb. 24, 2020).

31.02. Officer to Take Responses and Prepare Record. A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rules 30.03, 30.05, and 30.06, to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by the officer. [As amended July 1, 1979.]

31.03. Notice of Filing. When the deposition is filed the party taking it shall promptly give notice thereof to all other parties. [As amended July 1, 1979.]

Advisory Commission Comments. Rule 31 previously designated questions propounded to witnesses thereunder as interrogatories. The terminology has been changed to avoid confusion with Rule 33, which provides for interrogatories to parties. Written questions may be

submitted to any witness, whether a party or not, under Rule 31. Rule 33 permits interrogatories to be served upon parties only. [1979.]

Compiler's Notes. For background of the 1979 amendments to this rule, see Advisory Commission Comments to Rule 26. Former Rules 31.04 and 31.05 were deleted by the 1979 amendments.

Cross-References. Depositions, T.C.A. title 24, ch. 9.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 458, 561.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-31.01-1, 1-32.04-2, 1-37.01-1.

Tennessee Jurisprudence. 9 Tenn. Juris., Discovery, §§ 10, 27-29.

Law Reviews. A Survey of Civil Procedure in Tennessee — 1977, IV. Pretrial Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 308.

Deposition Tactics and Ethics (Donald F. Paine), 25 No. 3 Tenn. B.J. 21 (1989).

RULE 32

USE OF DEPOSITIONS IN COURT PROCEEDINGS

32.01. Use of Depositions. At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the Tennessee Rules of Evidence applied as though the witness were then present and testifying, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof in accordance with any of the following provisions:

(1) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness.

(2) The deposition of a party or of anyone who at the time of taking the deposition was an officer, director, or managing agent, or a person designated under Rule 30.02(6) or 31.01 to testify on behalf of a public or private corporation, partnership or association, governmental agency or individual proprietorship which is a party may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds that the witness is "unavailable" as defined by Tennessee Rule of Evidence 804(a). But depositions of experts taken pursuant to the provisions of Rule 26.02(4) may not be used at trial except to impeach in accordance with the provisions of Rule 32.01(1).

(4) If only part of a deposition is offered in evidence by a party, an adverse party may require the introduction at that time of any other part which ought in fairness to be considered contemporaneously with it.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken. When an action in any court of Tennessee, of the United States, or of any other state has been dismissed and an action involving the same subject matter is afterwards brought, all depositions lawfully taken in the former action may be used in the latter against any party who has both an opportunity and similar motive to develop the testimony at the prior deposition by direct, cross, or redirect examination. A deposition previously taken may also be used as permitted by the Tennessee Rules of Evidence. [As amended July 1, 1979; by orders entered January 23, 1986, effective August 1, 1986, January 29, 1987, effective August 1, 1987, January 26, 1990, effective July 9, 1990, December 10, 2003, effective July 1, 2004; and by order filed December 29, 2005, effective July 1, 2006.]

NOTES TO DECISIONS

Analysis

1. Construction.
2. Appropriate Use.
3. Harmless Error.

1. Construction.

While Fed. R. Civ. P. 32 indicates that a deponent-witness may be impeached and rehabilitated by that deponent-witness's deposition testimony, Tenn. R. Civ. P. 32.01 maintains that deposition testimony, as it pertains to the deponent-witness, may be used only for impeachment purposes; accordingly, the trial court's decision to exclude the witness's deposition testimony did not violate the rule for prior consistent statements. Boyd v. BNSF Ry. Co., 596 S.W.3d 712, 2018 Tenn. App. LEXIS 736 (Tenn. Ct. App. Sept. 12, 2018), appeal denied, Boyd v. BNSF Ry. Co., — S.W.3d —, 2019 Tenn. LEXIS 235 (Tenn. May 20, 2019).

2. Appropriate Use.

Hearing Panel of the Board of Professional Responsibility did not err by admitting a paralegal's testimony by written deposition because a lawyer initiated the paralegal's deposition and had notice of it; the lawyer failed to proffer redirect questions after he was served with the Board's cross-examination questions, and that was the proper procedure for initiating redirect when a witness was deposed upon written questions. Bd. of Prof'l Responsibility of the Supreme Court of Tenn. v. Justice, 577 S.W.3d 908, 2019 Tenn. LEXIS 288 (Tenn. July 2, 2019), cert. denied, 206 L. Ed. 2d 187, 140 S. Ct. 1212, — U.S. —, 2020 U.S. LEXIS 944 (U.S. Feb. 24, 2020).

Admitting portions of a physician's deposition transcript pursuant to Tenn. R. Civ. P. 32.01(3) was not error where, as a practicing physician, he was exempt from subpoena to trial under T.C.A. § 24-9-101(a), and thus unavailable under Tenn. R. Evid. 804(a)(5). Spearman v. Shelby Cty. Bd. of Educ., — S.W.3d —, 2021 Tenn. App. LEXIS 17 (Tenn. Ct. App. Jan. 15, 2021).

3. Harmless Error.

Trial court never made a determination that fairness demanded that the various portions be considered at the same time, but while defendant should not have been prohibited from introducing the subsequent portion of the witness's deposition testimony on re-direct, as this did not affect the judgment, the error was harmless. Boyd v. BNSF Ry. Co., 596 S.W.3d 712, 2018 Tenn. App. LEXIS 736 (Tenn. Ct. App. Sept. 12, 2018), appeal denied, Boyd v. BNSF Ry. Co., — S.W.3d —, 2019 Tenn. LEXIS 235 (Tenn. May 20, 2019).

32.02. Objections to Admissibility. Subject to the provisions of Rule 28.02 and Rule 32.04(3), objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of the evidence if the witness were then present and testifying. [As amended July 1, 1979.]

NOTES TO DECISIONS

1. Waiver of Objection to Defective Notice.

Although the Department of Health failed to provide proper notice to the physician of an expert's deposition testimony under Tenn. R. Civ. P. 32.04(1), 6.01, and 6.05, the physician did not have the option to wait until the contested case hearing to object; instead of promptly asserting a challenge to the admissibility of the deposition, the physician expressed no objection for seven weeks. By failing to promptly object in writing, the physician waived his right to object to the defective notice of the deposition and the admissibility of that deposition at the final hearing to revoke the physician's medical license. Roy v. Tenn. Bd. of Med. Examiners, 310 S.W.3d 360, 2009 Tenn. App. LEXIS 484 (Tenn. Ct. App. July 24, 2009), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 199 (Tenn. Feb. 22, 2010).

32.03. Effect of Taking or Using Depositions. A party does not make a person the party's own witness for any purpose by taking the person's deposition. The introduction in evidence of the deposition or any part thereof for any purpose other than that of contradicting or impeaching the deponent makes the deponent the witness of the party introducing the deposition, but

this shall not apply to the use by an adverse party of a deposition under Rule 32.01(2). At the trial or hearing any party may rebut any relevant evidence contained in a deposition whether introduced by that party or by any other party. [As amended July 1, 1979.]

32.04. Effect of Errors and Irregularities in Depositions. (1) As to Notice. — All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) As to Disqualification of Officer. — Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) As to Taking of Deposition. — (A) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(B) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(C) Objections to the form of written questions submitted under Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within 5 days after service of the last questions authorized.

(4) As to Completion and Return of Deposition. — Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained. [As amended July 1, 1979.]

Advisory Commission Comments. This Rule is designed to bring together rules relating to the timing and method of presentation of objections based on errors and irregularities in depositions.

32.01: The added language [in 1984] in Rule 32.01(3)(D), dispensing with the necessity of a trial subpoena for deponents exempt under revised Tenn. Code Ann. § 24-9-101, changes the requirement under prior law, explained in Stokes v. Leung, 651 S.W.2d 704, 710 (Tenn. Ct. App. 1982). [1984.]

The new sentence [in 1984] inserted at the end of 32.01(3) protects the trial lawyer who takes an opposing expert's discovery deposition by court order or by agreement from being confronted with the deposition as substantive proof at trial. Tactically the discovering lawyer wants to find out everything the expert intends to say at trial and conducts a very open inquiry, expecting many unfavorable answers; there is no cross examination in the trial sense. It would be unfair to plaintiffs and defendants alike to have such a deposition admitted as former testimony on the ground that the deponent is unavailable, whether dead, outside the jurisdiction, or more than one hundred miles from the courtroom. If the party who hired the expert wants to take a deposition for proof, of course, that can be accomplished by notice or agreement. The present amendment applies only to a discovery deposition of the adversary's expert. [1984.]

The Commission recommends [in 1987] add-

ing language to the last paragraph of Rule 32.01 to make the former testimony hearsay exception work the same way with depositions in civil actions as it does with preliminary hearing transcripts in a criminal prosecution with the advent of *State v. Causby*, 706 S.W.2d 628 (Tenn. 1986). *Causby*, at page 631, adopts F.R.Evid. 804(b)(1) insofar as it admits former testimony against a person who at the prior hearing "'had an opportunity and similar motive to develop the testimony ....'" The previous deposition rule appears to limit substantive use of depositions – the most common type of former testimony – to subsequent lawsuits involving the "same parties," thereby imposing a strict identity of parties requirement rejected by the Supreme Court in *Causby*. [1987.]

The added sentence [in 1990] at the end of Rule 32.01 is needed to conform the Rules of Civil Procedure to the Rules of Evidence. Under Rule 804(b)(1), Tennessee Rules of Evidence, depositions may be admissible as former testimony even though taken in an action other than one dismissed before the present suit was filed. [1990.]

Advisory Commission Comments [2001]. Rule 32.01(3) describes when a deposition can be used "for proof" under the former testimony hearsay exception. Except with respect to some experts, a deposition is admissible as substantive evidence at trial if the deponent is unavailable to give live testimony.

Advisory Commission Comments [2004]. Rule 32.01(4) is conformed to the rule of completeness in Evidence Rule 106.

Advisory Commission Comments [2006]. The new language in Rule 32.01(3) incorporates by cross-reference all of the unavailability grounds listed in Evidence Rule 804(a). That list includes deponents who are more than 100 miles from the courthouse on trial day. The more restrictive provision for discovery depositions of experts is retained.

Compiler's Notes. For background of the 1979 amendments to this rule, see Advisory Commission Comments to Rule 26.

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated December 10, 2003, was ratified and approved by 2004 House Resolution 233 and Senate Resolution 115. The order promulgating the amendment of this rule provided that it take effect July 1, 2004.

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated December 29, 2005, was ratified and approved by 2006 House Resolution 200 and Senate Resolution 95. The order promulgating the amendment of this rule provided that it take effect July 1, 2006.

Cross-References. Depositions, T.C.A. title 24, ch. 9.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), § 564.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-32.01-1, 1-32.04-1 — 1-32.04-3, 1-45.05-1.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, § 84; 9 Tenn. Juris., Discovery, §§ 12-14, 30; 21 Tenn. Juris., Reference and Commissioners, § 18.

Law Reviews. A Survey of Civil Procedure in Tennessee — 1977, IV. Pretrial Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 308.

Deposition Questioning Made Easy — or — CLE at the Office (Robert L. Arrington), 29 No. 5 Tenn. B.J. 22 (1993).

Deposition Tactics and Ethics (Donald F. Paine), 25 No. 3 Tenn. B.J. 21 (1989).

How to Act During a Deposition (Daniel C. Headrick), 48 Tenn. B.J. 22 (2012).

Is this deposition for discovery or proof? (Donald F. Paine), 36 No. 5 Tenn. B.J. 20 (2000).

Sanctions For Discovery Abuse (Donald F. Paine), 27 No. 6 Tenn. B.J. 19 (1991).

Tennessee and Federal Rules of Civil Procedure (Donald F. Paine), 27 Tenn. B.J. 25.

The Bearman Rule (Donald F. Paine), 39 No. 4 Tenn. B.J. 33 (2003).

10 Significant Differences Between State and Federal Civil Procedure, 38 No. 7 Tenn. B.J. 27 (2002).

NOTES TO DECISIONS

Analysis

1. Deposition of Party.
2. Deposition of Witness.
3. Filing Deposition as Exhibit.
4. Use in Jury Deliberations.
5. Right to Face Accuser.
6. Defective Depositions.
7. Deposition Held Inadmissible.
8. Deposition Held Admissible.
9. Waiver of Objection to Defective Notice.
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11. Deposition of Expert.
12. Conduct During Deposition.

1. Deposition of Party.

Tenn. R. Civ. P. 32 clearly permits the deposition of a party to be admissible in evidence for any purpose. Nelms v. Tennessee Farmers Mut. Ins. Co., 613 S.W.2d 481, 1978 Tenn. App. LEXIS 364 (Tenn. Ct. App. 1978).

Tenn. R. Civ. P. 32 provides that a party may use the deposition of an adverse party for any purpose. Where the person deposed was the president of the defendant corporation, whose testimony was taken by the plaintiffs' counsel as if it were cross-examination, it was not error to allow portions of the deposition to be read, even though he was present and testifying at trial. Ball v. Overton Square, Inc., 731 S.W.2d

536, 1987 Tenn. App. LEXIS 3161 (Tenn. Ct. App. 1987).

Although a previously deposed witness was present at a bench trial, submission of his deposition as an exhibit was not improper since the deposition as an adverse party may be used for any purpose. McLemore v. Powell, 968 S.W.2d 799, 1997 Tenn. App. LEXIS 541 (Tenn. Ct. App. 1997), rehearing denied, — S.W.2d —, 1997 Tenn. App. LEXIS 571 (Tenn. Ct. App. 1997).

2. Deposition of Witness.

One does not have to have a witness to introduce testimony of another witness; if the deposition is admissible it may be read to the trier of facts by counsel or may simply be handed to the judge for his reading if the judge happens to be the trier of facts. There is simply no such thing as using the "wrong witness" to introduce that which is per se admissible. Campbell County Bd. of Education v. Brownlee-Kesterson, Inc., 677 S.W.2d 457, 1984 Tenn. App. LEXIS 2744 (Tenn. Ct. App. 1984).

3. Filing Deposition as Exhibit.

Under Tenn. R. Civ. P. 32 defendant's attorney had the right to read any or all of the deposition to the jury but not to file the same as an exhibit without giving the jury the opportunity to know the contents of the deposition. Nelms v. Tennessee Farmers Mut. Ins. Co., 613 S.W.2d 481, 1978 Tenn. App. LEXIS 364 (Tenn. Ct. App. 1978).

Evidence contained in the deposition of a party may be read into the record if the evidence is otherwise admissible; Tenn. R. Civ. P. 32.01(b) does not suggest that the deposition of a party may be made an exhibit at trial. Doochin v. United States Fidelity & Guar. Co., 854 S.W.2d 109, 1993 Tenn. App. LEXIS 25 (Tenn. Ct. App. 1993).

Where depositions in a bench trial were admitted as exhibits rather than read into the record, the trial court could consider such depositions as filed and part of the record. McLemore v. Powell, 968 S.W.2d 799, 1997 Tenn. App. LEXIS 541 (Tenn. Ct. App. 1997), rehearing denied, — S.W.2d —, 1997 Tenn. App. LEXIS 571 (Tenn. Ct. App. 1997).

4. Use in Jury Deliberations.

While a deposition of the adverse party may be used for any purpose at trial, that is no carte blanche for the proposition that it may be used by the jury in its deliberations. Fletcher v. Coffee County Farmers Cooperative, 618 S.W.2d 490, 1981 Tenn. App. LEXIS 502 (Tenn. Ct. App. 1981).

5. Right to Face Accuser.

The right to face one's accuser in civil matters is not the same as in criminal matters. Goodwin v. Metropolitan Bd. of Health, 656 S.W.2d 383, 1983 Tenn. App. LEXIS 710 (Tenn. Ct. App. 1983).

6. Defective Depositions.

It was error to admit a defective deposition where there were no written stipulations or court orders waiving the technical requirements violated. State Dep't of Human Services v. Neilson, 771 S.W.2d 128, 1989 Tenn. App. LEXIS 6 (Tenn. Ct. App. 1989).

7. Deposition Held Inadmissible.

Deposition of a vocational expert was inadmissible since there was no proof in the record that he was presently a practicing psychologist and therefore was not a witness exempt from subpoena to trial under T.C.A. § 24-9-101. Raines v. Shelby Williams Industries, Inc., 814 S.W.2d 346, 1991 Tenn. LEXIS 273 (Tenn. 1991).

The mere showing that witness was "Supervisor of Personnel" was insufficient to support a finding that she was an officer, director, or managing agent of the defendants or otherwise a person whose deposition could be read as evidence pursuant to Tenn. R. Civ. P. 32. Phillips v. F.W. Woolworth Co., 867 S.W.2d 316, 1992 Tenn. App. LEXIS 918 (Tenn. Ct. App. 1992), appeal denied, Phillips v. F. W. Woolworth Co., — S.W.2d —, 1993 Tenn. LEXIS 53 (Tenn. Feb. 22, 1993).

8. Deposition Held Admissible.

Because there was no evidence that the plaintiffs procured expert's absence, the expert's status as a witness satisfied the distance and geographic requirements contained in Tenn. R. Civ. P. 32.01(3). White v. Vanderbilt Univ., 21 S.W.3d 215, 1999 Tenn. App. LEXIS 874 (Tenn. Ct. App. 1999).

Deposition of doctors' witness could be used at trial because the witness had knowledge of facts of the case and resided in Georgia, thus meeting the distance or location criteria. Yadon v. Rist (In re Estate of Brock), 63 S.W.3d 729, 2001 Tenn. App. LEXIS 482 (Tenn. Ct. App. 2001), appeal denied, Brock v. Rist, — S.W.3d —, 2002 Tenn. LEXIS 14 (Tenn. 2002).

In an action involving alleged breach of settlement agreement between employer and employee, trial court did not err in determining that a nurse was unavailable because she had moved to San Diego and was unavailable on the date of trial; thus, admission of her deposition was appropriate, as a deposed witness who was more than 100 miles from the courthouse at time of trial qualified as an unavailable declarant. DePasquale v. Chamberlain, 282 S.W.3d 47, 2008 Tenn. App. LEXIS 403 (Tenn. Ct. App. July 15, 2008), appeal denied, Depasquale v. Chamberlain, — S.W.3d —, 2009 Tenn. LEXIS 217 (Tenn. Feb. 2, 2009).

9. Waiver of Objection to Defective Notice.

The plaintiff failed to provide required seven days' advance notice, but the defendant's objection was waived because the defendant did not

promptly serve plaintiff's counsel with a written objection to the technical deficiency of the notice. Raines v. Shelby Williams Industries, Inc., 814 S.W.2d 346, 1991 Tenn. LEXIS 273 (Tenn. 1991).

Although the Department of Health failed to provide proper notice to the physician of an expert's deposition testimony under Tenn. R. Civ. P. 32.04(1), 6.01, and 6.05, the physician did not have the option to wait until the contested case hearing to object; instead of promptly asserting a challenge to the admissibility of the deposition, the physician expressed no objection for seven weeks. By failing to promptly object in writing, the physician waived his right to object to the defective notice of the deposition and the admissibility of that deposition at the final hearing to revoke the physician's medical license. Roy v. Tenn. Bd. of Med. Examiners, 310 S.W.3d 360, 2009 Tenn. App. LEXIS 484 (Tenn. Ct. App. July 24, 2009), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 199 (Tenn. Feb. 22, 2010).

10. No Waiver of Objection.

Patient in a medical negligence action did not waive his objections to the testimony of two experts regarding the defense of comparative negligence, where the doctor waived the defense and thus, any ground for a relevant objection could not have been removed at the time. Dickson v. Kriger, 374 S.W.3d 405, 2012 Tenn. App. LEXIS 91 (Tenn. Ct. App. Feb. 10, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 414 (Tenn. June 19, 2012).

11. Deposition of Expert.

The last sentence of Rule 32.01(3) prohibits the use of the discovery deposition of an expert for anything other than contradicting or impeaching the testimony of the deponent as an expert witness, regardless of whether the deposition was taken in the present case or in a previous case. Further, the specific prohibition contained in that sentence is given precedence over the general exceptions to the hearsay rule contained in Tenn. R. Evid. 803 and 804. Drennon v. GE, 897 S.W.2d 243, 1994 Tenn. LEXIS 387 (Tenn. Special Workers' Comp. App. Panel 1994).

Trial court erred in excluding the deposition of plaintiffs' expert witness in plaintiffs' response to defendants' summary judgment motion. An expert deposition taken in accordance with Tenn. R. Civ. P. 26 could be offered by a party to oppose summary judgment to the same extent that an affidavit may be so used. Dial v. Harrington, 138 S.W.3d 895, 2003 Tenn. App. LEXIS 761 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 275 (Tenn. Mar. 22, 2004).

Where buyers of a termite-infested house sued sellers and the termite control company, trial court did not err in instructing the jury on the "missing witness" rule because the termite expert was not available at trial; trial court properly applied Tenn. R. Civ. P. 32.01(3) and Tenn. R. Evid. 804(a) in holding that defendants could not read portions of the termite expert's deposition into evidence. Elchlepp v. Hatfield, 294 S.W.3d 146, 2008 Tenn. App. LEXIS 437 (Tenn. Ct. App. July 30, 2008), appeal denied, — S.W.3d —, 2009 Tenn. LEXIS 83 (Tenn. Jan. 26, 2009).

12. Conduct During Deposition.

One reason for the solemnity and formality surrounding the taking of depositions is the possibility that deposition testimony will be introduced into court. Dargi v. Terminix Int'l Co., L.P., 23 S.W.3d 342, 2000 Tenn. App. LEXIS 67 (Tenn. Ct. App. 2000).

Plaintiff should have been aware that profane outbursts made at deposition could be presented to the court; therefore, plaintiff's conduct constituted criminal contempt under T.C.A. § 29-9-102(1). Dargi v. Terminix Int'l Co., L.P., 23 S.W.3d 342, 2000 Tenn. App. LEXIS 67 (Tenn. Ct. App. 2000).

RULE 33

INTERROGATORIES TO PARTIES

33.01. Availability; Procedures for Use. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each interrogatory shall be answered separately and fully in writing under oath, unless an objection is made to it or to a portion thereof, in which event the reasons and grounds for objection shall be stated with specificity in lieu of an

answer for that portion to which an objection is made. An objection must clearly indicate whether responsive information is being withheld on the basis of that objection. The answers are to be signed by the person making them, and the objections signed by the attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 37.01 with respect to any objection to or other failure to answer an interrogatory. [As amended July 1, 1979; amended by order dated January 16, 2020, effective July 1, 2020.]

Advisory Commission Comments [2020]. Rule 33.01 is amended to require that objections to interrogatories be stated with specificity. The amendment is intended to make clear that vague, generalized, or "boilerplate" objections are improper. Instead, objections should be specific as to the grounds for the objection, describing the reason(s) in a manner that will reasonably inform the adverse party as to what aspect of the interrogatory the objection pertains, thereby facilitating the resolution of discovery disputes without the need for judicial intervention.

In addition, the rule is amended to require that any objection or response under Rule 33 make clear whether information is actually being withheld pursuant to that objection, if any. A responding party may object to part of a request, but a party should answer any part of an interrogatory for which no objection is made, making clear which part is being answered.

The Commission envisions that, in the not too distant future, all of Tennessee's courts will adopt electronic case filing systems. In order to achieve statewide uniformity, the systems utilized throughout the state must comply with technological standards promulgated by the Supreme Court. Without such uniformity, the desired ease of access to data and cost efficiencies could not be achieved. For example, a responding party may object to a Rule 33 interrogatory as overly broad on the grounds that the time period covered is too long, or that the breadth of sources from which documents are sought is unduly burdensome, providing the specific bases therefore, and further making clear whether the objection is being made in whole or in part. For any such objection or answer that covers only a part of the interrogatory, it should be clear from the objection or answer that the information contained in the answer is being limited to covering the specifically identified time period or sources for which the responding party has no objection.

This amendment should end the confusion that frequently arises when a responding party states several objections, but then still answers the interrogatory by providing information, leaving the requesting party uncertain whether and to what extent relevant and responsive information has been withheld on the basis of the objection. The producing party does not need to provide a detailed description or log of information withheld, but does need to respond in a manner that will alert and inform parties what information is being provided, and what categories or types of information have been withheld pursuant to objection, thereby facilitating an informed discussion of the objection.

Compiler's Notes. The amendment of Rule 33, which amended subdivision 33.01 and added the [2020] Advisory Comments, as promulgated and adopted by the Supreme Court in its order dated January 16, 2020, was ratified and approved by 2020 House Resolution 236 and Senate Resolution 141. The order promulgating the amendment of subdivision 33.01 and the addition of the [2020] Advisory Comments, provided that it take effect July 1, 2020.

33.02. Scope; Use at Trial. Interrogatories may relate to any matters which can be inquired into under Rule 26.02, and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that

relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pre-trial conference or other later time. [As amended July 1, 1979.]

33.03. Option to Produce Business Records. Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract, or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained. [As amended July 1, 1979, and by order entered January 31, 1984, effective August 20, 1984; and by order entered January 8, 2009, effective July 1, 2009.]

Advisory Commission Comments. Rule 33 deals specifically with written interrogatories to adverse parties. It thus differs from Rule 31 which deals generally with depositions of "any person" upon written interrogatories. Rule 33, providing a simple method of obtaining the "official position" of an adversary on specific questions, would seem to constitute a useful addition to Tennessee procedure.

Rule 33 previously provided that the plaintiff could not serve interrogatories within 30 days after the commencement of the action without obtaining leave of the court. Rule 33.01 now [in 1979] permits interrogatories, without leave of the court, to be served by the plaintiff with or after service of the summons and complaint upon the defendant. [1979.]

Rule 33.03 is new [in 1979] and should permit the more equitable apportionment of the burden of examining voluminous records. [1979.]

33.03: Purely as an option for the party required to respond to interrogatories, Rule 33 has allowed under certain circumstances substituting specification and an opportunity to examine records in place of written answers. If the option is exercised, the discovered party must specify in a realistic and pragmatic fashion the business records from which answers can be obtained. [1984.]

Advisory Commission Comments [2009]. Rule 33.03 is amended to parallel Rule 34.01 by recognizing the importance of electronically stored information. The term "electronically stored information" has the same broad meaning in Rule 33.03 as in Rule 34.01. Much business information is stored only in electronic form; the Rule 33.03 option should be available with respect to such records as well.

Special difficulties may arise in using electronically stored information, either due to its form or because it is dependent on a particular computer system. Rule 33.03 allows a responding party to substitute access to documents or electronically stored information for an answer only if the burden of deriving the answer will be substantially the same for either party. Rule 33.03 states that a party electing to respond to an interrogatory by providing electronically stored information must ensure that the interrogating party can locate and identify it "as readily as can the party served," and that the responding party must give the interrogating party a "reasonable opportunity to examine, audit, or inspect" the information. Depending on the circumstances, satisfying these provisions with regard to electronically stored information may require the responding party to provide some combination of technical support, information on application software, or other assistance. The key question is whether such support enables the interrogating party to derive or ascertain the answer from the electronically stored information as readily as the responding party. A party that wishes to invoke Rule 33.03 by specifying electronically stored information may be required to provide direct access to its electronic information system, but only if that is necessary to afford the requesting party an adequate opportunity to derive or

ascertain the answer to the interrogatory. In that situation, the responding party's need to protect sensitive interests of confidentiality or privacy may mean that it must derive or ascertain and provide the answer itself rather than invoke Rule 33.03.

Compiler's Notes. For background of the 1979 amendments to this rule, see Advisory Commission Comments to Rule 26.

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 8, 2009, was ratified and approved by 2009 House Resolution 18 and Senate Resolution 19. The order promulgating the amendment of this rule provided that it take effect July 1, 2009.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 458, 561.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-29-1, 1-33-1, 1-33-3 — 1-33-9, 1-37.01-1.

Tennessee Jurisprudence. 9 Tenn. Juris., Discovery, §§ 31-33.

Law Reviews. A Survey of Civil Procedure in Tennessee — 1977, IV. Pretrial Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 308.

"Bring Your Own Device" Programs: Employer Control Over Employee Devices in the Mobile E-Discovery Age, 82 Tenn. L. Rev. 443 (2015).

NOTES TO DECISIONS

Analysis

1. Sanctions.
2. Experts Not Expected to Be Called.

1. Sanctions.

The trial courts of Tennessee must and do have the discretion to impose sanctions such as dismissal in order to penalize those who fail to comply with the rules and, further, to deter others from flouting or disregarding discovery orders. Holt v. Webster, 638 S.W.2d 391, 1982 Tenn. App. LEXIS 472 (Tenn. Ct. App. 1982).

2. Experts Not Expected to Be Called.

A party, through the use of written interrogatories pursuant to Tenn. R. Civ. P. 33, may discover, under Tenn. R. Civ. P. 26.02(1), identifying information concerning an adversary's formally retained expert when the expert is not expected to be called as witness at trial. Vythoulkas v. Vanderbilt University Hospital, 693 S.W.2d 350, 1985 Tenn. App. LEXIS 3392 (Tenn. Ct. App. 1985), superseded by statute as stated in, Thomas v. Oldfield, — S.W.3d —, 2007 Tenn. App. LEXIS 680 (Tenn. Ct. App. Nov. 7, 2007).

RULE 34

PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

34.01. Scope. Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on the requesting party's behalf, to inspect, copy, test or sample any designated documents or electronically stored information (including writings, drawings, graphs, charts, photographs, sound recordings, images, phonorecords, and other data and data compilations stored in any medium from which information can be obtained either directly or, if necessary, after translation by the respondent into a reasonably usable form), or to inspect and copy, test, or sample any designated tangible things which constitute or contain matters within the scope of Rule 26.02 and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26.02. [As amended July 1, 1979; and by order entered January 8, 2009, effective July 1, 2009.]

Advisory Commission Comments [2009]. As originally adopted, Rule 34 focused on discovery of "documents" and "things." Later, Rule 34 was amended to include discovery of data compilations, anticipating that the use of computerized information would increase. Since

then, the growth in electronically stored information and in the variety of systems for creating and storing such information has been dramatic. Lawyers and judges interpreted the term "documents" to include electronically stored information because it was obviously improper to allow a party to evade discovery obligations on the basis that the label had not kept pace with changes in information technology. But it has become increasingly difficult to say that all forms of electronically stored information, many dynamic in nature, fit within the traditional concept of a "document." Electronically stored information may exist in dynamic databases and other forms far different from fixed expression on paper.

Rule 34.01 is amended to confirm that discovery of electronically stored information stands on equal footing with discovery of paper documents. The change clarifies that Rule 34 applies to information that is fixed in a tangible form and to information that is stored in a medium from which it can be retrieved and examined. At the same time, a Rule 34 request for production of "documents" should be understood to encompass, and the response should include, electronically stored information unless discovery in the action has clearly distinguished between electronically stored information and "documents."

Discoverable information often exists in both paper and electronic form, and the same or similar information might exist in both. The items listed in Rule 34.01 show different ways in which information may be recorded or stored. Images, for example, might be hard-copy documents or electronically stored information. The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of electronically stored information. Rule 34.01 is expansive and includes any type of information that is stored electronically. A common example often sought in discovery is electronic communications, such as email. The rule covers — either as documents or as electronically stored information — information "stored in any medium," to encompass future developments in computer technology. Rule 34.01 is intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments.

The Rule 34.01 requirement that, if necessary, a party producing electronically stored information translate it into reasonably usable form does not address the issue of translating from one human language to another. *See In re Puerto Rico Elect. Power Auth.*, 687 F.2d 501, 504-510 (1st Cir. 1989).

Rule 34.01 is also amended to make clear that parties may request an opportunity to test or sample materials sought under the rule in addition to inspecting and copying them. That opportunity may be important for both electronically stored information and hard-copy materials. The current rule is not clear that such testing or sampling is authorized; the amendment expressly permits it. As with any other form of discovery, issues of burden and intrusiveness raised by requests to test or sample can be addressed under Rules 26.02 and 26.03. Inspection or testing of certain types of electronically stored information or of a responding party's electronic information system may raise issues of confidentiality or privacy. The addition of testing and sampling to Rule 34.01 with regard to documents and electronically stored information is not meant to create a routine right of direct access to a party's electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.

Rule 34.01 is further amended to make clear that tangible things must — like documents and land sought to be examined — be designated in the request.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 8, 2009, was ratified and approved by 2009 House Resolution 18 and Senate Resolution 19. The order promulgating the amendment of this rule provided that it take effect July 1, 2009.

Law Reviews. "Bring Your Own Device" Programs: Employer Control Over Employee Devices in the Mobile E-Discovery Age, 82 Tenn. L. Rev. 443 (2015).

NOTES TO DECISIONS

1. Improper Request for Production.

Employee and her husband failed to properly request the hospital's employment and payroll documents; their counsel's request in a letter that the witnesses bring all documents and any other materials relating to the witness's relationship to the employee during 2001-2003 was not a proper request for production of that information pursuant to Tenn. R. Civ. P. 34; therefore, there was no merit in the employee and the husband's alleged error that the hospital and other related persons and entities did not respond to a proper request for documents. Frye v. St. Thomas Health Servs., 227 S.W.3d 595, 2007 Tenn. App. LEXIS 151 (Tenn. Ct. App. 2007).

After the hospital and other related persons and entities provided the employee and her husband with the items specifically set forth in the request, the hospital and other related persons and entities were under no duty to relinquish materials which were not requested

or which were not described with reasonable particularity; since the employee and the husband failed to file a competent request which specifically sought the hospital's and other related persons' and entities' hard drives, the trial court properly denied the employee's and the husband's motion to compel. Frye v. St. Thomas Health Servs., 227 S.W.3d 595, 2007 Tenn. App. LEXIS 151 (Tenn. Ct. App. 2007).

34.02. Procedure. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected, either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place and manner of making the inspection and performing the related acts. The request may specify the form or forms in which the electronically stored information is to be produced.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, stating with specificity the grounds and reasons for objecting to the request. If objection is made to part of an item or category, the part shall be specified. An objection must state whether any responsive materials are being withheld on the basis of that objection.

If objection is made to the requested form or forms for producing electronically stored information–or if no form was specified in the request–the responding party must state the form or forms it intends to use.

Unless the parties otherwise agree, or the court otherwise orders:

(1) The party submitting the request may move for an order under Rule 37.01 with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(2) A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

(3) If a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and

(4) A party need not produce the same electronically stored information in more than one form. [As amended July 1, 1979 and by order entered January 31, 1984, effective August 20, 1984; and by order entered January 8, 2009, effective July 1, 2009; adopted by order dated January 8, 2019, effective October 1, 2019.]

Advisory Commission Comments [2009]. Rule 34.02 provides that a party must produce documents as they are kept in the usual course of business or must organize and label them to correspond with the categories in the discovery request. The production of electronically stored information should be subject to comparable requirements to protect against deliberate or inadvertent production in ways that raise unnecessary obstacles for the requesting party. Rule 34.02 is amended to ensure similar protection for electronically stored information.

The amendment to Rule 34.02 permits the requesting party to designate the form or forms in which it wants electronically stored information produced. The form of production is more important to the exchange of electronically stored information than of hard-copy materials, although a party might specify hard copy as the requested form. Specification of the desired form or forms may facilitate the orderly, efficient, and cost-effective discovery of electronically stored information. The rule recognizes that different forms of production may be appropriate for different types of electronically stored information. Using current technology, for example, a party might be called upon to produce word processing documents, e-mail messages, electronic spreadsheets, different image or sound files, and material from databases. Requiring that such diverse types of electronically stored information all be produced in the same form could prove impossible, and even if possible could increase the cost and burdens of producing and using the information. The rule therefore provides that the requesting party may ask for different forms of production for different types of electronically stored information.

The rule does not require that the requesting party choose a form or forms of production. The requesting party may not have a preference. In some cases, the requesting party may not know what form the producing party uses to maintain its electronically stored information, although Rule 26.06 is amended to call for discussion of the form of production in the parties' prediscovery conference.

The responding party also is involved in determining the form of production. In the written response to the production request that Rule 34 requires, the responding party must state the form it intends to use for producing electronically stored information if the requesting party does not specify a form or if the responding party objects to a form that the requesting party specifies. Stating the intended form before the production occurs may permit the parties to identify and seek to resolve disputes before the expense and work of the production occurs. A party that responds to a discovery request by simply producing electronically stored information in a form of its choice, without identifying that form in advance of the production in the response required by Rule 34.02, runs a risk that the requesting party can show that the produced form is not reasonably usable and that it is entitled to production of some or all of the information in an additional form. Additional time might be required to permit a responding party to assess the appropriate form or forms of production.

If the form of production is not specified by party agreement or court order, the responding party must produce electronically stored information either in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable. Rule 34.01 requires that, if necessary, a responding party "translate" information it produces into a "reasonably usable" form. Under some circumstances, the responding party may need to provide some reasonable amount of technical support, information on application software, or other reasonable assistance to enable the requesting party to use the information. The rule does not require a party to produce electronically stored information in the form in which it is ordinarily maintained, as long as it is produced in a reasonably usable form. But the option to produce in a reasonably usable form does not mean that a responding party is free to convert electronically stored information from the form in which it is ordinarily maintained to a different form that makes it more difficult or burdensome for the requesting party to use the information efficiently in the litigation. If the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature.

Some electronically stored information may be ordinarily maintained in a form that is not reasonably usable by any party. One example is "legacy" data that can be used only by superseded systems. The questions whether a producing party should be required to convert such information to a more usable form, or should be required to produce it at all, should be addressed under Rule 26.06.

Whether or not the requesting party specified the form of production, Rule 34.02 provides that the same electronically stored information ordinarily need be produced in only one form.

Advisory Commission Comments [2019]. Rule 34.02 is amended to require that objections to requests for production of documents and things be stated with specificity. The amendment is intended to make clear that vague, generalized, or "boilerplate" objections are improper. Instead, objections should be specific as to the grounds for the objection, describing the reason(s) in a manner that will reasonably inform the adverse party as to what aspect of the request the objection pertains, thereby facilitating the resolution of discovery disputes without the need for judicial intervention.

In addition, the rule is amended to require that any objection or response under Rule 34 make clear what documents and things are actually being withheld pursuant to that objection, if any. A responding party may object to part of a request, or to any item or category sought, but a party should produce those documents and things as to any part of a request for which no objection is made, making clear which parts, items, or categories are being produced. For example, a responding party may object to

a Rule 34 request as overly broad on the grounds that the time period covered is too long, or that the breadth of sources from which documents are sought is unduly burdensome, providing the specific bases therefore, and further making clear whether the objection is being made in whole or in part. For any such objection or response that covers only a part of the request, it should be clear from the response that production is being limited to documents or electronically-stored information covering the specifically identified time period or sources for which the responding party has no objection.

This amendment should end the confusion that frequently arises when a producing party states several objections, but then still produces information, documents, and things, leaving the requesting party uncertain whether and to what extent relevant and responsive information has been withheld on the basis of the objection. The producing party does not need to provide a detailed description or log of all documents and things withheld, but does need to respond in a manner that will alert and inform parties what documents and things are being produced, and what categories or types of documents and things have been withheld pursuant to objection, thereby facilitating an informed discussion of the objection.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 8, 2009, was ratified and approved by 2009 House Resolution 18 and Senate Resolution 19. The order promulgating the amendment of this rule provided that it take effect July 1, 2009.

In its order filed January 8, 2019, the Supreme Court adopted the amendment to this rule, effective July 1, 2019, subject to approval by resolution of the General Assembly.

The amendment of Rule 34, which amended subsection 34.02 and added a new [2019] Advisory Commission Comment, as promulgated and adopted by the Supreme Court in its order dated January 8, 2019, was ratified and approved by 2019 Special Session House Resolution 4 and 2019 Regular Session Senate Resolution 16. The order promulgating the amendment of Rule 34 by amendment of subsection 34.02 and the addition of a new [2019] Advisory Commission Comment, provided that it take effect October 1, 2019.

The amendment of Rule 34, which amended the [2019] Advisory Comments, as promulgated and adopted by the Supreme Court in its order dated January 16, 2020, was ratified and approved by 2020 House Resolution 236 and Senate Resolution 141. The order promulgating the amendment of the [2019] Advisory Comments, provided that it take effect July 1, 2020.

NOTES TO DECISIONS

1. Improper Request for Production.

After the hospital and other related persons and entities provided the employee and her husband with the items specifically set forth in the request, the hospital and other related persons and entities were under no duty to relinquish materials which were not requested or which were not described with reasonable particularity; since the employee and the husband failed to file a competent request which specifically sought the hospital's and other related persons' and entities' hard drives, the trial court properly denied the employee's and the husband's motion to compel. Frye v. St. Thomas Health Servs., 227 S.W.3d 595, 2007 Tenn. App. LEXIS 151 (Tenn. Ct. App. 2007).

Employee and her husband failed to properly request the hospital's employment and payroll documents; their counsel's request in a letter that the witnesses bring all documents and any other materials relating to the witness's relationship to the employee during 2001-2003 was not a proper request for production of that information pursuant to Tenn. R. Civ. P. 34; therefore, there was no merit in the employee and the husband's alleged error that the hospital and other related persons and entities did not respond to a proper request for documents. Frye v. St. Thomas Health Servs., 227 S.W.3d 595, 2007 Tenn. App. LEXIS 151 (Tenn. Ct. App. 2007).

34.03. Persons not Parties. As provided in Rule 45, a person not a party can be compelled to produce documents and tangible things or to permit an inspection. [As amended July 1, 1979; and by order filed January 8, 2009, effective July 1, 2009.]

Advisory Commission Comments. This Rule provides a method by which a party may obtain access to relevant material objects under the control of another party. This procedure has long been established in the Federal Rules of Civil Procedure. It has not had an exact equivalent in Tennessee procedure, although a somewhat similar procedure was authorized under Tenn. Code Ann. § 24-1101 et seq. [repealed].

34.01: The provisions of this rule [in 1984] permit a party to obtain documents which are subject to another party's effective control (e.g.,

medical records). [1984.]

34.02: A party responding to a request for production obviously must produce documents. To alleviate occasional abuses whereby a party will change the usual organization of files, the [1984] amendment requires either arrangement of records as kept in the course of business or rearrangement to track the request. [1984.]

Advisory Commission Comments [2009]. New Rule 34.03 replaces the earlier version, which mentioned an independent action for production or entry. The subpoena duces tecum procedure in Rule 45 is more efficient.

Compiler's Notes. For background of the 1979 amendments to this rule, see Advisory Commission Comments to Rule 26.

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 8, 2009, was ratified and approved by 2009 House Resolution 15 and Senate Resolution 16. The order promulgating the amendment of this rule provided that it take effect July 1, 2009.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 165, 461, 561.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-29-1, 1-30.02-5, 1-33-3, 1-33-6, 1-33-9, 1-34.01-1, 1-34.01-3, 1-37.01-3, 1-37.04-1.

Tennessee Jurisprudence. 9 Tenn. Juris., Discovery, §§ 23, 34-36.

Law Reviews. A Survey of Civil Procedure in Tennessee — 1977, IV. Pretrial Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 308.

Discovery for Paupers (Donald F. Paine), 25 No. 6 Tenn. B.J. 35 (1989).

RULE 34A

SPOLIATION OF EVIDENCE

34A.01 Testing of Tangible Things. Before a party or an agent of a party, including experts hired by a party or counsel, conducts a test materially altering the condition of tangible things that relate to a claim or defense in a civil action, the party shall move the court for an order so permitting and specifying the conditions. Rule 37 sanctions may be imposed on an offending party. [Adopted by order entered January 24, 1992, effective July 1, 1992, as amended by order entered December 30, 1993, effective July 1, 1994; as amended by order filed December 29, 2005, effective July 1, 2006.]

34A.02 Other Spoliation. Rule 37 sanctions may be imposed upon a party or an agent of a party who discards, destroys, mutilates, alters, or conceals evidence. [Adopted by order filed December 29, 2005, effective July 1, 2006.]

Advisory Commission Comments [1992]. Concern over destructive testing of real evidence prompted this addition to the Rules of Civil Procedure. If one party's expert destroys a tangible thing in testing, the opponent will be deprived of similar testing and may be without evidence to support a claim or defense. Requiring a motion, which would put the opponent on notice, and giving the court discretion to set conditions should prevent an unjust result. The rule applies, however, only where a civil action has been commenced.

Advisory Commission Comments [1994]. The amendment provides for destruction or other disposition in addition to testing.

Advisory Commission Comments [2006]. The rule has a new, broader heading. Rule 34A.02 is new. Also, Rule 37 sanctions are made available against offenders. Those sanctions include, at 37.02, refusal to allow claims or defenses; even dismissal of a plaintiff's complaint and entry of default judgment against a defendant are possible.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated December 29, 2005, was ratified and approved by 2006 House Resolution 200 and Senate Resolution 95. The order promulgating the amendment of this rule provided that it take effect July 1, 2006.

NOTES TO DECISIONS

ANALYSIS

1. Dismissal Too Severe.
2. Intentional Misconduct.
3. Sanctions.

1. Dismissal Too Severe.

Dismissal of a property damage claim was too severe of a sanction because both parties were guilty of spoliation due to discarding or destroying evidence relating to a fuel fire. Be-

cause of the spoliation, both sides in this case were hindered severely in their ability to prove claims and defenses. Griffith Servs. Drilling, LLC v. Arrow Gas & Oil, Inc., 448 S.W.3d 376, 2014 Tenn. App. LEXIS 300 (Tenn. Ct. App. May 27, 2014), appeal denied, Griffith Drilling Servs. v. Arrow Gas & Oil, Inc., — S.W.3d —, 2014 Tenn. LEXIS 840 (Tenn. Oct. 16, 2014).

2. Intentional Misconduct.

Trial court did not abuse its discretion in declining to dismiss a purchaser's product liability case as a sanction for the spoliation of evidence because it relied on the absence of intentional misconduct; although not a prerequisite to the imposition of a sanction, the absence or presence of intentional misconduct is an important factor, and the application and weight of such factor is within a trial court's wide discretion. Tatham v. Bridgestone Ams. Holding, Inc., 473 S.W.3d 734, 2015 Tenn. LEXIS 911 (Tenn. Oct. 30, 2015).

In light of the rule and the long-standing recognition of a trial court's inherent authority and wide discretion in imposing sanctions to ensure fundamental fairness and the proper administration of justice, intentional misconduct is not a prerequisite to impose sanctions for the spoliation of evidence, including that of a negative inference; the analysis for the imposition of any sanction for the spoliation of evidence should be based upon a consideration of the totality of the circumstances. Tatham v. Bridgestone Ams. Holding, Inc., 473 S.W.3d 734, 2015 Tenn. LEXIS 911 (Tenn. Oct. 30, 2015).

Intentional misconduct should not be a prerequisite to the imposition of some sanction under any approach; rather, such determinations should be made on a case-by-case basis considering all relevant circumstances, and whether the conduct involved intentional misconduct simply should be one of the factors considered by the trial court. Tatham v. Bridgestone Ams. Holding, Inc., 473 S.W.3d 734, 2015 Tenn. LEXIS 911 (Tenn. Oct. 30, 2015).

Trial court did not abuse its discretion in declining to dismiss a purchaser's product liability case as a sanction for the spoliation of evidence because a tire was destroyed as a part of a routine practice, and there was no evidence it was destroyed as the result of intentional misconduct, including fraudulent intent to conceal evidence on the part of the purchaser. Tatham v. Bridgestone Ams. Holding, Inc., 473 S.W.3d 734, 2015 Tenn. LEXIS 911 (Tenn. Oct. 30, 2015).

3. Sanctions.

Although the dismissal of an action is a severe sanction, such a sanction would be appropriate in circumstances where any less severe remedy would not be sufficient to redress the prejudice caused to the non-spoliating party by the loss of the evidence. Tatham v. Bridgestone Ams. Holding, Inc., 473 S.W.3d 734, 2015 Tenn. LEXIS 911 (Tenn. Oct. 30, 2015).

Factors which are relevant to a trial court's consideration of what, if any, sanction should be imposed for the spoliation of evidence include the culpability of the spoliating party in causing the destruction of the evidence, including evidence of intentional misconduct or fraudulent intent, and the degree of prejudice suffered by the non-spoliating party as a result of the absence of the evidence. Tatham v. Bridgestone Ams. Holding, Inc., 473 S.W.3d 734, 2015 Tenn. LEXIS 911 (Tenn. Oct. 30, 2015).

Factors which are relevant to a trial court's consideration of what, if any, sanction should be imposed for the spoliation of evidence include whether, at the time the evidence was destroyed, the spoliating party knew or should have known that the evidence was relevant to pending or reasonably foreseeable litigation, and the least severe sanction available to remedy any prejudice caused to the non-spoliating party. Tatham v. Bridgestone Ams. Holding, Inc., 473 S.W.3d 734, 2015 Tenn. LEXIS 911 (Tenn. Oct. 30, 2015).

Trial court did not abuse its discretion by dismissing a negligence action that arose from a tractor-trailer accident because the tractor owners' purportedly unintentional spoliation of evidence resulted in severe prejudice to the trailer owner's ability to defend against the tractor owners' claims due to the trailer owner's inability to inspect the tractor when the tractor owners assigned title to the tractor to their insurance carrier and the insurance carrier then removed tractor's engine and sold the chassis for salvage. Gardner v. R & J Express, LLC, 559 S.W.3d 462, 2018 Tenn. App. LEXIS 248 (Tenn. Ct. App. May 7, 2018), appeal denied, Gardner v. R & J Express, LLC, — S.W.3d —, 2018 Tenn. LEXIS 552 (Tenn. Sept. 13, 2018).

Trial court did not abuse its discretion by denying appellant's motion for sanctions based on spoliation of evidence when the opposing parties attached an inaccurate version of appellant's petition for remonstrance to a memorandum because appellant provided the trial court with a copy of the complete version of the petition, the petition attached to the memorandum was not submitted as evidence, and appellant's original petition became moot when ap-

pellant filed an amended petition for writ of mandamus. Gentry v. Casada, — S.W.3d —, 2020 Tenn. App. LEXIS 416 (Tenn. Ct. App. Sept. 17, 2020).

RULE 35

PHYSICAL AND MENTAL EXAMINATION OF PERSONS

35.01. Order for Examination. When the mental or physical condition (including the blood group) of a party, or of a person in the custody or under the legal control of a party, is in controversy, the court in which the action is pending may order the party to submit to a physical or mental examination by a suitably licensed or certified examiner or to produce for examination the person in his or her custody or legal control. The order may be made only on motion for good cause shown and upon notice to the person to be examined and to all parties and shall specify the time, place, manner, conditions, and scope of the examination and the person or persons by whom it is to be made. [As amended July 1, 1979.]

NOTES TO DECISIONS

ANALYSIS

1. Ex Parte Communications.
2. Requirements Met.

1. Ex Parte Communications.

Once the requirements of Tenn. R. Civ. P. 35 have been met, a trial court has the discretion to compel a plaintiff to submit to a medical examination by a medical expert chosen by the defendant, and the defendant and/or his counsel may have ex parte communication with that expert in preparation for the medical examination and for trial. Roach v. Dixie Gas Co., 371 S.W.3d 127, 2011 Tenn. App. LEXIS 612 (Tenn. Ct. App. Nov. 14, 2011).

2. Requirements Met.

Finding in favor of defendants in plaintiffs lawsuit for damages arising out of an explosion was proper because the requirements in Tenn. R. Civ. P. 35 were met and the trial court therefore did not abuse its discretion in ordering plaintiffs' medical examinations by two doctors. In light of the complaint filed by plaintiffs, and given the subjective nature of their claimed injuries, the trial court did not err in determining that the "in controversy" and the "good cause" requirements of R. 35 had been met. Roach v. Dixie Gas Co., 371 S.W.3d 127, 2011 Tenn. App. LEXIS 612 (Tenn. Ct. App. Nov. 14, 2011).

35.02. Report of Examining Physician. (1) If requested by the party against whom an order is made under Rule 35.01 or the person examined, the party causing the examination to be made shall deliver to him a copy of a detailed written report of the suitably licensed or certified examiner setting out findings, including results of all tests made, diagnoses and conclusions, together with like reports of all earlier examinations of the same condition. After delivery the party causing the examination shall be entitled upon request to receive from the party against whom the order is made a like report of any examination, previously or thereafter made, of the same condition, unless, in the case of a report of examination of a person not a party, the party cannot obtain it. The court on motion may make an order against a party requiring delivery of a report on such terms as are just, and if a suitably licensed or certified examiner fails or refuses to make a report the court may exclude testimony if offered at the trial.

(2) By requesting and obtaining a report of the examination so ordered or by taking the deposition of the examiner, the party examined waives any privilege

in that action or any other involving the same controversy, regarding the testimony of every other person who has examined or may thereafter examine that party in respect of the same mental or physical condition.

(3) This subdivision applies to examinations made by agreement of the parties, unless the agreement expressly provides otherwise. This subdivision does not preclude discovery of a report of a suitably licensed or certified examiner or the taking of a deposition of the suitably licensed or certified examiner in accordance with the provisions of any other rule. [As amended July 1, 1979, and by order entered December 20, 1993, effective July 1, 1994.]

Advisory Commission Comments. This Rule permits a court to order the physical or mental examination of a party upon motion of another party when the condition is in controversy. A provision is made to permit the examined party to obtain a copy of the report; obtaining such a copy acts as a waiver of any privilege with respect to other examinations of the same party for the same condition.

Advisory Commission Comments [1994]. The amendment expands the group of professionals who can conduct examinations. Whether an examiner authorized under this rule may give testimony at a trial or proceeding is governed by the Tennessee Rules of Evidence.

Compiler's Notes. For background of the 1979 amendments to this rule, see Advisory Commission Comments to Rule 26.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), § 561.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-35.01-1, 1-35.02-1.

Tennessee Jurisprudence. 9 Tenn. Juris., Discovery, §§ 37, 38.

Law Reviews. A Survey of Civil Procedure in Tennessee — 1977, IV. Pretrial Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 308.

Proof in Outrageous Conduct Cases (John A. Day), 36 No. 1 Tenn. 30 (2000).

NOTES TO DECISIONS

ANALYSIS

1. In General.
2. Child Custody.

1. In General.

Trial court erred in denying employer's request for independent medical examination because employer had a right to seek such examination pursuant to T.C.A. § 50-6-204(d)(9); this qualified right differed from cases outside of the Worker's Compensation Act. Overstreet v. TRW Commer. Steering Div., 256 S.W.3d 626, 2008 Tenn. LEXIS 413 (Tenn. June 17, 2008), superseded by statute as stated in, Hayes v. Am. Zurich Ins. Co., — S.W.3d —, 2011 Tenn. LEXIS 458 (Tenn. May 25, 2011).

2. Child Custody.

On hearing wherein husband sought to keep wife from removing children to Toronto, Canada, and to have a change of custody, trial court properly exercised discretion in refusing to allow psychological evaluation of children, whose mental and physical condition was not at issue, in order to predict the impact of the proposed move on them. Walker v. Walker, 656 S.W.2d 11, 1983 Tenn. App. LEXIS 597 (Tenn. Ct. App. 1983), overruled, Seessel v. Seessel, 748 S.W.2d 422, 1988 Tenn. LEXIS 55 (Tenn. 1988), overruled, Webster v. Webster, — S.W.3d —, 2006 Tenn. App. LEXIS 685 (Tenn. Ct. App. Oct. 24, 2006).

In a change of custody proceeding, evidence of the mother's loss of weight and her child's testimony that he found a marijuana-like substance in their home and that his mother took bags of the "sugar like stuff" to a back room did not require the trial court to order drug tests. Massengale v. Massengale, 915 S.W.2d 818, 1995 Tenn. App. LEXIS 634 (Tenn. Ct. App. 1995), appeal denied, — S.W.2d —, 1996 Tenn. LEXIS 70 (Tenn. Jan. 29, 1996).

RULE 36

REQUESTS FOR ADMISSION

36.01. Request for Admission. A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26.02 set forth in the request that relate to (a) facts, the application of law to fact, or opinions about either; and (b) the genuineness of any described documents. Copies of documents shall

be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon the defendant. If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that he or she has made reasonable inquiry and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37.03, deny the matter or set forth reasons why the party cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pre-trial conference or at a designated time prior to trial. The provisions of Rule 37.01(4) apply to the award of expenses incurred in relation to the motion. [As amended July 1, 1979; and by order filed December 21, 2010, effective July 1, 2011.]

Advisory Commission Comments [2011]. This amendment to Rule 36.01 is the same change that was made to Rule 36(a) of the Federal Rules of Civil Procedure in 2007. This change reinforces the point that a request is not objectionable merely because it asks an adversary to admit an opinion about facts or an opinion requiring the application of law to fact. This amendment should render obsolete any contrary suggestion that may be drawn from *Brooks v. United Uniform Co.*, 682 S.W.2d. 913 (Tenn. 1984).

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Su-

preme Court in its order dated December 21, 2010, was ratified and approved by 2011 House Resolution 34 and Senate Resolution 12. The order promulgating the amendment of this rule provided that it take effect July 1, 2011.

NOTES TO DECISIONS

ANALYSIS

1. Amendment.
2. Exclusion of Responses.
3. Waiver.

1. Amendment.

Trial court did not abuse its discretion by allowing appellee to amend her responses in this case; she did not fail to respond, but stated that she was unable to admit or deny, and the trial court perceived her responses to be denials. Allen v. Albea, 476 S.W.3d 366, 2015 Tenn. App. LEXIS 241 (Tenn. Ct. App. Apr. 23, 2015).

2. Exclusion of Responses.

Exclusion of appellee's responses that, as a lay person and without an expert medical opinion, she could neither admit nor deny appellant's assertions that the entirety of his medical bills were related to the collision and were reasonable and necessary did not prejudice appellant in light of the entirety of the testimony in this case. Allen v. Albea, 476 S.W.3d 366, 2015 Tenn. App. LEXIS 241 (Tenn. Ct. App. Apr. 23, 2015).

3. Waiver.

Judgment debtor could not rely on its requests for admission—even though the judgment creditor did not timely respond to the requests—because the judgment debtor waived any reliance on the requests by waiting until the last minute to bring the issue to the attention of the trial court. Wolf Org., Inc. v. TNG Contrs., LLC, — S.W.3d —, 2019 Tenn. App. LEXIS 338 (Tenn. Ct. App. July 3, 2019).

36.02. Effect of Admission. Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to the provisions of Rule 16 governing amendment of a pre-trial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by that party for any other purpose nor may it be used against that party in any other proceeding. [As amended July 1, 1979.]

Advisory Commission Comments. Rule 36.01 permits the plaintiff to serve requests for admissions upon the defendant with or after service of the summons and complaint. The rule fixes the time within which responses or objections must be served. The rule also imposes upon a party the duty to make a reasonable inquiry in an effort to ascertain the answer to a request for admissions. [1979.]

Compiler's Notes. For background of the 1979 amendments to this rule, see Advisory Commission Comments to Rule 26.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 158, 197, 461, 561.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-29-1, 1-36.01-1 — 1-36.01-5, 1-36.02-1, 1-37.03-1.

Tennessee Jurisprudence. 9 Tenn. Juris., Discovery, §§ 2, 39, 40; 11 Tenn. Juris., Evidence, § 195.

Law Reviews. A Survey of Civil Procedure in Tennessee — 1977, IV. Pretrial Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 308.

Discovery for Paupers (Donald F. Paine), 25 No. 6 Tenn. B.J. 35 (1989).

Sanction for Discovery Abuse (Donald F. Paine), 27 No. 6 Tenn. B.J. 19 (1991).

Sanctions for Discovery Abuse (Donald F. Paine), 28 No. 1 Tenn. B.J. 23 (1992).

Some Comparisons Between the New Tennessee Rules of Evidence and the Federal Rules of Evidence Part I (Robert Banks, Jr.), 20 Mem. St. U.L. Rev. 283 (1990).

The Emerging State Law of Sanctions (Lucian T. Pera), 28 No. 1 Tenn. B.J. 24 (1992).

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1. In General.

Courts are disinclined to grant appellate relief to parties who have failed to take advantage of the remedies available to them to prevent or nullify the harmful effect of an error. Hessmer v. Hessmer, 138 S.W.3d 901, 2003 Tenn. App. LEXIS 346 (Tenn. Ct. App. 2003).

Trial court did not abuse its discretion when it denied plaintiff's motion to deem the requests for admissions admitted as she did not demonstrate how she would have been prejudiced by the trial court's decision to grant defendants' motion for an extension of time to file responses; the trial court's ruling had little effect on plaintiff's ability to maintain the action, including the issues of negligence attributable to defendants. Lundell v. Hubbs, — S.W.3d —, 2020 Tenn. App. LEXIS 528 (Tenn. Ct. App. Nov. 23, 2020).

2. Expert Opinion.

Expert opinion is not subject to discovery under Tenn. R. Civ. P. 36 because it is not fact. Brooks v. United Uniform Co., 682 S.W.2d 913, 1984 Tenn. LEXIS 911 (Tenn. 1984).

3. Requests for Admission.

Unlike other forms of discovery, requests to admit under Tenn. R. Civ. P. 36 primarily involve the elimination of undisputed matters, rather than the ascertainment of facts. Tennessee Dep't of Human Services v. Barbee, 714 S.W.2d 263, 1986 Tenn. LEXIS 775 (Tenn. 1986).

Requests for admission that are unanswered are deemed admitted; thus, in an action by a homeowner against a manufacturer arising from injuries sustained as a result of exposure to termiticide, failure of the homeowner to respond to requests for admission barred recovery since the admissions conclusively established that here alleged injuries were not due to negligence or breach of warranty by the manufacturer. Neely v. Velsicol Chem. Corp., 906 S.W.2d 915, 1995 Tenn. App. LEXIS 155 (Tenn. Ct. App. 1995).

No authority could be found that allows a party to select and use parts of a response to a request for admissions; therefore, defendant was entitled under Tenn. R. Civ. P. 36 to explain defendant's answer to the request and if the plaintiff wished to use the admission without the explanation, plaintiff should have sought an order from the court. Bligh v. Snider (Estate of Bligh), 30 S.W.3d 319, 2000 Tenn. App. LEXIS 94 (Tenn. Ct. App. 2000).

4. Effect of Admission.

Unlike responses to other discovery procedures which are evidentiary and are obtained for the purpose of introduction at trial and subject to contradiction at trial, an admission under Tenn. R. Civ. P. 36, unless it is allowed to be withdrawn or amended, concludes the matter and avoids any need for proof at trial. Tennessee Dep't of Human Services v. Barbee, 714 S.W.2d 263, 1986 Tenn. LEXIS 775 (Tenn. 1986).

5. Genuineness of Document.

Admissions by plaintiffs as to the genuineness of certain documents were conclusive as to whether the document was what it purported to be. However, the admission of the genuineness of the document does not equate to the document itself being admitted into evidence and the party relying upon a document must still lay a foundation as to its relevance, and have the document properly admitted. Brown v. Daly, 884 S.W.2d 121, 1994 Tenn. App. LEXIS 190 (Tenn. Ct. App. 1994).

6. Waiver.

Tenn. R. Civ. P. 36, which was promulgated to eliminate and narrow the issues and relieve the party seeking the admissions from proving admitted facts, was waived by the plaintiff when the plaintiff proceeded to trial and attempted to prove the very issues that were the subjects of the requests for admissions. Tennessee Dep't of Human Services v. Barbee, 714 S.W.2d 263, 1986 Tenn. LEXIS 775 (Tenn. 1986).

7. Sanctions.

Imposition of sanctions for failure to meet requirements of rule regarding discovery requests is within discretion of court and will not be disturbed in absence of affirmative showing of abuse. Roberts v. Blount Mem. Hosp., 963 S.W.2d 744, 1997 Tenn. App. LEXIS 66 (Tenn. Ct. App. 1997), appeal denied, 963 S.W.2d 744, 1997 Tenn. LEXIS 484 (Tenn. 1997), overruled in part, Limbaugh v. Coffee Med. Ctr., 59 S.W.3d 73, 2001 Tenn. LEXIS 756 (Tenn. 2001).

8. Time for Responding.

If the debtor's responses to the assignee's requests were made at the hearing in January, the assignee had sufficient time before trial to pursue further discovery if it so desired and was not prejudiced by the fact that the debtor

did not respond within the time allotted under Tenn. R. Civ. P. 36.01; the probative value of the matters deemed admitted was inconsequential and therefore any error committed by the trial court in this regard was harmless. C & W Asset Acquisition, LLC v. Oggs, 230 S.W.3d 671, 2007 Tenn. App. LEXIS 57 (Tenn. Ct. App. Jan. 30, 2007), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 490 (Tenn. May 14, 2007).

Clear language of Tenn. R. Civ. P. 36 provided the trial court discretion to allow withdrawal or amendment of matters deemed admitted due to a party's failure to timely provide answers to a request for admission, including when no response had been provided by a party who had received a request for admission. Meyer Laminates (SE), Inc. v. Primavera Distrib., 293 S.W.3d 162, 2008 Tenn. App. LEXIS 19 (Tenn. Ct. App. Jan. 18, 2008), appeal denied, Meyer Laminates (Se), Inc. v. Primavera Distrib., Inc., — S.W.3d —, 2008 Tenn. LEXIS 594 (Tenn. Aug. 25, 2008).

There was no abuse of discretion in the trial court's order establishing as admitted those matters that the claimant presented in its discovery request for admissions because the company was given ten days to respond to the claimant's outstanding discovery requests, but made no response for four months and offered no reason or explanation for the delay; under Tenn. R. Civ. P. 37.02, the trial court was authorized to sanction the company, and the company's own motion for additional time demonstrated that the company did not consider its answer to the complaint to be a meaningful discovery response. Meyer Laminates (SE), Inc. v. Primavera Distrib., 293 S.W.3d 162, 2008 Tenn. App. LEXIS 19 (Tenn. Ct. App. Jan. 18, 2008), appeal denied, Meyer Laminates (Se), Inc. v. Primavera Distrib., Inc., — S.W.3d —, 2008 Tenn. LEXIS 594 (Tenn. Aug. 25, 2008).

9. Failure to Respond.

Grant of summary judgment in favor of a credit card company in an action on a sworn account for unpaid credit card debt was appropriate because the company was not required to bring forth further proof of its claim; the properly authenticated and sworn account, without a proper response from the customer, was conclusive against him. The customer never answered the request to admit. Am. Express Bank, FSB v. Fitzgibbons, 362 S.W.3d 93, 2011 Tenn. App. LEXIS 572 (Tenn. Ct. App. Oct. 24, 2011).

10. Amendment.

Garnishee was properly allowed to withdraw deemed admissions to a request for admissions because there was confusion as to the propriety of discovery from the garnishee. Smith v. Smith, — S.W.3d —, 2019 Tenn. App. LEXIS 59 (Tenn. Ct. App. Jan. 31, 2019).

11. Withdrawal of Admissions.

Withdrawal of successor lender's admissions was proeprly allowed where the withdrawn admissions had no bearing on the borrowers' ability to argue that the MERS could not transfer the property, and there was no showing of prejudice. Ross v. Orion Fin. Grp., Inc., — S.W.3d —, 2019 Tenn. App. LEXIS 113 (Tenn. Ct. App. Mar. 7, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 281 (Tenn. June 20, 2019).

RULE 37

FAILURE TO MAKE OR COOPERATE IN DISCOVERY: SANCTIONS

37.01. Motion for Order Compelling Discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) APPROPRIATE COURT. An application for an order to a party or to a deponent who is not a party, may be made to the court in which the action is pending.

(2) MOTION. If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30.02(6) or 31.01, or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or

adjourn the examination before applying for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26.03.

(3) EVASIVE OR INCOMPLETE ANSWER. For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) AWARD OF EXPENSES OF MOTION. If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner. [As amended July 1, 1979.]

37.02. Failure to Comply with Order. If a deponent; a party; an officer, director, or managing agent of a party; or, a person designated under Rule 30.02(6) or 31.01 to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under Rule 37.01 or Rule 35, or if a party fails to obey an order entered under Rule 26.06, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) Where a party has failed to comply with an order under Rule 35.01 requiring the party to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this rule, unless the party failing to comply shows that he or she is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall

require the party failing to obey the order or the attorney advising the party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. [As amended July 1, 1979, and by order entered January 31, 1984, effective August 20, 1984.]

NOTES TO DECISIONS

ANALYSIS

1. Dismissal Proper.
2. Dismissal Improper.
3. Sanctions Proper.
4. Sanction Improper.

1. Dismissal Proper.

Trial court did not abuse its discretion when it dismissed a franchisee's complaint with prejudice because of the franchisee's failure to attend several properly noticed depositions. The trial court had authority under Tenn. R. Civ. P. 37.04 to dismiss the action pursuant to Tenn. R. Civ. P. 37.02(C). Langlois v. Energy Automation Sys., Inc., 332 S.W.3d 353, 2009 Tenn. App. LEXIS 868 (Tenn. Ct. App. Dec. 21, 2009), appeal denied, Langlois v. Energy Automation Sys., — S.W.3d —, 2010 Tenn. LEXIS 595 (Tenn. June 18, 2010).

Judgment dismissing plaintiffs' suit and sanctioning plaintiffs was affirmed because (1) plaintiffs had repeatedly disregarded the trial court's orders and directives concerning the conditions of the limited continuance of this matter provided by the trial court on or about July 25, 2008; and (2) the trial court based its dismissal on the totality of the circumstances, not just on one instance of behavior. Amanns v. Grissom, 333 S.W.3d 90, 2010 Tenn. App. LEXIS 418 (Tenn. Ct. App. June 30, 2010), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 1173 (Tenn. Dec. 7, 2010).

Trial court did not abuse its discretion in dismissing the Tennessee cases of personal injury plaintiffs who claimed that jurisdiction did not exist in Mexico, but failed to disclose in discovery their prior filings in Mexico, which were voluntarily dismissed, because the plaintiffs were not purely innocent and the dismissal was not too harsh a sanction under Tenn. R. Civ. P. 37. Ramirez v. Bridgestone/Firestone, Inc., 414 S.W.3d 707, 2013 Tenn. App. LEXIS 231 (Tenn. Ct. App. Apr. 4, 2013), appeal denied, — S.W.3d —, 2013 Tenn. LEXIS 710 (Tenn. Aug. 26, 2013).

Trial court properly dismissed a plaintiff's case for lack of prosecution because the record contained no evidence that the judge said or did anything even mildly discourteous to her, and acted properly in letting her know that the status conference was not the proper time to get into the matters of the case, the judge's membership in an political organization did not mean that the judge was biased against the plaintiff, the trial court clearly warned her that the case would be dismissed with prejudice if she failed to show up for the trial date, and the plaintiff's explanation of why she failed to show up for trial—it was cold and rainy that day and she had "put back in service" a 1985 vehicle—was insufficient for not showing up for trial. Harris v. Smith, — S.W.3d —, 2019 Tenn. App. LEXIS 616 (Tenn. Ct. App. Dec. 20, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 371 (Tenn. June 5, 2020), cert. denied, — L. Ed. 2d —, — S. Ct. —, — U.S. —, 2020 U.S. LEXIS 5515 (U.S. Nov. 16, 2020).

Dismissal of a former employee's claims against the president and auditor as a discovery sanction was not an abuse of discretion where the trial court identified and applied the correct law, and the failure to properly respond to discovery requests unduly prolonged discovery and halted forward progress in the litigation, and the court's choice of dismissal as the appropriate sanction was within the range of acceptable dispositions. Collins v. Carter, — S.W.3d —, 2020 Tenn. App. LEXIS 149 (Tenn. Ct. App. Apr. 9, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 562 (Tenn. Oct. 8, 2020).

Trial court properly dismissed a pro se driver's negligence action pursuant to Tenn. R. Civ. P. 37.02(C) where the court had notified the driver that he was required to supplement his discovery responses, he had more than three months in which to do so, the court had warned him that it would dismiss his action if he failed to comply, and the driver had no difficulty obtaining any of the records that he needed to comply with the court's order in a timely manner. Gordon v. Chapman, — S.W.3d —, 2020 Tenn. App. LEXIS 592 (Tenn. Ct. App. Dec. 22, 2020).

2. Dismissal Improper.

Dismissal of a property damage claim was too severe of a sanction because both parties were guilty of spoliation due to discarding or destroying evidence relating to a fuel fire. Because of the spoliation, both sides in this case were hindered severely in their ability to prove claims and defenses. Griffith Servs. Drilling, LLC v. Arrow Gas & Oil, Inc., 448 S.W.3d 376, 2014 Tenn. App. LEXIS 300 (Tenn. Ct. App. May 27, 2014), appeal denied, Griffith Drilling Servs. v. Arrow Gas & Oil, Inc., — S.W.3d —, 2014 Tenn. LEXIS 840 (Tenn. Oct. 16, 2014).

3. Sanctions Proper.

Trial court did not abuse its discretion in awarding a husband the fees incurred related to discovery because the wife repeatedly disobeyed the trial court's discovery orders; the husband moved for sanctions multiple times, and the amount awarded was not excessive and was directly related to the abuse. Odom v. Odom, — S.W.3d —, 2019 Tenn. App. LEXIS 378 (Tenn. Ct. App. Aug. 5, 2019).

Circuit court properly imposed discovery sanctions in an injured motorcyclist's personal injury action against a truck driver by excluding the motorcyclist's use of a portion of the driver's deposition testimony because the motorcyclist's counsel demonstrated no efforts to participate in discovery, even after the driver's counsel twice renewed his request for interrogatories and production of documents, and agreed to extend the response deadline, and failed to provide the photograph until many months later during depositions, the motorcyclist was still permitted to use the photograph during his cross-examination of the driver at trial. Cuddeford v. Jackson, — S.W.3d —, 2020 Tenn. App. LEXIS 161 (Tenn. Ct. App. Apr. 16, 2020).

4. Sanction Improper.

Trial court did not abuse its discretion by denying appellant's motion for sanctions based on spoliation of evidence when the opposing parties attached an inaccurate version of appellant's petition for remonstrance to a memorandum because appellant provided the trial court with a copy of the complete version of the petition, the petition attached to the memorandum was not submitted as evidence, and appellant's original petition became moot when appellant filed an amended petition for writ of mandamus. Gentry v. Casada, — S.W.3d —, 2020 Tenn. App. LEXIS 416 (Tenn. Ct. App. Sept. 17, 2020).

37.03. Failure to Supplement or Amend Responses or Failure to Admit. (1) A party who without substantial justification fails to supplement or amend responses to discovery requests as required by Rule 26.05 is not permitted, unless such failure is harmless, to use as evidence at trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court on motion may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses (including attorney fees) caused by the failure, these sanctions may include any of the actions authorized under Rule 37.02(A), (B), and (C) and may include informing the jury of the failure to supplement or amend.

(2) If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the requesting party the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36.01, or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he or she might prevail on the matter, or (4) there was other good reason for the failure to admit. [As amended July 1, 1979; by order filed December 29, 2005, effective July 1, 2006; and by order entered December 14, 2009, effective July 1, 2010.]

Advisory Commission Comments [2010]. The title of Rule 37.03 is expanded to conform to the language in the rule.

Compiler's Notes. The amendment of the heading for Rule 37.03 and the enactment of Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 14, 2009, was ratified and approved by 2010 Senate Resolution 180 and 2010 House Resolution 239. The order promulgating the amendment of this rule provided that it take effect July 1, 2010.

NOTES TO DECISIONS

Analysis

1. Sanctions.
2. Expert Testimony Admissible.
3. Failure to Disclose.

1. Sanctions.

Where city employees filed a class action lawsuit seeking step raise promotions based upon merit, the city failed to answer discovery requests; the trial court's decision to impose sanctions against the city under Tenn. R. Civ. P. 37 did not constitute an abuse of discretion. Considering the harsh result that would ensue from not allowing the city to make affirmative defenses, the court did not err in relieving the city of this portion of the sanctions under Tenn. R. Civ. P. 59. Ussery v. City of Columbia, 316 S.W.3d 570, 2009 Tenn. App. LEXIS 363 (Tenn. Ct. App. June 1, 2009), rehearing denied, 316 S.W.3d 570, 2009 Tenn. App. LEXIS 490 (Tenn. Ct. App. June 30, 2009), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 246 (Tenn. Mar. 15, 2010).

Judgment dismissing plaintiffs' suit and sanctioning plaintiffs was affirmed because (1) plaintiffs had repeatedly disregarded the trial court's orders and directives concerning the conditions of the limited continuance of this matter provided by the trial court on or about July 25, 2008; and (2) the trial court based its dismissal on the totality of the circumstances, not just on one instance of behavior. Amanns v. Grissom, 333 S.W.3d 90, 2010 Tenn. App. LEXIS 418 (Tenn. Ct. App. June 30, 2010), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 1173 (Tenn. Dec. 7, 2010).

2. Expert Testimony Admissible.

In a medical malpractice case, it was not error to allow a physician's experts to testify about opinions that a hospital's nursing staff was at fault, when those opinions were allegedly not disclosed in the physician's expert disclosures, because (1) the testimony of the experts as to the actions of the nursing staff was adequately disclosed, as the disclosures stated that the nursing staff was required to notify the physician when a patient's coma score dropped significantly, and (2) the testimony responded to criticisms by opposing experts. Stanfield v. Neblett, 339 S.W.3d 22, 2010 Tenn. App. LEXIS 373 (Tenn. Ct. App. June 4, 2010), appeal denied, — S.W.3d —, 2011 Tenn. LEXIS 39 (Tenn. Jan. 13, 2011).

3. Failure to Disclose.

Expert witness was not properly disclosed as an expert on the standard of nursing care and whether the hospital's nurses complied with that standard of care as the hospital's adopted expert disclosures did not state that the expert was expected to offer any opinion with regard to the nursing standard of care and whether the hospital's nurses complied with that standard of care. Mayo v. Shine, 392 S.W.3d 61, 2012 Tenn. App. LEXIS 425 (Tenn. Ct. App. June 25, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 807 (Tenn. Oct. 18, 2012).

37.04. Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Requests for Inspection. If a party or an officer, director, or managing agent of a party or a person designated under Rule 30.02(6) or 31.01 to testify on behalf of a party fails (1) to appear before the officer who is to take his or her deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of Rule 37.02. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26.03. [As amended July 1, 1979.]

NOTES TO DECISIONS

Analysis

1. Dismissal Proper.
2. Sanction Proper.

1. Dismissal Proper.

Trial court did not abuse its discretion when it dismissed a franchisee's complaint with prejudice because of the franchisee's failure to attend several properly noticed depositions. The trial court had authority under Tenn. R. Civ. P. 37.04 to dismiss the action pursuant to Tenn. R. Civ. P. 37.02(C). Langlois v. Energy Automation Sys., Inc., 332 S.W.3d 353, 2009 Tenn. App. LEXIS 868 (Tenn. Ct. App. Dec. 21, 2009), appeal denied, Langlois v. Energy Automation Sys., — S.W.3d —, 2010 Tenn. LEXIS 595 (Tenn. June 18, 2010).

2. Sanction Proper.

Discovery sanctions against the father were affirmed as he never responded to the mother's rule 34 requests, he was only restricted from testifying or offering into evidence matters that were requested in discovery and not produced, and his former attorney's conduct was considered. Wassenberg v. Wassenberg, — S.W.3d —, 2020 Tenn. App. LEXIS 309 (Tenn. Ct. App. July 9, 2020).

37.05. Failure to Participate in the Framing of a Discovery Plan. If a party or the party's attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26.06, the court may, after opportunity for hearing, require such party or the party's attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure. [Added by order entered January 31, 1984, effective August 20, 1984.]

37.06. Electronically Stored Information. (1) If a party fails to provide electronically stored information and a motion to compel discovery is filed, a judge should first determine whether the material sought is subject to production under the applicable standard of discovery. If the requested information is subject to production, a judge should then weigh the benefits to the requesting party against the burden and expense of the discovery for the responding party, considering such factors as: the ease of accessing the requested information; the total cost of production compared to the amount in controversy; the materiality of the information to the requesting party; the availability of the information from other sources; the complexity of the case and the importance of the issues addressed; the need to protect privilege, proprietary, or confidential information, including trade secrets; whether the information or software needed to access the requested information is proprietary or constitutes confidential business information; the breadth of the request, including whether a subset (e.g., by date, author, recipient, or through use of a key-term search or other selection criteria) or representative sample of the contested electronically stored information can be provided initially to determine whether production of additional such information is warranted; the relative ability of each party to control costs and its incentive to do so; the resources of each party compared to the total cost of production; whether the requesting party has offered to pay some or all of the costs of identifying, reviewing, and producing the information; whether the electronically stored information is stored in a way that makes it more costly or burdensome to access than is reasonably warranted by legitimate personal, business, or other non-litigation-related reasons; and whether the responding party has deleted, discarded or erased electronic information after litigation was commenced or after the responding party was aware that litigation was probable.

(2) Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith, operation of an electronic information system. [Added by order filed January 8, 2009, effective July 1, 2009.]

Advisory Commission Comments. This Rule prescribes penalties for violation of pretrial procedures contained in Rules 26 through 36. While the penalties provided for herein probably lie within the inherent power of a trial court, it was felt desirable to suggest guidelines for appropriate action under the various circumstances mentioned in the Rule.

37.02: Deponents are added to the list of persons who can be sanctioned. Presumably the usual sanction would be contempt under Rule 37.02(D). Compare F.R.C.P. 37 (b)(1). [1984.]

37.05: This amendment corresponds to new Rule 26.06. [1984.]

Advisory Commission Comments [2006]. Rule 37.03(1) expressly provides sanctions for failure to supplement or amend discovery responses. The usual sanction will be exclusion of evidence at trial. Courts already have this power under the common law. *Lyle v. Exxon.*, 746 S.W.2d 694 (Tenn. 1998), and *Ammons v. Bonilla*, 886 S.W.2d 239 (Tenn. Ct. App. 1994).

Advisory Commission Comments [2009]. Rule 37.06(1) is a new rule adopted from Guideline 5 ("The Scope of Electronic Discovery"), *Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information*, Conference of Chief Justices (2006). It focuses on a distinctive feature of computer operations, the routine alteration and deletion of information that attends ordinary use. Many steps essential to computer operation may alter or destroy information, for reasons that have nothing to do with how that information might relate to litigation. As a result, the ordinary operation of computer systems creates a risk that a party may lose potentially discoverable information without culpable conduct on its part. Under Rule 37.01(2), absent exceptional circumstances, sanctions cannot be imposed for loss of electronically stored information resulting from the routine, good-faith operation of an electronic information system.

Rule 37.06(2) applies only to information lost due to the "routine operation of an electronic information system" — the ways in which such systems are generally designed, programmed, and implemented to meet the party's technical and business needs. The "routine operation" of computer systems includes the alteration and overwriting of information, often without the operator's specific direction or awareness, a feature with no direct counterpart in hard-copy documents. Such features are essential to the operation of electronic information systems.

Rule 37.06(2) applies to information lost due to the routine operation of an information system only if the operation was in good faith. Good faith in the routine operation of an information system may involve a party's intervention to modify or suspend certain features of that routine operation to prevent the loss of information, if that information is subject to a preservation obligation. A preservation obligation may arise from many sources, including common law, statutes, regulations, or a court order in the case. The good faith requirement of Rule 37.06(2) means that a party is not permitted to exploit the routine operation of an information system to thwart discovery obligations by allowing that operation to continue in order to destroy specific stored information that it is required to preserve. When a party is under a duty to preserve information because of pending or reasonably anticipated litigation, intervention in the routine operation of an information system is one aspect of what is often called a "litigation hold." Among the factors that bear on a party's good faith in the routine operation of an information system are the steps the party took to comply with a court order in the case or party agreement requiring preservation of specific electronically stored information.

The protection provided by Rule 37.06 applies only to sanctions "under these rules." It does not affect other sources of authority to impose sanctions or rules of professional responsibility.

This rule restricts the imposition of "sanctions." It does not prevent a court from making the kinds of adjustments frequently used in managing discovery if a party is unable to provide relevant responsive information. For example, a court could order the responding party to produce an additional witness for deposition, respond to additional interrogatories, or make similar attempts to provide substitutes or alternatives for some or all of the lost information.

Compiler's Notes. For background of the 1979 amendments to this rule, see Advisory Commission Comments to Rule 26.

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated December 29, 2005, was ratified and approved by 2006 House Resolution 200 and Senate Resolution 95. The order promulgating the amendment of this rule provided that it take effect July 1, 2006.

The amendment of Rule 37, which added § 37.06, as promulgated and adopted by the Supreme Court in its order dated January 8, 2009, was ratified and approved by 2009 House

Resolution 18 and Senate Resolution 19. The order promulgating the amendment of this rule provided that it take effect July 1, 2009.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 140, 158, 263, 461, 565.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-26.03-1, 1-30.04-1, 1-35.02-1, 1-36.01-5, 1-37.01-1 — 1-37.01-3, 1-37.02-1, 1-37.02-2, 1-37.03-1, 1-37-04-1, 1-37.05-1, 1-45.06-1.

Tennessee Jurisprudence. 9 Tenn. Juris., Discovery, § 8.

Tennessee Law of Evidence (Paine, Schaffner, and Ulin), §§ 46, 225.

Law Reviews. Civil Procedure — Discovery of the Identity of a Nontestifying Expert in Tennessee, 16 Mem. St. U.L. Rev. 271 (1986). Discovery for Paupers (Donald F. Paine), 25 No. 6 Tenn. B.J. 35 (1989).

Revised Federal Discovery Rules are an Improvement (Donald F. Paine), 37 No. 3 Tenn. B.J. 31 (2001).

Sanctions for Discovery Abuse (Donald F. Paine), 28 No. 1 Tenn. B.J. 23 (1992).

The Pre-Hearing Stage of Contested Cases under the Tennessee Uniform Administrative Procedures Act (L. Harold Levinson), 13 Mem. St. U.L. Rev. 465 (1984).

NOTES TO DECISIONS

Analysis

1. Scope of Sanctions.
2. Court Order Necessary.
3. Discretion of Trial Courts.
4. Sanctions Upheld.
5. Sanctions Improper.
6. Sanctions Ordered.
7. Sanctions Refused.

1. Scope of Sanctions.

Under provisions of the Tennessee Rules of Civil Procedure, various sanctions against a party are provided when a party abuses the discovery process; however, these sanctions are mainly for noncompliance with orders of the court. No sanctions against a party are provided for the failure to "seasonably" supplement a response to an interrogatory requesting the identity of expert witnesses expected to testify at trial. Lyle v. Exxon Corp., 746 S.W.2d 694, 1988 Tenn. LEXIS 172 (Tenn. 1988).

2. Court Order Necessary.

Ordinarily sanctions can be applied under Tenn. R. Civ. P. 37 only for a failure to comply with a court order. Strickland v. Strickland, 618 S.W.2d 496, 1981 Tenn. App. LEXIS 503 (Tenn. Ct. App. 1981).

Where a party knowingly and deliberately refused to reveal the name of a person who had knowledge of discoverable matter and then presented that person as a witness at the trial, Tenn. R. Civ. P. 37 does not provide any sanction whatsoever. Strickland v. Strickland, 618 S.W.2d 496, 1981 Tenn. App. LEXIS 503 (Tenn. Ct. App. 1981).

3. Discretion of Trial Courts.

The trial courts of Tennessee must and do have the discretion to impose sanctions such as dismissal in order to penalize those who fail to comply with the rules and, further, to deter others from flouting or disregarding discovery orders. Holt v. Webster, 638 S.W.2d 391, 1982 Tenn. App. LEXIS 472 (Tenn. Ct. App. 1982).

On appeal, the exercise of discretion by a trial court in imposing sanctions will not be disturbed in the absence of an affirmative showing of abuse. Brooks v. United Uniform Co., 682 S.W.2d 913, 1984 Tenn. LEXIS 911 (Tenn. 1984).

Trial courts possess inherent, common law authority to control their dockets and the proceedings in their courts; their authority is quite broad and includes the express authority to dismiss cases for failure to prosecute or to comply with the Tennessee Rules of Civil Procedure or the orders of the court. Hodges v. Tennessee AG, 43 S.W.3d 918, 2000 Tenn. App. LEXIS 785 (Tenn. Ct. App. 2000).

In a doctor's wrongful termination case, the discovery abuse by the doctor involved the surreptitious destruction of evidence by the doctor who, during a videotaped deposition, concealed an exhibit with the doctor's own written calculations of estimated monthly income; the next day, the doctor repeatedly lied under oath when questioned about the exhibit, then admitted destroying it when confronted with the videotape. Thus, while Tenn. R. Civ. P. 37.02 primarily applies to sanctions for noncompliance with a court order, the doctor's actions offended the basic principles underlying the judicial system and the trial court did not abuse its discretion in dismissing the doctor's suit as a sanction. Alexander v. Jackson Radiology Assocs., P.A., 156 S.W.3d 11, 2004 Tenn. App. LEXIS 359 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 1020 (Tenn. Nov. 15, 2004).

4. Sanctions Upheld.

Judgment of default for failure to comply with discovery order, and denial of motion to set aside default judgment affirmed. Yearwood, Johnson, Stanton & Crabtree, Inc. v. Foxland Dev. Venture, 828 S.W.2d 412, 1991 Tenn. App. LEXIS 934 (Tenn. Ct. App. 1991).

Corporate principal's flagrant disregard of the rules and orders of the court by refusing to disclose serious breaches of faith of corporate officers and directors in misuse and/or abstraction of contributions of stockholders and persistent resistance to discovery to evade liability

for his misconduct warranted severe sanction of judgment entered against him by trial court. American Steinwinter Investor Group ex rel. American Steinwinter v. American Steinwinter, 964 S.W.2d 569, 1997 Tenn. App. LEXIS 379 (Tenn. Ct. App. 1997), rehearing denied, Steinwinter Inv. Group v. American Steinwinter, — S.W.2d —, 1997 Tenn. App. LEXIS 417 (Tenn. Ct. App. 1997).

Trial court acted within its discretion in entering a default judgment as sanctions for a party's discovery misconduct, as the uncontradicted evidence established that the party committed perjury in the party's interrogatories. Potts v. Mayforth, 59 S.W.3d 167, 2001 Tenn. App. LEXIS 573 (Tenn. Ct. App. 2001), cert. denied, Potts v. Potts, 536 U.S. 959, 122 S. Ct. 2662, 153 L. Ed. 2d 837, 2002 U.S. LEXIS 4944 (2002).

There was no abuse of discretion for imposing monetary sanctions for discovery abuses when the patient failed to identify medical records that would have shown her claim was time-barred. Crawford v. Beatty, 108 S.W.3d 877, 2003 Tenn. App. LEXIS 19 (Tenn. Ct. App. 2003), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 543 (Tenn. June 2, 2003).

In a divorce case, a court properly entered a default judgment against a husband for failing to appear at a scheduled trial management conference where the court concluded that his nonappearance was part of his "obstructive" and "defiant" behavior which had been exhibited throughout the course of the proceedings. Orten v. Orten, 185 S.W.3d 825, 2005 Tenn. App. LEXIS 543 (Tenn. Ct. App. 2005), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 74 (Tenn. 2006).

There was no abuse of discretion in the trial court's order establishing as admitted those matters that the claimant presented in its discovery request for admissions because the company was given ten days to respond to the claimant's outstanding discovery requests, but made no response for four months and offered no reason or explanation for the delay; under Tenn. R. Civ. P. 37.02, the trial court was authorized to sanction the company, and the company's own motion for additional time demonstrated that the company did not consider its answer to the complaint to be a meaningful discovery response. Meyer Laminates (SE), Inc. v. Primavera Distrib., 293 S.W.3d 162, 2008 Tenn. App. LEXIS 19 (Tenn. Ct. App. Jan. 18, 2008), appeal denied, Meyer Laminates (Se), Inc. v. Primavera Distrib., Inc., — S.W.3d —, 2008 Tenn. LEXIS 594 (Tenn. Aug. 25, 2008).

5. Sanctions Improper.

Imposition of a default judgment was too drastic a sanction for the husband's contemptuous behavior; thus, the default judgment on the wrongful death action and the damages award was improper. March v. Levine, 115 S.W.3d 892, 2003 Tenn. App. LEXIS 219 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 771 (Tenn. Sept. 2, 2003).

Sanction of dismissal of employee's case under Tenn. R. Civ. P. 37.02 was not warranted where employee had attempted to comply with trial court's discovery order and was within the scheduling order established by trial court in April 2007. Pegues v. Ill. Cent. R.R. Co., 288 S.W.3d 350, 2008 Tenn. App. LEXIS 418 (Tenn. Ct. App. July 22, 2008).

6. Sanctions Ordered.

Where the state was aware of a deadline for the filing of pretrial memorandums, the court graciously extended the deadline, and the state indicated that it would obey the order within the extended deadline but failed to do so, the state was in contempt and an award of sanctions was ordered against it. State ex rel. Comm'r DOT v. Cox, 840 S.W.2d 357, 1991 Tenn. App. LEXIS 1006 (Tenn. Ct. App. 1991).

7. Sanctions Refused.

Denial of discovery sanctions against the state in the individual's action for damages after she fell into a hole in a state park was improper where the photographs of the accident sites were not offered at trial and were taken several months after the accident; although the trial court did not condone a failure to disclose, it was not of the opinion that the error prejudiced the individual's case. Cornell v. State, 118 S.W.3d 374, 2003 Tenn. App. LEXIS 299 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 968 (Tenn. Oct. 6, 2003).

RULE 38

JURY TRIAL OF RIGHT

38.01. Right Preserved. The right of trial by jury as declared by the Constitution or existing laws of the state of Tennessee shall be preserved to the parties inviolate.

38.02. Demand. Any party may demand a trial by jury of any issue triable of right by jury by demanding the same in any pleading specified in Rule 7.01 or by endorsing the demand upon such pleading when it is filed, or by written demand filed with the clerk, with notice to all parties, within fifteen (15) days after the service of the last pleading raising an issue of fact.

38.03. Demand — Cases Removed to Trial Court. In cases removed by appeal or otherwise to the chancery or circuit courts or to courts of similar jurisdiction, any party may demand a trial by jury of any issue triable of right by jury by filing written demand for jury trial within ten (10) days after the papers are filed with the clerk. If such a case is set for trial within ten (10) days after the papers are filed with the clerk, any party may make demand for jury trial when the case is called for trial. In every case removed to the chancery or circuit courts or to courts of similar jurisdiction the clerk shall promptly give notice to the appellee of the filing of the papers.

38.04. Demand — Specification of Issues. In the demand a party may specify the issues which the party wishes so tried; otherwise the party shall be deemed to have demanded trial by jury of all the issues so triable. If the party has demanded trial by jury of only some of the issues, any other party within fifteen (15) days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action. Nothing in this section limits or qualifies the rights granted in Rule 38.02.

38.05. Waiver. The failure of a party to make demand as required by this rule constitutes a waiver by the party of trial by jury. A demand for trial by jury as herein provided may not be withdrawn without the consent of all parties as to whom issues have been joined.

Advisory Commission Comments. 38.01: The procedures described in this Rule for demanding a trial by jury were not intended or designed to abridge any constitutional or statutory right to jury trial, the Committee deeming such rights to be a matter of substantive law and not merely procedural.

38.03: The provisions of this Rule apply to cases appealed to the circuit or chancery courts. Appeals from courts of general sessions to the circuit court are the most numerous cases affected by this Rule. The last sentence of this Rule expressly provides for notice to the appellee of the filing of the papers with the clerk of the chancery or circuit court, so that the appellee shall be afforded an opportunity to make a jury demand if the appellee so desires. Since the appellant has perfected the appeal, it should be obligatory upon the appellant to ascertain when the papers have been filed with the clerk of the circuit court. The provisions of Rule 39.02, however, permit a court to allow a jury trial, in its discretion, even where the parties have failed to make a timely demand.

Cross-References. Civil actions, peremptory challenges, T.C.A. § 22-3-104.

Criminal actions, peremptory challenges, Tenn. R. Crim. P. 24.

Examination and challenge of jurors, T.C.A. title 22, ch. 3.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 202, 204, 209.

Pritchard on Wills and Administration of Estates (4th ed., Phillips and Robinson), § 367.

Tennessee Forms (Robinson, Ramseyos). 1-38.03-1, 1-38.04-1, 1-38.05-1.

Tennessee Jurisprudence. 1 Tenn. Juris., Amendments, § 13; 11 Tenn. Juris., Equity, §§ 62-64; 17 Tenn. Juris., Jury, § 9.

Law Reviews. Juvenile Law — Trial by Jury — Applicability of Tennessee Rules of Civil Procedure, 45 Tenn. L. Rev. 534.

NOTES TO DECISIONS

Analysis

1. Failure to Make Demand.
2. Nature of Right.
3. Demand.
4. Advisory Jury.
5. Waiver.
6. Supplemental Pleading.
7. Judgment Not Effective Upon Filing.

1. Failure to Make Demand.

Since the trial judge had the discretionary power to allow a trial by jury regardless of plaintiff's previous default in demand, the defendant did not have the right to a nonjury trial. Silcox v. Smith County, 487 S.W.2d 652, 1972 Tenn. App. LEXIS 328 (Tenn. Ct. App. 1972).

The demand for a jury trial, the waiver of a jury trial, or the withdrawal of a demand for a jury trial must be made in an affirmative declaration, and the mere omission of the demand in an amended complaint does not delete it as it would delete some factual allegation. Caudill v. Mrs. Grissom's Salads, Inc., 541 S.W.2d 101, 1976 Tenn. LEXIS 528 (Tenn. 1976).

2. Nature of Right.

The constitutional right to a trial by jury may not be denied because a nonjury trial might be easier and faster, and to do so would be an abuse of judicial discretion. Caudill v. Mrs. Grissom's Salads, Inc., 541 S.W.2d 101, 1976 Tenn. LEXIS 528 (Tenn. 1976).

A local court rule requiring a party seeking a jury to file issues of fact and stating that failure to comply constituted waiver of jury trial was in conflict with the right to trial by jury provided by Tenn. R. Civ. P. 38 and was null and void. Brown v. Daly, 884 S.W.2d 121, 1994 Tenn. App. LEXIS 190 (Tenn. Ct. App. 1994).

Landowners were not entitled to a jury trial in a quo warranto proceeding under T.C.A. § 6-58-111(b) because (1) the quo warranto action is a remedy created after the formation of the Tennessee Constitution, and thus Tenn. Const. art. I, § 6 does not guarantee a jury trial in such a proceeding; and (2) Tenn. R. Civ. P. 38.01 only guarantees the right to a jury to the extent that this right is granted by the Constitution or the existing laws of the State. State ex rel. Tipton v. City of Knoxville, 205 S.W.3d 456, 2006 Tenn. App. LEXIS 29 (Tenn. Ct. App. 2006), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 922 (Tenn. 2006).

3. Demand.

When a juvenile is charged with an offense which would constitute a felony under the penal code appeals to the circuit court for trial de novo under § 37-258(a) (see T.C.A. § 37-1-159), a demand for a jury trial pursuant to Tenn. R. Civ. P. 38 is not necessary. State v. Johnson, 574 S.W.2d 739, 1978 Tenn. LEXIS 685 (Tenn. 1978).

There is no provision which permits the trial judge to impanel a jury on his own motion; there must be a demand by a party. Smith v. Williams, 575 S.W.2d 503, 1978 Tenn. App. LEXIS 321, 9 A.L.R.4th 1033 (Tenn. Ct. App. 1978).

A defendant is allowed a jury trial on an appeal to the circuit court from a judgment of a municipal court based on the violation of a city ordinance, provided a jury trial is timely demanded. Chattanooga v. Myers, 787 S.W.2d 921, 1990 Tenn. LEXIS 158 (Tenn. 1990).

4. Advisory Jury.

Although in cases of an inherently equitable nature, an advisory jury may be impaneled, the verdict of which the trial judge or chancellor need not accept, in cases of a nonequitable nature, the chancellor or judge must submit to the jury the issues triable by jury and for which demand for jury trial was made. In these situations the chancellor or judge may reject the jury verdict as thirteenth juror, but such rejection leads to a new trial with a new jury, not a substituted verdict by the chancellor or judge. Smith v. Williams, 575 S.W.2d 503, 1978 Tenn. App. LEXIS 321, 9 A.L.R.4th 1033 (Tenn. Ct. App. 1978).

5. Waiver.

The trial court could force the parties to trial by jury even though there was a timely consent by all parties that the previously demanded trial by jury be waived. Smith v. Williams, 575 S.W.2d 503, 1978 Tenn. App. LEXIS 321, 9 A.L.R.4th 1033 (Tenn. Ct. App. 1978).

A civil defendant waived his right to a jury trial by failing to appear at trial. Davis v. Ballard, 946 S.W.2d 816, 1996 Tenn. App. LEXIS 726 (Tenn. Ct. App. 1996).

Appearance and objection of counsel for uninsured motorist carrier after a jury trial had been waived by all counsel present when the trial began came too late to prevent carrier's implied waiver of the right to a jury trial. Beal v. Doe, 987 S.W.2d 41, 1998 Tenn. App. LEXIS 700 (Tenn. Ct. App. 1998).

As defendant's jury demand was made more than one year following the docketing of the case with the trial court clerk's office, the trial court correctly found that his demand for a jury trial was untimely and accordingly waived; given this and the fact that he had consented to setting the case for a non-jury trial as evinced by a prior agreed order, the trial court did not err by declining to exercise discretion to allow a jury trial under Tenn. R. Civ. P. 39.02. City of Athens v. Straser, — S.W.3d —, 2020 Tenn. App. LEXIS 464 (Tenn. Ct. App. Oct. 20, 2020).

6. Supplemental Pleading.

Defendants were not entitled to a jury trial where their first demand was made in a supplemental answer; even though the supplemental pleading raised new defenses, they were based on facts set forth in the original complaint and answer. Hardeman County Bank v. Stallings, 917 S.W.2d 695, 1995 Tenn. App. LEXIS 557 (Tenn. Ct. App. 1995).

7. Judgment Not Effective Upon Filing.

Although not notified of the exact filing date, all parties received a copy of the proposed order for summary judgment, but rather than setting the Tenn. R. Civ. P. 60 motion to be heard in a timely fashion, the client's attorney waited until December of 2002, nearly 19 months after the entry of the motion for summary judgment to schedule the matter for hearing; thus, the trial court did not abuse its discretion in denying the client's Rule 60 motion because the client's attorney was derelict, and because the unwarranted delay could have prejudiced the other party's case. Thompson v. Chafetz, 164 S.W.3d 571, 2004 Tenn. App. LEXIS 152 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 813 (Tenn. Sept. 13, 2004).

RULE 39

TRIAL BY JURY OR BY THE COURT

39.01. By Jury. When trial by jury has been demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury, unless (a) the parties or their attorneys of record, by written stipulation filed with the court or by oral stipulation made in open court and entered in the record, consent to trial by the court sitting without a jury or (b) the court upon motion or of its own initiative finds that a right of trial by jury of some or all of those issues does not exist under the Constitution or statutes of the state of Tennessee.

NOTES TO DECISIONS

Analysis

1. Waiver.
2. Request.
3. Granted.
4. Sanctions.

1. Waiver.

Borrower's pre-dispute contractual waiver of the right to a jury trial was permissible and not prohibited under Tenn. Const. art. 1, § 6 or Tenn. R. Civ. P. 39.01 where the lender presented three separate contracts containing jury-waiver provisions and where there were no allegations of fraud, overreaching, or unconscionability. Poole v. Union Planters Bank, N.A., 337 S.W.3d 771, 2010 Tenn. App. LEXIS 259 (Tenn. Ct. App. Apr. 8, 2010), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 942 (Tenn. Sept. 23, 2010).

Trial court did not err in granting a hospital's motion for a nonjury trial because the employee was not entitled to a jury trial in her retaliation claim against under the Tennessee Human Rights Act. Terry v. Jackson-Madison Cty. Gen. Hosp. Dist., 572 S.W.3d 614, 2018 Tenn. App. LEXIS 324 (2018).

Trial court properly heard a hospital's motion for a nonjury trial despite an employee's contention that the hospital violated the scheduling order because the rule placed no time limitation on the movant; the employee failed to cite to any authority in her brief to support her contention that the trial court should have declined to hear the motion because it was made "on the eve of trial." Terry v. Jackson-Madison Cty. Gen. Hosp. Dist., 572 S.W.3d 614, 2018 Tenn. App. LEXIS 324 (2018).

2. Request.

Hospital sought a bench trial under the rule, which places no time limitation on a movant, claiming the a recent Tennessee Supreme Court decision indicated that appellant did not have the right to a jury trial in this retaliation case; appellant failed to cite to authority support the claim that the trial court should have declined to hear the motion because it was made on the eve of trial, plus under the professional conduct rule, an attorney was to be candid towards the tribunal and disclose dispositive legal authority. Terry v. Jackson-Madison Cty. Gen. Hosp. Dist., 572 S.W.3d 614, 2018 Tenn. App. LEXIS 324 (2018).

3. Granted.

Trial court properly granted the hospital's motion for a non-jury trial, as appellant was not entitled to a jury trial in this retaliation case; it was originally filed in the circuit court, and the statute did not confer a right to a jury trial in such cases. Terry v. Jackson-Madison Cty. Gen.

Hosp. Dist., 572 S.W.3d 614, 2018 Tenn. App. LEXIS 324 (2018).

4. Sanctions.

Trial court abused its discretion in awarding attorney's fees to an employee because a hospital made a non-frivolous motion for a non-jury trial, which was granted; the employee was not entitled to a trial by jury, and the hospital violated no rule in making the motion. Terry v. Jackson-Madison Cty. Gen. Hosp. Dist., 572 S.W.3d 614, 2018 Tenn. App. LEXIS 324 (2018).

39.02. By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury as to any issue with respect to which demand might have been made of right, the court in its discretion upon motion may order a trial by jury of any or all issues.

NOTES TO DECISIONS

1. Judge's Discretion.

As defendant's jury demand was made more than one year following the docketing of the case with the trial court clerk's office, the trial court correctly found that his demand for a jury trial was untimely and accordingly waived; given this and the fact that he had consented to setting the case for a non-jury trial as evinced by a prior agreed order, the trial court did not err by declining to exercise discretion to allow a jury trial under Tenn. R. Civ. P. 39.02. City of Athens v. Straser, — S.W.3d —, 2020 Tenn. App. LEXIS 464 (Tenn. Ct. App. Oct. 20, 2020).

39.03. Advisory Jury. Nothing in this rule shall impair the right of a court to empanel an advisory jury as that right existed prior to the adoption of these rules.

Advisory Commission Comments. 39.01: Tennessee statutes governing trials by jury in chancery courts expressly recognize that certain types of issues are not triable by jury. See Tenn. Code Ann. § 21-1-103.

39.02: The provisions of this Rule are designed to give the trial court discretion to grant a jury trial even though timely demand has not been previously made, if the trial court deems it in the interest of justice to do so.

Textbooks. Pritchard on Wills and Administration of Estates (4th ed., Phillips and Robinson), § 367.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-38.03-1, 1-39.01-1, 1-39.02-1.

Tennessee Jurisprudence. 11 Tenn. Juris., Equity, §§ 56, 58, 63.

Law Reviews. Trial, 4 Mem. St. U.L. Rev. 335.

NOTES TO DECISIONS

Analysis

1. Failure to Demand Jury.
2. Waiver.
3. Demand.
4. Advisory Jury.

1. Failure to Demand Jury.

Since the trial judge had the discretionary power to allow a trial by jury regardless of plaintiff's previous default in demand, the defendant did not have the right to a nonjury trial. Silcox v. Smith County, 487 S.W.2d 652, 1972 Tenn. App. LEXIS 328 (Tenn. Ct. App. 1972).

2. Waiver.

The trial court could force the parties to trial by jury even though there was a timely consent by all parties that the previously demanded trial by jury be waived. Smith v. Williams, 575 S.W.2d 503, 1978 Tenn. App. LEXIS 321, 9 A.L.R.4th 1033 (Tenn. Ct. App. 1978).

Appearance and objection of counsel for uninsured motorist carrier after a jury trial had been waived by all counsel present when the trial began came too late to prevent carrier's implied waiver of the right to a jury trial. Beal v. Doe, 987 S.W.2d 41, 1998 Tenn. App. LEXIS 700 (Tenn. Ct. App. 1998).

3. Demand.

There is no provision which permits the trial judge to impanel a jury on his own motion; there must be a demand by a party. Smith v. Williams, 575 S.W.2d 503, 1978 Tenn. App. LEXIS 321, 9 A.L.R.4th 1033 (Tenn. Ct. App. 1978).

4. Advisory Jury.

In cases of an equitable nature, the trial judge or chancellor may of his own motion impanel an advisory jury and submit to it such issues of fact as he deems appropriate. The judge or chancellor need not accept the finding of the jury, but he must give it great weight. Smith v. Williams, 575 S.W.2d 503, 1978 Tenn. App. LEXIS 321, 9 A.L.R.4th 1033 (Tenn. Ct. App. 1978).

In Tennessee an advisory jury may be impaneled only in cases of an inherently equitable nature. Smith v. Williams, 575 S.W.2d 503, 1978 Tenn. App. LEXIS 321, 9 A.L.R.4th 1033 (Tenn. Ct. App. 1978).

Jury impaneled by the trial judge in condemnation suit after all parties waived jury trial was not an advisory jury. Smith v. Williams, 575 S.W.2d 503, 1978 Tenn. App. LEXIS 321, 9 A.L.R.4th 1033 (Tenn. Ct. App. 1978).

RULE 40

SETTING CASES FOR TRIAL

The courts shall provide by rule for the setting of cases for trial (a) without request of the parties but upon notice to the parties, or (b) upon request of a party and notice to other parties. Precedence shall be given to actions entitled thereto by any statute of the state of Tennessee.

Advisory Commission Comments. The provisions of this Rule are directory only. The Committee felt that the circumstances as to the setting of local trial dockets are so varied that this matter must be left to the trial judges in each circuit or division. Tenn. Code Ann. §§ 20-8-101 – 20-8-106 provide general guidelines and are not affected by this Rule.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), § 208.

Pritchard on Wills and Administration of Estates (4th ed., Phillips and Robinson), § 368.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-40-1, 1-40-2.

Law Reviews. Public Access to Civil Court Records: A Common Law Approach (Ronald D. May), 39 Vand. L. Rev. 1465 (1986).

NOTES TO DECISIONS

1. Due Process.

Although the committee comment to Tenn. R. Civ. P. 40 states that "the provisions of this Rule are directory only"; nevertheless, it is axiomatic that all parties to litigation are entitled to receive notice of important hearings and other proceedings; due process requires it. Bryant v. Edwards, 707 S.W.2d 868, 1986 Tenn. LEXIS 682 (Tenn. 1986).

RULE 41

DISMISSAL OF ACTIONS

41.01. Voluntary Dismissal — Effect Thereof. (1) Subject to the provisions of Rule 23.05, Rule 23.06 or Rule 66 or any statute, and except when a motion for summary judgment made by an adverse party is pending, the plaintiff shall have the right to take a voluntary nonsuit to dismiss an action without prejudice by filing a written notice of dismissal at any time before the trial of a cause and serving a copy of the notice upon all parties, and if a party has not already been served with a summons and complaint, the plaintiff shall also serve a copy of the complaint on that party; or by an oral notice of dismissal made in open court during the trial of a cause; or in jury trials at any time before the jury retires to consider its verdict and prior to the ruling of the court sustaining a motion for a directed verdict. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of plaintiff's motion to dismiss, the defendant may elect to proceed on such counterclaim in the capacity of a plaintiff.

(2) Notwithstanding the provisions of the preceding paragraph, a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has twice dismissed in any court an action based on or including the same claim.

(3) A voluntary nonsuit to dismiss an action without prejudice must be followed by an order of voluntary dismissal signed by the court and entered by the clerk. The date of entry of the order will govern the running of pertinent time periods. [As amended by order entered January 25, 1991, effective July 1, 1991; by order adopted January 24, 1992, effective July 1, 1992; by order filed January 31, 2002, effective July 1, 2002; and by order entered December 10, 2003, effective July 1, 2004.]

NOTES TO DECISIONS

Analysis

1. Disciplinary Proceedings.
2. Dismissal Improper.
3. Application.
4. Dismissal.
5. Statute of Limitations.

1. Disciplinary Proceedings.

Trial court erred by denying an attorney's motion for a voluntary nonsuit because Tenn. R. Civ. P. 41.01(1) applied in the disciplinary proceedings; the Tennessee Rules of Civil Procedure apply to the appeal of hearing panel judgments to the trial court, and Rule 41.01(1) provides that an attorney appealing a hearing panel's judgment by means of a petition for writ of certiorari to a circuit or chancery court is entitled to a voluntary nonsuit of his or her petition. Rayburn v. Bd. of Prof'l Responsibility of the Supreme Court, 300 S.W.3d 654, 2009 Tenn. LEXIS 741 (Tenn. Dec. 1, 2009).

2. Dismissal Improper.

Trial court erred in permitting a county to voluntarily dismiss its petition for condemnation of a family's property because voluntary dismissal by the county after the trial court granted it ownership and the legal right of possession, leaving only the issue of compensation to be decided, was precluded; while the county had actual physical possession of the property prior to the filing of the condemnation action, its possession was bare, the county did not actually have the right to own and possess the property free of any claim by the family until entry of the consent order, and the right of possession was distinct from actual physical possession, which the county already enjoyed. Shelby County v. Crews, 315 S.W.3d 477, 2009 Tenn. App. LEXIS 783 (Tenn. Ct. App. Nov. 23, 2009), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 472 (Tenn. May 12, 2010).

Rule does not permit the dismissal of a claim that is not actually before the court; thus, the court reversed the trial court's grant of voluntary nonsuit to appellant as a nullity. Phi Air Med., LLC v. Corizon, Inc., — S.W.3d —, 2021 Tenn. App. LEXIS 85 (Tenn. Ct. App. Mar. 8, 2021).

3. Application.

When a defamation case was voluntarily dismissed on procedural grounds pursuant to Tenn. R. Civ. P. 41.01, the order did not "reflect on the merits" of that underlying defamation case, and plaintiff in a later action, who had earlier been sued for defamation, could not establish a favorable termination for purposes of his malicious prosecution claim. Lane v. Becker, 334 S.W.3d 756, 2010 Tenn. App. LEXIS 145 (Tenn. Ct. App. Feb. 25, 2010), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 1146 (Tenn. Nov. 24, 2010).

Statute of limitations, T.C.A. § 28-3-104, had expired as to a truck buyer's products liability negligence claim against the seller, because it was filed more than one year after a nonsuit, T.C.A. § 28-1-105. The buyer's strict liability claim under former T.C.A. § 29-28-106(b) (repealed) was timely, however, because this claim did not accrue until the manufacturer was insolvent. Lind v. Beaman Dodge, Inc., 356 S.W.3d 889, 2011 Tenn. LEXIS 1151 (Tenn. Dec. 15, 2011).

In Tennessee, a voluntary nonsuit without prejudice is not a favorable termination of a prior lawsuit for purposes of a malicious prosecution claim. Himmelfarb v. Allain, 380 S.W.3d 35, 2012 Tenn. LEXIS 620 (Tenn. Aug. 28, 2012).

When physicians sued a patient for malicious prosecution after the patient voluntarily dismissed the patient's medical malpractice claims against the physicians, the patient was entitled to summary judgment because the physicians could not prove an element of the malicious prosecution claim, since the patient's voluntary nonsuit in the prior case was not a favorable termination of that suit, for purposes of a malicious prosecution claim, as (1) the voluntary nonsuit was the first voluntary non-

suit in the case, (2) an order of dismissal pursuant to the voluntary nonsuit was without prejudice to the patient, (3) the dismissal neither addressed the merits of the patient's case nor the physicians' liability, and, (4) in general, a voluntary nonsuit was not a favorable termination of a prior suit for purposes of a malicious prosecution claim. Himmelfarb v. Allain, 380 S.W.3d 35, 2012 Tenn. LEXIS 620 (Tenn. Aug. 28, 2012).

As plaintiffs' correspondence to defendants during the pendency of plaintiffs' first medical malpractice action, which they later voluntarily non-suited, was not compliant notice under the amended version of T.C.A. § 29-26-121 as it existed when plaintiffs' second suit was filed, that suit was properly dismissed. Childs v. Ut Medical Group, Inc., 398 S.W.3d 163, 2012 Tenn. App. LEXIS 547 (Tenn. Ct. App. Aug. 8, 2012), appeal denied, Childs v. UT Med. Group, Inc., — S.W.3d —, 2012 Tenn. LEXIS 926 (Tenn. Dec. 11, 2012).

Plaintiff's second voluntary dismissal of supplemental state-law claims filed in federal court did not preclude him from later refiling an action based on the same claims in Tennessee state court, because Tenn. R. Civ. P. 41.01(1) permitted a plaintiff to voluntarily dismiss his case two times without prejudice. Cooper v. Glasser, 419 S.W.3d 924, 2013 Tenn. LEXIS 991 (Tenn. Nov. 26, 2013).

Trial court did not abuse its discretion by entering a written order of voluntary dismissal without prejudice under this rule because defendant's summary judgment motion, filed after plaintiff gave notice it would take a nonsuit but before the entry of the order of nonsuit, did not bar plaintiff's right to voluntarily dismiss the matter without prejudice and defendant did not assert that the nonsuit deprived him of any vested right. Ewan v. Hardison Law Firm, 465 S.W.3d 124, 2014 Tenn. App. LEXIS 456 (Tenn. Ct. App. July 31, 2014).

Voluntary nonsuit did not deprive a trial court of jurisdiction to later modify a protective order because (1) nonsuit did not occur until a confirming order was entered, (2) the order expressly did not terminate until further order, and (3) depriving the court of jurisdiction would limit the order's protection and the court's inherent supervisory power over the court's records. Autin v. Goetz, 524 S.W.3d 617, 2017 Tenn. App. LEXIS 114 (Tenn. Ct. App. Feb. 22, 2017).

Trial court did not err in declining to allow the company to voluntarily dismiss its claims after the oral ruling was issued, as appellee not only demonstrated valid defenses to the company's claims but also obtained an advantageous ruling from the trial court prior to the filing of the company's notice of voluntary nonsuit; allowing a voluntary dismissal at this late stage would certainly cause plain legal prejudice to appellee. Irvin v. Green Wisehomes, LLC, — S.W.3d —, 2021 Tenn. App. LEXIS 63 (Tenn. Ct. App. Feb. 26, 2021).

Company lost the ability to take a nonsuit as a matter of right after the trial court orally granted appellee's motion to dismiss the company's claims; at that point, the company's case had been decided on the merits and it was within the trial court's discretion to decide whether to allow the company to voluntarily dismiss its claims. Irvin v. Green Wisehomes, LLC, — S.W.3d —, 2021 Tenn. App. LEXIS 63 (Tenn. Ct. App. Feb. 26, 2021).

4. Dismissal.

In a health care liability action, the trial court did not err in treating the motions for summary judgment as restyled motions to dismiss under Tenn. R. Civ. P. 12.02(6), and thus, plaintiff's right to take a voluntary nonsuit was not disturbed pursuant to this rule and the entry of an order of voluntary dismissal was not erroneous. Renner v. Takoma Reg'l Hosp., — S.W.3d —, 2019 Tenn. App. LEXIS 50 (Tenn. Ct. App. Jan. 29, 2019).

Wife's voluntary dismissal of petitions for orders of protection did not deprive a trial court of jurisdiction to consider the matters because (1) dismissal was not effective until confirmed by a court order, and (2) the wife withdrew the dismissal before the court entered such an order. Purswani v. Purswani, 585 S.W.3d 907, 2019 Tenn. App. LEXIS 147 (Tenn. Ct. App. Mar. 26, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 415 (Tenn. Aug. 14, 2019).

Trial court erred in dismissing plaintiff's case with prejudice for failure to prosecute because plaintiff was entitled to voluntarily dismiss his action without prejudice, and pursuant to the plain language of subsection (1), plaintiff was entitled to dismissal without prejudice; plaintiff had a right to take a nonsuit unless one of the recognized exceptions outlined in the rule or in caselaw was present, and no exception was present. Lemonte v. Lemonte, — S.W.3d —, 2019 Tenn. App. LEXIS 238 (Tenn. Ct. App. May 17, 2019).

5. Statute of Limitations.

Selling shareholder cited no specific procedural rule in support of his motion to reinstate the manager and the officer as party defendants because he did not file a new action against them within one year of the order of voluntary dismissal. Lance v. Alcoa Hotel Hosp., LLC, — S.W.3d —, 2020 Tenn. App. LEXIS 507 (Tenn. Ct. App. Nov. 16, 2020).

Trial court properly ruled that a church's 2019 complaint against a lending institution was barred by the statutes of limitation and the savings statute because the complaint was not filed within one year from the date the church's initial complaint was dismissed; the statute of limitations for the lending institution's breach of contract and fraud claims had run by the time the church filed its complaint, and as a

result, the church's nonsuit of its 2018 lawsuit operated as a dismissal on the merits of those claims. Mount Hopewell Missionary Baptist Church v. Found. Capital Res., — S.W.3d —, 2021 Tenn. App. LEXIS 39 (Tenn. Ct. App. Feb. 4, 2021).

41.02. Involuntary Dismissal — Effect Thereof. (1) For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against the defendant.

(2) After the plaintiff in an action tried by the court without a jury has completed the presentation of plaintiff's evidence, the defendant, without waiving the right to offer evidence in the event the motion is not granted, may move for dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court shall reserve ruling until all parties alleging fault against any other party have presented their respective proof-in-chief. The court as trier of the facts may then determine them and render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court grants the motion for involuntary dismissal, the court shall find the facts specially and shall state separately its conclusions of law and direct the entry of the appropriate judgment.

(3) Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this Rule 41, other than a dismissal for lack of jurisdiction or for improper venue or for lack of an indispensable party, operates as an adjudication upon the merits. [As amended by order effective July 1, 1998; and by order entered December 14, 2009, effective July 1, 2010.]

Advisory Commission Comments [2010]. The final sentence of Rule 41.02(2) deletes the requirement of a request for written findings of fact and conclusions of law. Instead, in conformity with Rule 52.01, findings of fact and conclusions of law are required without request.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated December 14, 2009, was ratified and approved by 2010 Senate Resolution 180 and 2010 House Resolution 239. The order promulgating the amendment of this rule provided that it take effect July 1, 2010.

NOTES TO DECISIONS

Analysis

1. Applicability.
2. Dismissal Proper.
3. Dismissal Improper.
4. Appealability.
5. Findings of Fact.

1. Applicability.

In an estate's action against a county, wherein the estate alleged the decedent's leg was amputated after suffering an injury in an ambulance ride, the trial court properly determined the county was not entitled to a judgment of dismissal because there was evidence the decedent had no injury to her left foot when she was loaded into the ambulance, the decedent had an injury to her left foot when she arrived at the emergency room, the stretcher came loose inside the ambulance during the ride to the hospital, the ambulance attendant told the driver to stop the ambulance, and the ambulance driver opened the back doors and saw blood in the floor near the foot of the stretcher; thus, the evidence supported a finding of liability against the county. Wilson v. Monroe County, 411 S.W.3d 431, 2013 Tenn. App. LEXIS 53 (Tenn. Ct. App. Jan. 30, 2013), appeal denied, — S.W.3d —, 2013 Tenn. LEXIS 511 (Tenn. June 12, 2013).

2. Dismissal Proper.

Trial court properly granted a property owner's motion for involuntary dismissal because she was under no duty to protect adjoining owners from the criminal act of a trespasser that occurred on her property; it was not reasonably foreseeable that the adjoining owners' buildings would be destroyed by a fire that the trespasser intentionally set in the property owner's building Main St. Mkt., LLC v. Wein-

berg, 432 S.W.3d 329, 2013 Tenn. App. LEXIS 488 (Tenn. Ct. App. July 31, 2013), appeal denied, — S.W.3d —, 2013 Tenn. LEXIS 1026 (Tenn. Dec. 10, 2013).

Trial court properly dismissed a plaintiff's case for lack of prosecution because the record contained no evidence that the judge said or did anything even mildly discourteous to her, and acted properly in letting her know that the status conference was not the proper time to get into the matters of the case, the judge's membership in an political organization did not mean that the judge was biased against the plaintiff, the trial court clearly warned her that the case would be dismissed with prejudice if she failed to show up for the trial date, and the plaintiff's explanation of why she failed to show up for trial—it was cold and rainy that day and she had "put back in service" a 1985 vehicle—was insufficient for not showing up for trial. Harris v. Smith, — S.W.3d —, 2019 Tenn. App. LEXIS 616 (Tenn. Ct. App. Dec. 20, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 371 (Tenn. June 5, 2020), cert. denied, — L. Ed. 2d —, — S. Ct. —, — U.S. —, 2020 U.S. LEXIS 5515 (U.S. Nov. 16, 2020).

Circuit court properly dismissed a pro se injured customer's action against a grocery store because he waived any issues he might have attempted to raise on appeal where his brief significantly failed to comply with the appellate rules since it lacked a statement of the issues, statement of the case, and statement of facts, it vaguely referred to the trial court's actions, but did not cite to any alleged error of the trial court in the record or any legal authority whatsoever, and did not provide any citations to the record. Payne, — S.W.3d —, 2020 Tenn. App. LEXIS 196 (Tenn. Ct. App. Apr. 29, 2020).

Because dismissal under this rule was with prejudice when the order failed to provide otherwise, the order of dismissal in plaintiff's first suit was in fact both final and on the merits; accordingly, res judicata barred plaintiff's second petition to recover the balance of the unpaid note, and plaintiff's complaint in the second suit was properly dismissed. Furthermore, the appellate court's decision remained the same despite any previous inconsistent comments to the contrary which were made by the trial court that plaintiff was welcome to refile. Regions Bank v. Prager, — S.W.3d —, 2020 Tenn. App. LEXIS 210 (Tenn. Ct. App. May 11, 2020).

3. Dismissal Improper.

Trial court erred in dismissing with prejudice a franchisee's claim for failure to prosecute based on the franchisee's failure to serve any discovery in four years. The franchisee was not required to engage in discovery to maintain his action. Langlois v. Energy Automation Sys., Inc., 332 S.W.3d 353, 2009 Tenn. App. LEXIS 868 (Tenn. Ct. App. Dec. 21, 2009), appeal denied, Langlois v. Energy Automation Sys., — S.W.3d —, 2010 Tenn. LEXIS 595 (Tenn. June 18, 2010).

In personal injury action, involuntary dismissal of appellant's suit under Tenn. R. Civ. P. 41.02 for alleged fraud in filing the complaint under an assumed name was premature and summary judgment for appellees was improper, as there was a dispute of material fact as to whether appellant lacked capacity at the time appellant filed the complaint due to a head injury. Urtuzuastegui v. Kirkland, 366 S.W.3d 128, 2011 Tenn. App. LEXIS 132 (Tenn. Ct. App. Mar. 17, 2011), appeal denied, — S.W.3d —, 2011 Tenn. LEXIS 805 (Tenn. Aug. 24, 2011).

Trial court erred by granting a neighbor's motion to dismiss a homeowner's action seeking to enforce the decision of the county board of zoning appeals limiting concerts the neighbor hosted on his farm to one per year because the music concerts could not claim the benefit of the exemption contained in T.C.A. § 13-7-114 from compliance with county's zoning resolution since they did not fall within the rubric of "agriculture." Shore v. Maple Lane Farms, LLC, 411 S.W.3d 405, 2013 Tenn. LEXIS 644 (Tenn. Aug. 19, 2013).

Trial court erred by granting a neighbor's motion to dismiss a homeowner's action seeking to abate concerts the neighbor hosted on his farm as a common-law nuisance because the homeowner presented a prima facie case of common-law nuisance; the noise from the concerts invaded the homeowner's interests in the use and enjoyment of her property, and the homeowner was forced out of her home during daytime concerts and was a hostage to the noise at night. Shore v. Maple Lane Farms, LLC, 411 S.W.3d 405, 2013 Tenn. LEXIS 644 (Tenn. Aug. 19, 2013).

Tenn. R. Civ. P. 41.02 motion for involuntary dismissal on the ground of immunity under the Tennessee Governmental Tort Liability Act was properly denied where a teacher's actions in demonstrating proper shot put technique was not an intentional tort, and he did not act recklessly or with gross negligence when he distanced himself from the students, instructed them to move back, and threw the shot put with less than full force. Spearman v. Shelby Cty. Bd. of Educ., — S.W.3d —, 2021 Tenn. App. LEXIS 17 (Tenn. Ct. App. Jan. 15, 2021).

4. Appealability.

As leasing and hauling companies' motion for involuntary dismissal under Tenn. R. Civ. P. 41.02(2) of various claims asserted by a truck driver was denied by the trial court, and they put on their proof and the case proceeded to judgment, rather than standing on the motion and bringing an appeal, the issue of the trial court's denial thereof was not reviewable. White v. Empire Express, Inc., 395 S.W.3d 696,

2012 Tenn. App. LEXIS 677 (Tenn. Ct. App. Sept. 27, 2012), appeal denied, White v. Empire Express, Inc., — S.W.3d —, 2013 Tenn. LEXIS 159 (Tenn. Feb. 19, 2013).

5. Findings of Fact.

Because the trial court's decision regarding a motion to deem requests for admissions admitted was not a ruling concerning a motion for involuntary dismissal or a temporary injunction, it was not necessary for the trial court to make associated findings of fact. Lundell v. Hubbs, — S.W.3d —, 2020 Tenn. App. LEXIS 528 (Tenn. Ct. App. Nov. 23, 2020).

41.03. Dismissal of Counterclaim, Cross-Claim or Third-Party Claim. The provisions of this Rule 41 also apply to the dismissal of any counterclaim, cross-claim, or third-party claim.

41.04. Costs of Previously Dismissed Action. If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the new action until the plaintiff has complied with the order.

Advisory Commission Comments. 41.01: Prior practice in the circuit court permitted a claimant an unrestricted right to take a voluntary nonsuit in jury cases at any time before final retirement of the jury, and in nonjury cases until final submission of the case to the court for decision. Tenn. Code Ann. § 20-1311 et seq. [repealed]. In chancery the right to a voluntary dismissal without prejudice was much more limited; generally permission of the court was required after proof on the merits was taken. *Gibson's Suits in Chancery*, § 612 (5th ed. 1955). The Committee felt that the more liberal circuit court practice would probably be preferable to the Bar, particularly since most cases are now tried on oral testimony even in chancery. The provisions of the second paragraph of the Rule, however, impose a limit upon the number of voluntary dismissals which can be taken as a matter of right.

41.02: The provisions of the second paragraph were designed to eliminate the harsh rule formerly applied in chancery cases to the effect that a defendant could not move for dismissal at the end of the complainant's proof without resting his case and waiving his right to offer evidence. The Committee felt that a party should be able to test the legal sufficiency of his adversary's proof without such drastic consequences.

Advisory Commission Comments [1991]. Rule 41.01(1) is amended to require service of both the written notice of nonsuit and a copy of the complaint on other parties.

Advisory Commission Comments [1992]. Rule 41.01(1) is amended to require service of a complaint only on those parties not already served by summons and complaint.

Advisory Commission Comments [1998]. Adding the [second] sentence in Rule 41.02(2) concerning reservation of a ruling was thought necessary in light of Tennessee's adoption of comparative fault.

Advisory Commission Comments [2002]. Added to the list of situations where a plaintiff cannot take a nonsuit is a shareholder's derivative action, provided for by Rule 23.06.

Advisory Commission Comments [2004]. New paragraph 41.01(3) mandates a court order after nonsuit. The order entry date would start the saving year running under Tenn. Code Ann. § 28-1-105. In rare cases, the date would trigger times for filing post trial motions or a notice of appeal. *See Green v. Moore*, 101 S.W.3d 415 (Tenn. 2003).

Advisory Commission Comments [2005]. Plaintiffs and their counsel should note that in certain circumstances a case cannot be recommenced after the filing of a voluntary nonsuit. See e.g. *Lynn v. City of Jackson*, 63 S.W.3d 332, 337 (Tenn. 2001) (stating, "the general rule in Tennessee is that savings statutes may not be applied to extend the period within which an action must be filed under the [Governmental Tort Liability Act]"); *In re Estate of Barnhill*, 62 S.W.3d 139 (Tenn. 2001) (holding that a will contest action cannot be refiled after a voluntary nonsuit).

Advisory Commission Comments [2006]. Although Rule 41.01(2) allows two nonsuits without prejudice, a plaintiff must carefully consider the *separate* issue of whether the saving statute, T.C.A. § 28-1-105, authorizes a recommencement of the plaintiff's action after a nonsuit. A plaintiff should note that taking a second nonsuit, which is permitted by Rule 41.01(2), does not initiate a second one-year period for recommencing the action under the saving statute. *See Payne v. Matthews*, 633 S.W.2d 494, 495-96 (Tenn. Ct. App. 1982) (stating, "It has long been held that after the taking of any nonsuit to the original action, any addi-

tional suits would have to be filed within one year of the first nonsuit to be within the purview of T.C.A. Sec. 28-1-105.").

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated December 10, 2003, was ratified and approved by 2004 House Resolution 233 and Senate Resolution 115. The order promulgating the amendment of this rule provided that it take effect July 1, 2004.

Cross-References. Dismissal against part of defendants, T.C.A. § 20-9-401.

Dismissal under criminal rules, Tenn. R. Crim. P. 48.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-41.01-1 — 1-41.01-4, 1-41.02-1 — 1-41.02-5.

Tennessee Jurisprudence. 1 Tenn. Juris., Abatement, Survival and Revival, § 4; 9 Tenn. Juris., Demurrers and Motions to Dismiss, §§ 1, 22; 9 Tenn. Juris., Dismissal, Discontinuance and Nonsuit, §§ 2-20; 22 Tenn. Juris., Res Judicata, §§ 36-38.

Law Reviews. Attorney Malpractice — Chambers v. Dillow: Accrual of a Cause of Action Under Tennessee Law, 17 Mem. St. U.L. Rev. 583 (1987).

Nonsuits Don't Necessarily Save You (Donald F. Paine), 25 No. 1 Tenn. B.J. 28 (1989).

Nonsuits IV: An Updated List of Don'ts (Donald F. Paine), 39 No. 2 Tenn. B.J. 15 (2003).

Products Liability — Lessors as Warrantors of Fitness in Tennessee, 16 Mem. St. U.L. Rev. 303 (1986).

Sex, Lies and Nonsuits (Donald F. Paine), 29 No. 5 Tenn. B.J 17 (1993).

Tennessee and Federal Rules of Civil Procedure (Donald F. Paine), 27 Tenn. B.J. 25.

The Category of Tough: Nonsuits III (Donald F. Paine), 34 No. 5 Tenn. B.J. 16 (1998).

10 Significant Differences Between State and Federal Civil Procedure, 38 No. 7 Tenn. B.J. 27 (2002).

Attorney General Opinions. Dismissal of paternity suit for failure to prosecute, OAG 99-099 (5/4/99).

NOTES TO DECISIONS

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1. Construction with Other Statutes and Rules.
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1. Construction with Other Statutes and Rules.

T.C.A. § 28-1-105 addresses itself to time, while Tenn. R. Civ. P. 41 addresses itself to the number of dismissals (nonsuits) that can be taken; thus there is no conflict between the statute and the rule. Payne v. Matthews, 633 S.W.2d 494, 1982 Tenn. App. LEXIS 477 (Tenn. Ct. App. 1982).

Where appellees' three prior suits were all based on the inter vivos actions which decedent took with regard to her property, but the present claim, to the contrary, was founded on her testamentary actions, these claims were distinct and separate both in character and in time and were to be governed not by Tenn. R. Civ. P. 41.01(2) but by T.C.A. § 20-6-201. Wright v. Wright, 832 S.W.2d 542, 1991 Tenn. App. LEXIS 748 (Tenn. Ct. App. 1991).

In a worker's compensation proceeding, the employer's right to file suit and "submit the entire matter for determination" by the court under T.C.A. § 50-6-225(a)(1) [version applicable to injuries occurring prior to July 1, 2014)], could be asserted as a counterclaim, even though the claimant had taken a voluntary nonsuit. Blake v. Plus Mark, Inc., 952 S.W.2d 413, 1997 Tenn. LEXIS 428 (Tenn. 1997).

2. Purpose of Rule 41.01.

The purpose of adopting Tenn. R. Civ. P. 41.01 was to liberalize the rule in chancery cases and to make the rule uniform between chancery and circuit courts. Evans v. Perkey, 647 S.W.2d 636, 1982 Tenn. App. LEXIS 404 (Tenn. Ct. App. 1982).

3. Affirmative Defense.

Trial court found that the circumstances surrounding the stockholder's failure to personally appear at trial caused such prejudice to the limited partnership that it justified the dismissal of the stockholder's affirmative defense. Orlando Residence, Ltd. v. Nashville Lodging Co., 213 S.W.3d 855, 2006 Tenn. App. LEXIS 463 (Tenn. Ct. App. 2006), rehearing denied, 213 S.W.3d 855, 2006 Tenn. App. LEXIS 537 (2006), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 1222 (Tenn. 2006).

4. Voluntary Dismissal.

Will contestant was not permitted to file a second will contest after previously taking a

voluntary dismissal because such a contest was not an independent proceeding in itself and would seriously have disrupted the administration and distribution of the estate if the contest could be dismissed, voluntarily or without prejudice, and refiled at some indefinite later date. In re Estate of Barnhill, 62 S.W.3d 139, 2001 Tenn. LEXIS 859 (Tenn. 2001).

Because injured plaintiff failed to comply with Tenn. R. Civ. P. 3, requiring plaintiff to serve defendant doctor within 30 days of filing a medical malpractice case, plaintiff could rely on the original commencement date for purposes of a statute of limitations only so long as plaintiff continued the action; because plaintiff nonsuited, then refiled, without ever obtaining service on the first complaint, and without serving a copy of the notice of voluntary dismissal and complaint on the doctor, as required by Tenn. R. Civ. P. 41.01, plaintiff could not rely on the filing date of the original complaint to satisfy the applicable one year statute of limitations, and plaintiff's second suit was barred. Frye v. Blue Ridge Neuroscience Ctr., 70 S.W.3d 710, 2002 Tenn. LEXIS 123 (Tenn. 2002).

Because the unfavorable rulings by the trial court did not become appealable for an employee until the trial court entered its order confirming that all claims of all parties had been adjudicated, for purposes of filing an appeal under T.R.A.P. 3, 4(a), the 30-day appeal period commenced on the date that the trial court entered its order, not on the date that the employer and related individual filed a notice of voluntary dismissal of its counterclaim pursuant to Tenn. R. Civ. P. 41.01; the court noted that under the plain language of Tenn. R. Civ. P. 58, the signature of the judge is mandatory to effectuate a judgment. Green v. Moore, 101 S.W.3d 415, 2003 Tenn. LEXIS 324 (Tenn. 2003).

Pursuant to Tenn. R. Civ. P. 41, since the trial court had not yet ruled on the bookkeeper's motion for the entry of an involuntary dismissal, and since there was still further action that could have been taken, the club's motion for voluntary dismissal should have been granted. Club Leconte v. Swann, 270 S.W.3d 545, 2008 Tenn. App. LEXIS 159 (Tenn. Ct. App. Mar. 20, 2008), appeal denied, Club LeConte v. Swann, — S.W.3d —, 2008 Tenn. LEXIS 742 (Tenn. Sept. 29, 2008), appeal denied, Club LeConte v. Swann, — S.W.3d —, 2008 Tenn. LEXIS 750 (Tenn. Sept. 29, 2008).

When a mother voluntarily dismissed a wrongful death suit against a railroad and a conductor brought in the mother's individual capacity, as well as the mother's representative capacity as administratrix of the decedent's estate, it was not error to award the railroad and conductor discretionary costs because the award was not premature, despite the mother's announced intent to re-file, because: (1) Under Tenn. R. Civ. P. 54.04(2), discretionary costs could be taxed at the time of voluntary dismissal and before re-filing; and (2) The voluntary dismissal made defendants prevailing parties whether or not suit was re-filed. Freeman v. CSX Transp., Inc., 359 S.W.3d 171, 2010 Tenn. App. LEXIS 691 (Tenn. Ct. App. Nov. 3, 2010).

5. Voluntary Nonsuit.

A motion to dismiss a wrongful death action on the ground that the plaintiff had executed a release did not constitute a motion for summary judgment under Tenn. R. Civ. P. 56.02 since under Tenn. R. Civ. P. 8.03 release must be pleaded as an affirmative defense and the motion to dismiss did not operate as a bar to plaintiff's taking a voluntary nonsuit. Hixson v. Stickley, 493 S.W.2d 471, 1973 Tenn. LEXIS 507 (Tenn. 1973).

The court may grant plaintiff a voluntary nonsuit without prejudice during pendency of a summary judgment motion but such is discretionary with the court and plaintiff cannot move for dismissal as a matter of right. Stewart v. University of Tennessee, 519 S.W.2d 591, 1974 Tenn. LEXIS 431 (Tenn. 1974).

The right of plaintiff to a nonsuit is subject to the restriction that the granting of the nonsuit will not deprive defendant of a right that has become vested during the pendency of the case. Anderson v. Smith, 521 S.W.2d 787, 1975 Tenn. LEXIS 696 (Tenn. 1975).

Where the condemnor obtained a court order for possession of the property being condemned leaving nothing to be decided except the compensation to be paid the owner of the land taken, condemnor lost the right to take a nonsuit over the objection of the owner. Anderson v. Smith, 521 S.W.2d 787, 1975 Tenn. LEXIS 696 (Tenn. 1975).

Where plaintiff filed written notice of dismissal before trial date, he was entitled to have action dismissed without prejudice and the judge had no authority to deny such right. Rickets v. Sexton, 533 S.W.2d 293, 1976 Tenn. LEXIS 502 (Tenn. 1976).

Where plaintiffs' counsel told the clerk prior to the trial that plaintiffs desired to take a voluntary nonsuit, but where the written notice of dismissal was not filed for several months, the trial court was without authority to make such order effective retrospectively to the date of the conversation between counsel and the clerk. Snell v. Leffew, 558 S.W.2d 849, 1977 Tenn. App. LEXIS 315 (Tenn. Ct. App. 1977).

Whereas the plaintiff had voluntarily asked for a dismissal at the hearing of his insurance suit and the word "Dismissed" had been written by the judge on the civil warrant, the proper procedure would have been to ask for a "voluntary nonsuit" or a "dismissal without prejudice." Hargis v. Pilot Life Ins. Co., 566 S.W.2d 543, 1977 Tenn. App. LEXIS 283 (Tenn. Ct. App. 1977).

There was no error in not permitting plaintiff to take a nonsuit as to the defendant where

defendant's motion for a directed verdict had been argued and submitted to the court and the court had ruled thereon prior to the motion for nonsuit being made. German v. Nichopoulos, 577 S.W.2d 197, 1978 Tenn. App. LEXIS 334 (Tenn. Ct. App. 1978), overruled, Seavers v. Methodist Med. Ctr., 9 S.W.3d 86, 1999 Tenn. LEXIS 605 (Tenn. 1999), overruled on other grounds, Seavers v. Methodist Med. Ctr., 9 S.W.3d 86, 1999 Tenn. LEXIS 605 (Tenn. 1999), review or rehearing denied, 9 S.W.3d 86, 1999 Tenn. LEXIS 695 (Tenn. 1999).

Under Tennessee law no res judicata effect attaches to a voluntary nonsuit taken by a plaintiff in a jury trial before the jury retires, so long as no motion for summary judgment is pending and the plaintiff has not previously taken two voluntary nonsuits. Holden v. Cities Service Co., 514 F. Supp. 662, 1980 U.S. Dist. LEXIS 16682 (E.D. Tenn. 1980).

Where following the trial judge's grant of a new trial to the plaintiff the judge granted plaintiff's voluntary nonsuit without prejudice, the order of nonsuit was a final judgment appealable under T.R.A.P. 3; however, whether the plaintiff had a right to a nonsuit without prejudice depended on whether the trial court was correct in granting a new trial. Panzer v. King, 743 S.W.2d 612, 1988 Tenn. LEXIS 5 (Tenn. 1988).

In Tennessee, the court rules and the case law are silent with respect to a plaintiff's right to take a nonsuit after the grant of a new trial. The absolute right of a plaintiff to take a voluntary nonsuit without prejudice is terminated at some point in the first trial, and thereafter, the granting of such a dismissal is within the sound discretion of the trial judge. The trial judge should bear in mind the position of the defendant at the time of plaintiff's motion and may impose such conditions on the plaintiff as may be appropriate to prevent defendant from being unfairly affected by such dismissal. The trial court should impose only those conditions such as costs, attorney's fees, reasonable expenses of preparing for trial, etc., that are necessary to alleviate harm to defendant, and the court's discretion is reviewable only for abuse of discretion. This rule is applicable at all times subsequent to the retirement of the jury to consider its verdict at the first trial. Panzer v. King, 743 S.W.2d 612, 1988 Tenn. LEXIS 5 (Tenn. 1988).

There is a distinction between dismissing an appeal and taking a voluntary dismissal after an appeal has been perfected. Katz v. Bilsky, 759 S.W.2d 420, 1988 Tenn. App. LEXIS 226 (Tenn. Ct. App. 1988).

Voluntary dismissal without prejudice pursuant to Tenn. R. Civ. P. 41.01 of appeal from general sessions court to circuit court did not require affirmance of general sessions judgment under T.C.A. § 27-5-107. Katz v. Bilsky, 759 S.W.2d 420, 1988 Tenn. App. LEXIS 226 (Tenn. Ct. App. 1988).

A voluntary nonsuit may not be taken while a motion for summary judgment on the matter is pending, or after such motion has been granted and not set aside. Clevenger v. Baptist Health Sys., 974 S.W.2d 699, 1997 Tenn. App. LEXIS 579 (Tenn. Ct. App. 1997), appeal denied, — S.W.2d —, 1998 Tenn. LEXIS 199 (Tenn. Apr. 6, 1998).

In a personal injury suit, plaintiff's equivocal statements and conditional response to the trial court did not provide effective notice of voluntary dismissal, and the trial court's decision to direct a verdict against him at the close of plaintiff's proof was a final decision on the merits. Young v. Barrow, 130 S.W.3d 59, 2003 Tenn. App. LEXIS 678 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 80 (Tenn. Jan. 26, 2004).

Trial court erred in granting plaintiff's motion for a voluntary nonsuit without prejudice, as if it were a matter of right, after the jury retired to deliberate; the court had no authority to grant a voluntary dismissal without prejudice and, upon appeal, the plaintiff's voluntary dismissal was held to be with prejudice. Lacy v. Cox, 152 S.W.3d 480, 2004 Tenn. LEXIS 987 (Tenn. 2004).

6. —Retraxit.

The rule of retraxit, by which a plaintiff in renouncing his suit forever loses his right of action does not prevail in Tennessee; and nothing in the text of Tenn. R. Civ. P. 41 or in the Advisory Commission comments thereto changes that. Garrett v. Corry Foam Products, Inc., 596 S.W.2d 808, 1980 Tenn. LEXIS 430 (Tenn. 1980).

Inasmuch as retraxits are not recognized in Tennessee, the words "with prejudice" contained in a voluntary dismissal order should be treated as surplusage. Garrett v. Corry Foam Products, Inc., 596 S.W.2d 808, 1980 Tenn. LEXIS 430 (Tenn. 1980).

7. Dismissal by Stipulation.

Tenn. R. Civ. P. 41 does not recognize dismissal by stipulation of counsel, but such a procedure would be effective under Tennessee practice. Stewart v. University of Tennessee, 519 S.W.2d 591, 1974 Tenn. LEXIS 431 (Tenn. 1974).

8. Juvenile Proceedings.

The state rules of civil procedure do not apply to paternity cases in juvenile court, which are quasi-criminal actions. Patrick v. Dickson, 526 S.W.2d 449, 1975 Tenn. LEXIS 596 (Tenn. 1975).

9. Nonjury Trial.

Although motions for dismissal in nonjury cases under Tenn. R. Civ. P. 41.02(2) and motions for directed verdicts in jury cases under

Tenn. R. Civ. P. 50 are somewhat similar, they should not be confused since a motion for a directed verdict is neither necessary nor proper in a case which is being tried without a jury. Columbia v. C.F.W. Constr. Co., 557 S.W.2d 734, 1977 Tenn. LEXIS 678 (Tenn. 1977).

In a nonjury case, when a motion to dismiss is made at the close of plaintiff's case under Tenn. R. Civ. P. 41.02(2), the trial judge must impartially weigh and evaluate the evidence in the same manner as though he were making findings of fact at the conclusion of all of the evidence for both parties, determine the facts of the case, apply the law to those facts, and, if the plaintiff's case has not been made out by a preponderance of the evidence, a judgment may be rendered against the plaintiff on the merits, or, the trial judge in his discretion may decline to render judgment until the close of all the evidence, however, the action should be dismissed if on the facts found and the applicable law the plaintiff has shown no right to relief. Columbia v. C.F.W. Constr. Co., 557 S.W.2d 734, 1977 Tenn. LEXIS 678 (Tenn. 1977); Atkins v. Kirkpatrick, 823 S.W.2d 547, 1991 Tenn. App. LEXIS 547 (Tenn. Ct. App. 1991).

A review of a judgment by the court of appeals upon a motion pursuant to Tenn. R. Civ. P. 41 is governed by T.C.A. § 27-3-103 (repealed), providing that in a nonjury lawsuit a review in the appellate court of any issue of law or fact shall be de novo upon the record of the trial court, accompanied by a presumption of the correctness of the judgment or decree of the trial court, unless the preponderance of the evidence is otherwise. Nold v. Selmer Bank & Trust Co., 558 S.W.2d 442, 1977 Tenn. App. LEXIS 311 (Tenn. Ct. App. 1977), rehearing denied, Nold v. Selmer Bank, 558 S.W.2d 442, 1977 Tenn. App. LEXIS 312; College Grove Water Utility Dist. v. Bellenfant, 670 S.W.2d 229, 1984 Tenn. App. LEXIS 2742 (Tenn. Ct. App. 1984).

In a nonjury case, the plaintiff is entitled to a voluntary dismissal as a matter of right, at least until written post-trial briefs have been filed pursuant to order of the trial judge and until the matter has been finally submitted to the court for determination on the merits. Weedman v. Searcy, 781 S.W.2d 855, 1989 Tenn. LEXIS 541 (Tenn. 1989).

10. Oral Notice of Dismissal.

An oral notice of dismissal may be made only during the trial of a cause, and an oral request for dismissal made prior to the trial was not effective until written notice of dismissal was filed. Snell v. Leffew, 558 S.W.2d 849, 1977 Tenn. App. LEXIS 315 (Tenn. Ct. App. 1977).

11. Involuntary Dismissal.

For res judicata to apply, a prior judgment must conclude the rights of the parties on the merits. It is a general rule that a personal judgment for defendant does not bar another action on the same claim if the judgment is one of dismissal for lack of jurisdiction. A dismissal for lack of jurisdiction is not an adjudication on the merits under Tenn. R. Civ. P. 41. Goeke v. Woods, 777 S.W.2d 347, 1989 Tenn. LEXIS 453 (Tenn. 1989).

Res judicata applies to questions of jurisdiction if jurisdiction is litigated or determined by the court. The preclusive effect of a dismissal for lack of jurisdiction is, however, limited to matters actually decided and is not binding as to all matters that could have been raised. A dismissal for lack of jurisdiction does not preclude a party from litigating the same cause of action in a court of competent jurisdiction. Goeke v. Woods, 777 S.W.2d 347, 1989 Tenn. LEXIS 453 (Tenn. 1989).

If a party desires to challenge the sufficiency of the plaintiff's proof in a nonjury trial, it must file a motion for involuntary dismissal at the close of the plaintiff's proof pursuant to Tenn. R. Civ. P. 41.01(2). Smith v. Inman Realty Co., 846 S.W.2d 819, 1992 Tenn. App. LEXIS 777 (Tenn. Ct. App. 1992), rehearing denied, — S.W.2d —, 1992 Tenn. App. LEXIS 781 (Tenn. Ct. App. 1992).

In the case of a motion for involuntary dismissal pursuant to Tenn. R. Civ. P. 41.02(2), the trial court must impartially weigh and evaluate the evidence as it would after the presentation of all the evidence and must deny the motion if the plaintiff has made out a prima facie case. Smith v. Inman Realty Co., 846 S.W.2d 819, 1992 Tenn. App. LEXIS 777 (Tenn. Ct. App. 1992), rehearing denied, — S.W.2d —, 1992 Tenn. App. LEXIS 781 (Tenn. Ct. App. 1992).

Although the sanction of dismissal is harsh, there is no authority for the proposition that a dismissal proceeding under Tenn. R. Civ. P. 41.02(1) constitutes a criminal contempt proceeding, or that the sanction of dismissal constitutes a criminal contempt penalty. Manufacturers Consolidation Serv., Inc. v. Rodell, 42 S.W.3d 846, 2000 Tenn. App. LEXIS 148 (Tenn. Ct. App. 2000).

Although Tenn. R. Civ. P. 41.02(1) authorizes a trial court to dismiss a party's claim if the party asserting the claim fails to comply with an order of the court, there is no support within the language of the rule for dismissing one party's claim based upon a different party's violation of a court order. Manufacturers Consolidation Serv., Inc. v. Rodell, 42 S.W.3d 846, 2000 Tenn. App. LEXIS 148 (Tenn. Ct. App. 2000).

Dismissal of the wage claim was not dismissed because the money was not owed, but for failure to prosecute under Tenn. R. Civ. P. 41.02, where a temporary service agency employee refused to proceed on the agreed trial date after the employee's request for a continuance was denied. Osagie v. Peakload Temp. Servs., 91 S.W.3d 326, 2002 Tenn. App. LEXIS 351 (Tenn. Ct. App. 2002), review or rehearing

denied, — S.W.3d —, 2002 Tenn. LEXIS 591 (Tenn. 2002).

As the appellate court was required to review the grant of a motion for involuntary dismissal de novo with a presumption that the trial court's findings were correct, the appellate court was mandated to affirm the findings of the trial court even though the evidence could possibly have supported another conclusion that the co-op's spraying damaged the farmer's crops. Burton v. Warren Farmers Coop., 129 S.W.3d 513, 2002 Tenn. App. LEXIS 661 (Tenn. Ct. App. 2002).

Trial court did not abuse its discretion by dismissing pro se inmate's divorce petition for failure to prosecute the claim without having given him prior notice of the dismissal where he knew that original summons had been returned unserved and permitted the case to languish for seven months without making any effort to see to it that his wife was properly served; moreover, his position on appeal was undermined by his failure to avail himself of the post-judgment remedies available to him through a Tenn. R. Civ. P. 59.04 motion to alter or amend the trial court's judgment within 30 days after entry explaining his reasons for failing to serve his wife or otherwise prosecute his case, or Tenn. R. Civ. P. 60.02 arguing mistake, inadvertence, surprise, or excusable neglect. Hessmer v. Hessmer, 138 S.W.3d 901, 2003 Tenn. App. LEXIS 346 (Tenn. Ct. App. 2003).

State court dismissal of a wrongful death suit for failure to prosecute did not have preclusive effect on a federal action. The trial court erred by denying plaintiff's Tenn. R. Civ. P. 60 motion requesting modification of the dismissal order to reflect that it was not an adjudication on the merits. DeLong v. Vanderbilt Univ., 186 S.W.3d 506, 2005 Tenn. App. LEXIS 497 (Tenn. Ct. App. 2005), appeal denied, Delong v. Vanderbilt Univ., — S.W.3d —, 2005 Tenn. LEXIS 1189 (Tenn. Dec. 19, 2005).

Trial court did not err by granting a shareholder's motion for involuntary dismissal under Tenn. R. Civ. P. 41.02 in a customer's action to recover the money she paid for a hot tub that was never delivered due to the corporation's ceasing to operate because he was divested of title to any shares of the corporation's stock and received only attorney fees and costs. Pamperin v. Streamline Mfg., 276 S.W.3d 428, 2008 Tenn. App. LEXIS 154 (Tenn. Ct. App. Mar. 17, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 771 (Tenn. Oct. 6, 2008).

Trial court erred by granting a shareholder's motion for involuntary dismissal under Tenn. R. Civ. P. 41.02 in a customer's action to recover the money she paid for a hot tub that was never delivered due to the corporation's ceasing to operate because the value of the property that was transferred to the shareholder clearly exceeded the lien debt, so that an equity interest should have been available to pay the corporation's other creditors; because the shareholder directed all of the corporation's assets to his own personal use, the corporation became unable to fulfill its existing obligations to its creditors, and therefore piercing the corporate veil to impose liability on the shareholder was proper. Pamperin v. Streamline Mfg., 276 S.W.3d 428, 2008 Tenn. App. LEXIS 154 (Tenn. Ct. App. Mar. 17, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 771 (Tenn. Oct. 6, 2008).

12. —Evidence.

Tenn. R. Civ. P. 41 contemplates that the plaintiff's evidence shall be heard and evaluated by the court prior to an involuntary dismissal order at trial. Harris v. Baptist Memorial Hospital, 574 S.W.2d 730, 1978 Tenn. LEXIS 682 (Tenn. 1978).

A Tenn. R. Civ. P. 12.02(6) motion serves a distinctly different purpose than that authorized by a Tenn. R. Civ. P. 41.02(2) motion; the former tests the sufficiency of the complaint, while the latter evaluates the strength of the plaintiffs' case. Merriman v. Smith, 599 S.W.2d 548, 1979 Tenn. App. LEXIS 389 (Tenn. Ct. App. 1979).

The trial court abused its discretion when it dismissed corporation's claim based upon the theory of piercing the corporate veil, where the record contained nothing to suggest, prior to entry of the trial court's order of dismissal, that the court expected the corporation to perform the required act of posting the bond if corporate shareholder failed to do so. Manufacturers Consolidation Serv., Inc. v. Rodell, 42 S.W.3d 846, 2000 Tenn. App. LEXIS 148 (Tenn. Ct. App. 2000).

Dismissal of the decedent's daughter's ex-husband's and grandchildren's action against the decedent's sole surviving child to invalidate the decedent's will was appropriate because there was no evidence presented that the surviving child dominated the decedent in any way, much less to the extent that the child could have persuaded the decedent to execute a new will in the child's favor. In re Estate of Price, 273 S.W.3d 113, 2008 Tenn. App. LEXIS 163 (Tenn. Ct. App. Mar. 24, 2008), appeal denied, In re Estate of Price v. Price, — S.W.3d —, 2008 Tenn. LEXIS 739 (Tenn. Sept. 29, 2008).

13. —Opening Statements.

Opening statements are intended merely to inform the trial judge and jury, in a general way, of the nature of the case and to outline, generally, the facts each party intends to prove. Such statements do not amount to stipulations and certainly are not a substitute for the pleadings or for evidence. Thus, an involuntary dismissal upon the basis of the opening statements of counsel alone may effectively deny the litigants the opportunity to be heard or to fully present the facts and evidence in the

case. For this reason, the Supreme Court is unwilling to expand the provisions of Tenn. R. Civ. P. 41 to authorize trial judges to order involuntary dismissals upon opening statements only. Harris v. Baptist Memorial Hospital, 574 S.W.2d 730, 1978 Tenn. LEXIS 682 (Tenn. 1978).

The trial judges of this state are not authorized to order the involuntary dismissal of an action at trial upon the sole basis of the opening statements of counsel. Harris v. Baptist Memorial Hospital, 574 S.W.2d 730, 1978 Tenn. LEXIS 682 (Tenn. 1978).

14. —Statute of Limitations.

Dismissal based on a lapsed statute of limitations did not fall within one of the three stated exceptions in Tenn. R. Civ. P. 41.02(3) and, therefore, was an adjudication on the merits. In re Horkins, 153 B.R. 793, 1992 Bankr. LEXIS 2319 (Bankr. M.D. Tenn. 1992).

15. Discretion of Court.

Although Tenn. R. Civ. P. 41 does not expressly so provide, a trial court may under certain circumstances and upon adequate grounds therefor, sua sponte order the involuntary dismissal of an action. However, this power must be exercised most sparingly and with great care that the right of the respective parties to a hearing shall not be denied or impaired. Harris v. Baptist Memorial Hospital, 574 S.W.2d 730, 1978 Tenn. LEXIS 682 (Tenn. 1978).

Appellate review of decisions to dismiss cases pursuant to Tenn. R. Civ. P. 41.02(1) is governed by an abuse of discretion standard. Manufacturers Consolidation Serv., Inc. v. Rodell, 42 S.W.3d 846, 2000 Tenn. App. LEXIS 148 (Tenn. Ct. App. 2000).

Trial courts possess inherent, common law authority to control their dockets and the proceedings in their courts; their authority is quite broad and includes the express authority to dismiss cases for failure to prosecute or to comply with the Tennessee Rules of Civil Procedure or the orders of the court. Hodges v. Tennessee AG, 43 S.W.3d 918, 2000 Tenn. App. LEXIS 785 (Tenn. Ct. App. 2000).

16. Authority to Otherwise Specify.

The trial court has the authority and duty in its order of dismissal to "otherwise specify" in all those cases in which a palpable and unjustified injustice would result from dismissal with prejudice. Randle v. Lyle, 682 S.W.2d 219, 1984 Tenn. App. LEXIS 3200 (Tenn. Ct. App. 1984).

17. Payment of Costs Prior to Refiling.

In a voluntarily dismissed healthcare liability action, a request to stay proceedings until a patient paid assessed costs was premature because a re-filing was a prerequisite. Pinson v. Deboer, — S.W.3d —, 2019 Tenn. App. LEXIS 370 (Tenn. Ct. App. July 30, 2019).

In a healthcare liability action voluntarily dismissed and re-filed, a patient was not required to pay assessed costs or post a bond therefor prior to re-filing because the Rule did not so provide. Pinson v. Deboer, — S.W.3d —, 2019 Tenn. App. LEXIS 370 (Tenn. Ct. App. July 30, 2019).

RULE 42

CONSOLIDATION: SEPARATE TRIALS

42.01. Consolidation. When actions involving a common question of law or fact are pending before a court, the court may order all the actions consolidated or heard jointly, and may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

42.02. Separate Trials. The court for convenience or to avoid prejudice may in jury trials order a separate trial of any one or more claims, cross-claims, counterclaims, or third-party claims, or issues on which a jury trial has been waived by all parties. For the same purposes the court may, in nonjury trials, order a separate trial of any one or more claims, cross-claims, counterclaims, third-party claims, or issues. [Amended by order effective July 1, 1997.]

Advisory Commission Comments. 42.01: Prior to the adoption of these Rules, statutes permitted consolidation of suits in certain types of cases, including suits involving (a) mechanics' and materialmen's liens, Tenn. Code Ann. § 66-11-132, (b) delinquent taxes, Tenn. Code Ann. § 66-5-2409, and (c) municipal annexation, Tenn. Code Ann. § 6-51-103. The Committee felt that the consolidation of actions or the hearing of them jointly should be encouraged in order to avoid unnecessary delay and expense and the duplication of effort.

42.02: This Rule allows the court, for convenience or to avoid prejudice, to order a separate trial of any one or more claims, cross claims, counterclaims or third-party claims.

Advisory Commission Comments [1997]. Former constitutional concerns about a "right" to have a general jury verdict on all issues no longer exist in light of *Ennix v. Clay*, 703 S.W.2d 137 (Tenn. 1986).

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-42.01-1, 1-42.02-1, 1-42.02-2.

Tennessee Jurisprudence. 1 Tenn. Juris., Actions, §§ 22, 28.

Law Reviews. For an article, "Prejudice, Confusion, and the Bifurcated Civil Jury Trial: Lessons From Tennessee," see 67 Tenn. L. Rev. 653 (2000).

The Tennessee Court System — Circuit Court (Frederic S. Le Clercq), 8 Mem. St. U.L. Rev. 241.

NOTES TO DECISIONS

Analysis

1. Construction.
2. Separate Trials.
3. Discretion of Court.
4. Jurisdiction.

1. Construction.

The use of the term "may" in the initial portion of Tenn. R. Civ. P. 42 clearly gives the trial court discretion as to whether the facts of a particular case merit consolidation of cases of that type. Van Zandt v. Dance, 827 S.W.2d 785, 1991 Tenn. App. LEXIS 642 (Tenn. Ct. App. 1991).

2. Separate Trials.

Although the trial court entered an order "severing" the third party actions from the trial of the principal actions, it appears that what the court intended to do was to order separate trials pursuant to Tenn. R. Civ. P. 42. Pridemark Custom Plating, Inc. v. Upjohn Co., 702 S.W.2d 566, 1985 Tenn. App. LEXIS 3053 (Tenn. Ct. App. 1985), superseded by statute as stated in, Wheeler v. Harvey (In re Estate of Porter), 1997 Tenn. App. LEXIS 512 (Tenn. Ct. App. July 24, 1997).

Consolidation should not be ordered when the result will be to bring about a complication of issues of fact, embarrassment or delay in the trial, difficulty in presenting or applying the law to the evidence, or prejudice to the rights of the parties. Van Zandt v. Dance, 827 S.W.2d 785, 1991 Tenn. App. LEXIS 642 (Tenn. Ct. App. 1991).

Where plaintiff outdoor advertising company sued defendant real estate development company for a declaration that defendant did not have the right to terminate plaintiff's leases, defendant counterclaimed for damages suffered as a result of the plaintiff's failure to remove its billboards; and a third-party outdoor advertising company that was supposed to purchase the property filed a motion to intervene alleging that the plaintiff was interfering with its contractual relations with defendant. The trial court did not abuse its discretion by bifurcating the trial under Ten. R. Civ. P. 42.02, because the issue of liability under the lease agreements had to determined before damages could be awarded. Lamar Adver. Co. v. By-pass Partners, 313 S.W.3d 779, 2009 Tenn. App. LEXIS 468 (Tenn. Ct. App. July 22, 2009), appeal denied, Lamar Adver. Co. v. By-Pass Partners, — S.W.3d —, 2010 Tenn. LEXIS 287 (Tenn. Mar. 15, 2010).

3. Discretion of Court.

In the absence of statute, the consolidation of actions is not a matter of right, but rests in the sound discretion of the court, and its discretion in ordering or refusing consolidation will not be interfered with unless abused. Van Zandt v. Dance, 827 S.W.2d 785, 1991 Tenn. App. LEXIS 642 (Tenn. Ct. App. 1991).

4. Jurisdiction.

Circuit court was well within its discretion in retaining jurisdiction over a counterclaim and in granting a default judgment on the counterclaim, notwithstanding the dismissal of the general sessions appeal for lack of subject matter jurisdiction, because the dismissal of the general sessions appeal did not deprive the court of subject matter jurisdiction to adjudicate the counterclaim, as the court was permitted to render a judgment in the separate counterclaim, even though the original lawsuit was dismissed. Johnson v. Memphis Guitar Spa, LLC, 600 S.W.3d 348, 2019 Tenn. App. LEXIS 254 (Tenn. Ct. App. May 23, 2019), appeal denied, Johnson v. Memphis Guitar Spa, LLC, — S.W.3d —, 2019 Tenn. LEXIS 464 (Tenn. Sept. 20, 2019).

RULE 43

EVIDENCE

43.01. Evidence at Trials. In all actions at law or in equity, the testimony of witnesses shall be taken pursuant to the Tennessee Rules of Evidence. Also,

for good cause shown in compelling circumstances and with appropriate safeguards, the court may permit presentation of testimony in open court by contemporaneous audio-visual transmission from a different location. [As amended by order entered January 25, 1991, effective July 1, 1991; and by order entered January 30, 2002, effective July 1, 2002.]

43.02. Evidence at Motion Hearings. When a motion is based on facts not appearing of record, the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions. [As amended by order entered January 25, 1991, effective July 1, 1991.]

43.03. Order of Expert Testimony. In trials involving conflicting expert testimony and with the consent of all parties, courts may reorder the ordinary proof process to increase the likelihood that jurors will be able to comprehend and evaluate expert testimony. [Added by order filed January 31, 2003, effective July 1, 2003.]

43.04. Matters Considered by Court. When parties supporting or opposing motions before the court present materials not previously filed with the court, such materials shall be submitted as follows:

(1) All or part of any deposition taken pursuant to Rules 30 or 31 shall be accompanied by an original or photocopy of the certification of the officer taking the deposition.

(2) All or part of any interrogatory answers or objections thereto obtained pursuant to Rule 33 and all or part of any response or objection to a Rule 36 request for admission shall be accompanied by the original signature of the responding party or attorney, or a photocopy thereof.

(3) Any document obtained pursuant to a Rule 34 request for production of documents shall be accompanied by a copy of the request for production and either a copy of the response thereto or a certificate of authenticity from the party or attorney presenting the document to the court.

The submitting party shall also include the title page of the foregoing documents showing the complete caption for the action as required by Rule 10.01. The submission shall include all relevant definitions provided in the original document.

In ruling on any motion, the court shall consider only those documents and other materials that have been filed with the court as provided herein or that have been presented to the court in accordance with Rules 43.01 or 43.02, or matters that have been stipulated by the parties. [Added by order entered December 10, 2003, effective July 1, 2004.]

Advisory Commission Comments [1991]. The first section [43.01] is amended to cross-reference the Tennessee Rules of Evidence. The second section [43.02] was formerly numbered 43.05. Original 43.06 on compensating interpreters is moved to Rule 54.04(3). All other sections in the original rule are deleted because inconsistent with or superfluous in light of the Tennessee Rules of Evidence.

Advisory Commission Comments [2002]. The amendment permits testimony of a witness outside the courtroom to be transmitted by contemporaneous audio-visual means to the trier of fact. Note that three conditions must be

satisfied: good cause, compelling circumstances, and adequate safeguards.

Advisory Commission Comments [2003]. The new procedure in Rule 43.03 is designed to assist jurors in understanding conflicting expert testimony by providing judges and lawyers with considerable flexibility in the scheduling and mode of that testimony. On rare occasions, it may be helpful if expert testimony on the same subject be given in the same block of time rather than separated by days or weeks and given during each party's proof process. For example, in a tort case where both sides will present expert testimony on causation, jurors may benefit if the plaintiff's causation experts testify, followed immediately by the defendant's causation experts. This procedure may give the jurors a better way of resolving the issue of causation. Because of the tactical, financial, scheduling, and procedural issues raised by this new procedure, it can only be utilized with the consent of the court and all parties.

Advisory Commission Comments [2004]. New Rule 43.04 limits a trial court's consideration on motion rulings, particularly motion for summary judgment rulings, to certain designated materials. The amendment complements existing Rule 56.04.

Compiler's Notes. The adoption of this rule, as promulgated and adopted by the Supreme Court in its order dated January 31, 2003, was ratified and approved by 2003 House Resolution 21 and Senate Resolution 8. The order promulgating the adoption of this rule provided that it take effect on July 1, 2003.

The adoption of § 43.04 of this rule, as promulgated and adopted by the Supreme Court in its order dated December 10, 2003, was ratified and approved by 2004 House Resolution 233 and Senate Resolution 115. The order promulgating the amendment of this rule provided that it take effect July 1, 2004.

Cross-References. Arguments to jury, T.C.A. §§ 20-9-301 — 20-9-304.

Submission of exhibits to jury, T.C.A. § 20-9-510.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 38, 188, 202, 455.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-43.03-1, 1-43.06-1, 1-43.07-1.

Tennessee Jurisprudence. 9 Tenn. Juris., Discovery, § 12; Tennessee Jurisprudence. 11 Tenn. Juris., Equity, § 59; 25 Tenn. Juris., Witnesses, § 28.

Law Reviews. Better, Happier Juries (Neil P. Cohen), 39 No. 6 Tenn. B.J. 16 (2003).

Competency and Impeachment of Witnesses (Leo Bearman, Jr.), 57 Tenn. L. Rev. 89 (1989).

Davis v. Davis: The End of Interspousal Tort Immunity Tips the Scales on the Last Intrafamilial Immunity Stronghold, 14 Mem. St. U.L. Rev. 270 (1984).

Mary Carter Agreements, Learn the Inside Deal, (June F. Entman), 24 No. 1 Tenn. B.J. 10 (1988).

The Tennessee Court System — Circuit Court (Frederic S. Le Clercq), 8 Mem. St. U.L. Rev. 241.

Trial, 4 Mem. St. U.L. Rev. 335.

NOTES TO DECISIONS

Analysis

1. Offer to Prove.
2. Examination of Managing Agent.
3. Taking of Proof.
4. Trial by Deposition.
5. Self-Incrimination.

1. Offer to Prove.

Although an offer to prove consisting of a narration by counsel as to the expected substance of said proof meets the technical requirements of this rule, the better practice is to present the proof so that on appeal, if there is a reversal on the legal question presented, the possibility of a second appeal, following the remand, will be avoided. Farmers-Peoples Bank v. Clemmer, 519 S.W.2d 801, 1975 Tenn. LEXIS 718 (Tenn. 1975).

2. Examination of Managing Agent.

Rules governing the use of the deposition of a managing agent are the same as those governing the right to call a managing agent for interrogation, impeachment, and cross-examination. Seaboard C. R. Co. v. Hughes, 521 S.W.2d 558, 1975 Tenn. LEXIS 685 (Tenn. 1975).

A managing agent is any person who acts with superior authority and who is invested with general powers to exercise his discretion in dealing with his principal's affairs, who can be depended upon to carry out his principal's directions to give testimony at the demand of an adverse party in a suit against his principal, and who can be expected to identify himself with the interests of his principal. Seaboard C. R. Co. v. Hughes, 521 S.W.2d 558, 1975 Tenn. LEXIS 685 (Tenn. 1975); Wallace v. Knoxville's Community Development Corp., 568 S.W.2d 107, 1978 Tenn. App. LEXIS 288 (Tenn. Ct. App. 1978).

3. Taking of Proof.

That portion of T.C.A. § 27-9-111 which required that proof at a hearing for review of the revocation of a beer permit be taken by deposition was superseded by Tenn. R. Civ. P. 43 which provides that testimony of witnesses should be taken under oath and orally in open court. Hunter v. Bowman, 535 S.W.2d 853, 1976 Tenn. LEXIS 585 (Tenn. 1976).

4. Trial by Deposition.

Although the legislature intended by Tenn. R. Civ. P. 43 to abolish trials by deposition except to the limited extent exempted from application of the rule, trial by deposition may be permitted in certain cases pursuant to Tenn. R. Civ. P. 43.07 [repealed] and where the parties have agreed to that practice. Hunter v. Bowman, 535 S.W.2d 853, 1976 Tenn. LEXIS 585 (Tenn. 1976).

5. Self-Incrimination.

Where proceeding is not criminal in nature and does not involve the imposition of a civil penalty for misconduct which is criminal in nature, privilege against taking the witness stand is not applicable. England v. Civil Service Com. etc., 617 S.W.2d 135, 1981 Tenn. App. LEXIS 493 (Tenn. Ct. App. 1981).

RULE 43A

JUROR INFORMATION

43A.01. Juror Notetaking. Jurors shall be instructed that they may take notes during the trial. The court shall provide suitable materials for this purpose. Jurors shall have access to their notes during recesses and deliberations. After the jury has rendered a verdict, the notes shall be collected by court personnel who shall destroy them promptly.

43A.02. Juror Notebooks. When the court deems it helpful in a particular case, jurors may be provided with notebooks to use in collecting and organizing appropriate materials, including such items as jury instructions, copies of exhibits, and the juror's own notes. Counsel should be apprised of this procedure and invited to prepare exhibits and other materials in a way that facilitates their inclusion in the jurors' notebooks. At the end of the trial, the notebooks should be collected by court personnel and their contents destroyed, unless the court instructs to the contrary.

43A.03. Juror Questions of Witnesses. In the court's discretion, a juror desiring to propound a question to a witness may be permitted to do so. The juror must put the question in written form and submit it to the judge through a court officer at the end of a witness' testimony. The judge shall review all such questions and, outside the hearing of the jury, shall consult the parties about whether the question should be propounded. The judge, in his or her discretion, may ask the juror's question in whole or part and may change the wording of the juror's question before propounding it to the witness. The judge may permit counsel to ask the question in its original or amended form in whole or part, in the judge's discretion. When juror questions are permitted, early in the trial jurors shall be instructed about the mechanics of asking a question. In addition, the jurors shall be instructed to give no meaning to the fact that the judge chose not to ask a question or altered the wording of a question submitted by a juror. A juror's question shall be anonymous, so that the juror's name is not included in the question. All jurors' questions, whether approved or disapproved by the court, shall be retained for the record. [Added by order filed January 31, 2003, effective July 1, 2003.]

Advisory Commission Comments [2003]. This new rule adds three procedures designed to assist jurors in the effective performance of their important functions.

Rule 43A.01 specifically states that jurors are allowed to take notes during the trial and to use those notes during deliberations. The court is to provide the necessary materials and to collect and destroy the notes at the end of the trial. The premise of this rule is that jurors, like

judges and lawyers, may find it helpful to take notes during the trial in order to assist in remembering the evidence.

Rule 43A.02 authorizes the court, in its discretion, to provide jurors with notebooks to use in collecting and organizing the various materials presented to the jury. The notebook might include such items as jury instructions, copies of exhibits (photographs, charts, etc.), basic definitions of words used in the trial, and any other appropriate materials.

The court is given the discretion whether to use notebooks. The court might want to ask counsel to assist in the preparation of the notebooks. The content and financial aspects of the notebooks might be discussed and resolved during pretrial conference. After the trial, the court may collect the notebooks and destroy any contents that will not be used again, although the exact disposition is left to the court's discretion.

Rule 43A.03 gives the court the discretion to allow jurors to ask questions of witnesses. This rule is designed to assist jurors in their understanding of evidence and to make them feel more involved in the trial process. The procedure in this rule should ensure that improper questions are not propounded to witnesses. After a witness has completed testimony, a juror desiring to ask a question must submit that question in writing to a court officer who will give it to the judge. The question shall be submitted without identifying the juror who asked it. The judge then screens the question. Counsel shall be invited to comment on the propriety of the question out of the hearing of the jury. The court is given the discretion to reject or ask the question in whole or in part, to rephrase it, and to have counsel ask the question of the witness. If necessary, the court may accompany the question or the rejection of the question with appropriate jury instructions. All questions are to be retained for the record.

Compiler's Notes. The adoption of this rule, as promulgated and adopted by the Supreme Court in its order dated January 31, 2003, was ratified and approved by 2003 House Resolution 21 and Senate Resolution 8. The order promulgating the adoption of this rule provided that it take effect on July 1, 2003.

Law Reviews. Better, Happier Juries (Neil P. Cohen), 39 No. 6 Tenn. B.J. 16 (2003).

RULE 44

(RESERVED)

Advisory Commission Comments [1991]. Former Rule 44 dealt with admissibility of official records. The amendment deletes the rule, official records now being covered by such provisions as Tenn. R. Evid. 803(8) and 902(4).

Compiler's Notes. Former Rule 44, concerning the admissibility and proof of official records, was deleted by order promulgated January 25, 1991, which was ratified and approved by 1991 House Resolution No. 10 and Senate Resolution No. 15. The order promulgating the 1991 deletion of this rule provided that it was applicable to all cases tried on and after July 1, 1991.

RULE 44A

INTERIM COMMENTARY

During the course of the trial, the court may permit counsel to address the jury in order to assist jurors in understanding the evidence that has been presented or will be presented. The trial court may place reasonable time limits on such statements and shall permit all counsel to respond to the remarks of any one lawyer. [Added by order filed January 31, 2003, effective July 1, 2003.]

Advisory Commission Comments [2003]. This new rule gives the court the discretion to allow counsel to speak directly to the jury during the trial in order to assist the jurors in understanding the context of the evidence. For example, the court may allow counsel to make a short explanation of what legal issue the next two witnesses will address. The court is given the discretion to place time and content limits on these statements, but each counsel must be given a chance to respond to the interim commentary of any lawyer.

Compiler's Notes. The adoption of this rule, as promulgated and adopted by the Supreme Court in its order dated January 31, 2003, was ratified and approved by 2003 House Resolution 21 and Senate Resolution 8. The order promulgating the adoption of this rule provided that it take effect on July 1, 2003.

Law Reviews. Better, Happier Juries (Neil P. Cohen), 39 Tenn. B.J. 16 (2003).

RULE 45

SUBPOENA

45.01. For Attendance of Witnesses — Form — Issuance. Every subpoena shall be issued by the clerk, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at the time and place and for the party therein specified. The clerk shall issue a subpoena or a subpoena for the production of documentary evidence, signed but otherwise in blank, to a party requesting it, who shall fill it in before service. [As amended by order entered January 26, 1999, effective July 1, 1999; by order entered January 28, 2000, effective July 1, 2000; by order filed January 13, 2012, effective July 1, 2012; and by order filed December 18, 2012, effective July 1, 2013.]

Advisory Commission Comments [2012]. Rule 45.01 is amended to ensure that persons served with subpoenas receive adequate notice, simultaneously with service, that, as provided for in Rule 45.07, the failure to file a motion to quash or modify within fourteen days of service of the subpoena will result in the waiver of the right to seek relief from the subpoena (other than the right to seek the reasonable costs for producing books, papers, documents, electronically stored information, or tangible things). [The notice requirement in Rule 45.01, adopted in 2012, was subsequently deleted from Rule 45.01 and moved to Rule 45.04. *See* Rule 45.04, Advisory Commission Comment (2013).]

Advisory Commission Comments [2013]. The amendment deletes language setting out a 14-day time period to file a motion to quash and requiring a notice on the face of the subpoena. That language should not apply to a trial subpoena. Because Rule 45.01 relates to subpoenas in general and the 14-day time period was intended to address the more limited circumstances when a non-party receives a deposition subpoena, the provisions setting out the timing and placing of the notice were deleted from this rule and moved to Rules 45.04 and 45.07 where they properly belong.

Compiler's Notes. The amendment of Rule 45, as promulgated and adopted by the Supreme Court in its order dated January 13, 2012, was ratified and approved by 2012 House Resolution 193 and Senate Resolution 78. The order promulgating the amendment of Rule 45 provided that it take effect July 1, 2012.

The amendment of Rule 45.01, which deleted the former second sentence, added the last sentence in the 2012 Advisory Commission Comments, and added the 2013 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 18, 2012, was ratified and approved by House Resolution 36 and Senate Resolution 12. The order promulgating the amendment of Rule 45.01, the amendment of the 2012 Advisory Commission Comments and the addition of the 2013 Advisory Commission Comments provided that it take effect July 1, 2013.

45.02. For Production of Documents and Things or Inspection of Premises. A subpoena may command a person to produce and permit inspection, copying, testing, or sampling of designated books, papers, documents, electronically stored information, or tangible things, or inspection of premises with or without commanding the person to appear in person at the place of production or inspection. When appearance is not required, such a subpoena shall also require the person to whom it is directed to swear or affirm that the books, papers, documents, electronically stored information, or tangible things are authentic to the best of that person's knowledge, information, and belief and to state whether or not all books, papers, documents, electronically stored information or tangible things responsive to the subpoena have been produced for copying, inspection, testing, or sampling. Copies of the

subpoena must be served pursuant to Rule 5 on all parties, and all material produced must be made available for inspection, copying, testing or sampling by all parties.

A party serving a subpoena requiring production of electronically stored information shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.

An order of the court requiring compliance with a subpoena issued under this rule must provide protection to a person that is neither a party nor a party's officer from undue burden or expense resulting from compliance.

A command to permit inspection, copying, testing, or sampling may be joined with a command to appear at trial or hearing, or at a deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced. [As amended by order entered January 6, 2005, effective July 1, 2005; by order entered January 8, 2009, effective July 1, 2009; and by order entered December 14, 2009, effective July 1, 2010.]

Advisory Commission Comments [2009]. Rule 45 is amended to conform the provisions for subpoenas to changes in other discovery rules, largely related to discovery of electronically stored information. Rule 45.02 is amended to recognize that electronically stored information can also be sought by subpoena. Rule 45.02 is amended to provide that the subpoena can designate a form or forms for production of electronic data.

Rule 45.02 is also amended to provide that a subpoena is available to permit testing and sampling, as well as inspection and copying. This change recognizes that on occasion the opportunity to perform testing or sampling may be important, both for documents and for electronically stored information.

Inspection or testing of certain types of electronically stored information or of a person's electronic information system may raise issues of confidentiality or privacy. The addition of sampling and testing to Rule 45.02 with regard to documents and electronically stored information is not meant to create a routine right of direct access to a person's electronic information system, although such access might be justified in some circumstances. Courts should guard against undue intrusiveness resulting from inspecting or testing such systems.

Rule 45.02, paragraphs 2 and 3 have been adopted from Rule 10(c) and (d) of the *Uniform Rules Relating to Discovery of Electronically Stored Information*, National Conference of Commissioners on Uniform State Laws (2007).

Advisory Commission Comments [2010]. The title of Rule 45.02 is expanded to conform to the language in the rule.

Compiler's Notes. The amendment of Rule 45, as promulgated and adopted by the Supreme Court in its order dated January 8, 2009, was ratified and approved by 2009 House Resolution 18 and Senate Resolution 19. The order promulgating the amendment of Rule 45 provided that it take effect July 1, 2009.

The amendment of the heading and the Advisory Commission Comments of Rule 45, as promulgated and adopted by the Supreme Court in its order dated December 14, 2009, was ratified and approved by 2010 Senate Resolution 180 and 2010 House Resolution 239. The order promulgating the amendment of Rule 45 provided that it take effect July 1, 2010.

45.03. Service. A subpoena may be served by any person authorized to serve process, or the witness may acknowledge service in writing on the subpoena. Service of the subpoena shall be made by delivering or offering to deliver a copy thereof to the person to whom it is directed.

45.04. Subpoena for Taking Depositions — Place of Deposition. (1) A subpoena for taking depositions may be issued by the clerk of the court in which the action is pending. A subpoena for taking depositions may be served at any place within the state. If the subpoena commands the person to whom it is directed to produce designated books, papers, documents, electronically stored information, or tangible things which constitute or contain evidence

relating to any of the matters within the scope of the examination permitted by Rule 26.02, the subpoena will be subject to the provisions of Rules 30.02, 37.02, 45.02, and 45.07. A deposition subpoena for testimony or subpoena for production of documentary evidence also must state in prominently displayed, bold-faced text: "The failure to serve an objection to this subpoena within twenty-one days after the day of service of the subpoena waives all objections to the subpoena, except the right to seek the reasonable cost for producing books, papers, documents, electronically stored information, or tangible things."

(2) A resident of the state may be required to give a deposition only in the county where the person resides or is employed or transacts his or her business in person, or at such other convenient place as is fixed by an order of the court. [As amended by order entered January 26, 1999, effective July 1, 1999; by orders entered January 8, 2009, effective July 1, 2009; and by order filed December 18, 2012, effective July 1, 2013.]

Advisory Commission Comments [2009]. The amendment to Rule 45.04(1) restates settled law. A deposition subpoena, like a trial subpoena, may be served anywhere in Tennessee.

Advisory Commission Comments [2012]. Tennessee has adopted the Uniform Interstate Depositions and Discovery Act, Tenn. Code Ann. § 24-9-201 et. seq. The Act aids only the lawyer who wants to take a deposition or obtain discovery in Tennessee for use elsewhere. Tennessee lawyers seeking to take a deposition or obtain discovery in a foreign jurisdiction must look to that jurisdiction's law for similar assistance.

Advisory Commission Comments [2013]. The amendment requires a notice to be placed on a deposition subpoena issued to a non-party witness with the information that the witness has until twenty-one days after service of the subpoena to serve an objection to the subpoena on the issuing attorney. This change is consistent with the removal of the requirement to file a motion to quash within the earlier of the date of compliance or 14 days from the date of service, as set out in former Rule 45.01.

Compiler's Notes. The amendment of Rule 45, which added the second sentence of Rule 45.04(1), as promulgated and adopted by the Supreme Court in its order dated January 8, 2009, was ratified and approved by 2009 House Resolution 15 and Senate Resolution 16. The order promulgating the amendment of Rule 45 provided that it take effect July 1, 2009.

The amendment of Rule 45, which amended the present third sentence of Rule 45.04(1), as promulgated and adopted by the Supreme Court in its order dated January 8, 2009, was ratified and approved by 2009 House Resolution 18 and Senate Resolution 19. The order promulgating the amendment of Rule 45 provided that it take effect July 1, 2009.

The amendment deleting the original Advisory Commission Comments for Rule 45.04, and adding the 2012 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated January 13, 2012, was ratified and approved by 2012 House Resolution 193 and Senate Resolution 78. The order promulgating the deletion of the comments provided that the amendment take effect July 1, 2012.

The amendment of Rule 45.04, which amended subsections (1) and (2) of the rule and added the 2013 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 18, 2012, was ratified and approved by 2013 House Resolution 36 and Senate Resolution 12. The order promulgating the amendment of Rule 45.04 and the addition of the 2013 Advisory Commission Comments, provided that it take effect July 1, 2013.

45.05. Subpoena for a Hearing or Trial — Personal Attendance. (1) At the request of any party, subpoenas for attendance at a hearing or trial shall be issued by the clerk of the court in which the action is pending, and such a subpoena may be served at any place within the state.

(2) Upon the affidavit of a party or the party's attorney that the testimony of a witness is important, and that the just and proper effect of the testimony

cannot in a reasonable degree be obtained without an oral examination in court, the court may, in its discretion, order the personal attendance of the witness, although such witness may otherwise be exempt from personal attendance. [As amended by order filed January 23, 1986, effective August 1, 1986; and amended by order filed February 1, 1995, effective July 1, 1995; and amended by order filed January 6, 2005, effective July 1, 2005.]

45.06. Contempt. Disobedience or a refusal to be sworn or to answer as a witness may be punished as a contempt of the court in which the action is pending.

45.07. Protection of Persons Subject to Subpoena. (1) A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a non-party witness subject to the subpoena and shall provide the non-party witness at least twenty-one (21) days after service of the subpoena to respond, absent agreement of the non-party witness or a court order.

(2) A non-party witness commanded to give deposition testimony or to produce documents or tangible things or to permit inspection shall serve on the party or attorney designated in the subpoena a written objection, if any, to having to give testimony or to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises, or to producing electronically stored information in the form or forms requested. Such objection must be served on the party or attorney designated in the subpoena within twenty-one days after the subpoena is served.

(3) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling testimony, production or inspection.

(4) The Court may: (1) grant the motion to compel testimony or production or inspection, or modify the subpoena if it is unreasonable and oppressive; or (2) condition the grant of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable costs of producing the books, papers, documents, electronically stored information, or tangible things. The timely service of an objection obviates the need for compliance with the deposition subpoena pending further order of the court. The failure to serve an objection within the time period specified herein waives all objections to the subpoena except the right to seek the reasonable costs for the producing books, papers, documents, electronically stored information, or tangible things. [As enacted by order entered January 29, 1987, effective August 1, 1987; and by order entered January 6, 2005, effective July 1, 2005; and amended by order entered January 8, 2009, effective July 1, 2009; by order filed December 21, 2010, effective July 1, 2011; and by order filed December 18, 2012, effective July 1, 2013.]

Advisory Commission Comments [2011]. Rule 45.07 was amended to clarify the obligations of one who chooses to object to a subpoena issued under this rule. If a person served with a subpoena wishes to challenge it for any reason, a motion to quash or modify must be filed within fourteen days of service, unless the time for compliance is less than fourteen days from the date of service, in which event the motion to quash or modify must be filed before the date and time specified for compliance. The failure to timely file a motion to quash or modify waives all objections to the subpoena except the right to seek reasonable costs for producing

books, papers, documents, electronically stored information, or tangible things.

Advisory Commission Comments [2013]. Amended Rule 45.07 states the duty of an issuing party or attorney to avoid undue burden on the non-party witness receiving the subpoena. It also eliminates the necessity for a non-party to file a motion to quash or modify a deposition subpoena for testimony or subpoena for production of documentary evidence. The rule adopts the procedure under Fed. R. Civ. P. 45(c)(2)(B), permitting the subpoenaed non-party to serve a written objection on the party or attorney designated in the deposition subpoena. This objection must be served within twenty-one days of service of the subpoena on the non-party. The burden is shifted to the party issuing the subpoena to file a motion to compel. The rule otherwise retains the method of enforcing a subpoena set out in former Tenn. R. Civ. P. 45.07.

Compiler's Notes. The amendment of Rule 45, as promulgated and adopted by the Supreme Court in its order dated January 8, 2009, was ratified and approved by 2009 House Resolution 18 and Senate Resolution 19. The order promulgating the amendment of Rule 45 provided that it take effect July 1, 2009.

The amendment of Rule 45, as promulgated and adopted by the Supreme Court in its order dated December 21, 2010, was ratified and approved by 2011 House Resolution 34 and Senate Resolution 12. The order promulgating the amendment of Rule 45 provided that it take effect July 1, 2011.

The amendment of Rule 45.07, which rewrote the rule and added the 2013 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 18, 2012, was ratified and approved by House Resolution 36 and Senate Resolution 12. The order promulgating the amendment of Rule 45.07 and the addition of the 2013 Advisory Commission Comments provided that it take effect July 1, 2013.

NOTES TO DECISIONS

1. Subpoenas Properly Quashed.

Construction project administrator's deposition subpoenas were properly quashed where he did not allow 21 days after service of the subpoenas for a response as required by Tenn. R. Civ. P. 45.07(1), he did not file a proper motion to compel testimony pursuant to Tenn. R. Civ. P. 45.07(3), he failed to appear at the pretrial conference and failed to file a pleading or documentation explaining his failure to appear, and he filed his motion seeking the disqualification of an attorney as the property association's counsel the day before he caused the deposition subpoena to be issued to the attorney. Ski Chalet Vill. Owners Club, Inc. v. Pate, — S.W.3d —, 2020 Tenn. App. LEXIS 283 (Tenn. Ct. App. June 19, 2020).

45.08. Duties in Responding to Subpoena. (1)(A) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause. The court may specify conditions for the discovery including, but not limited to the allocation of costs pursuant to the guidelines in Rule 26.06.

(2)(A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial-preparation materials, the claim

shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved. [Added by order filed January 8, 2009, effective July 1, 2009.]

Advisory Commission Comments. 45.01: This Rule provides for the issuance of a subpoena, signed by the clerk or other authorized officer but otherwise in blank, in accord with custom of long standing in many counties.

45.02: Upon motion the court may quash or modify a subpoena duces tecum if it is unreasonable or oppressive and may require the party issuing the subpoena to advance reasonable costs of production of documents.

45.03: This Rule requires personal service upon a witness, unlike the prior practice, authorized by Tenn. Code Ann. § 24-206 [repealed], of leaving a copy of a subpoena at the usual place of residence of a witness who could not be found.

45.05: The first subparagraph of this Rule expressly authorizes service of a subpoena at any place within the state.

The second subparagraph recognizes the exemptions from personal attendance given by statute, Tenn. Code Ann. § 24-9-101, but authorizes the court, in its discretion, to order the personal attendance of such witnesses.

The reference to Rule 32.01(3) is a housekeeping change to conform to the 1979 rearrangement of discovery rules. [1986.]

45.07: The Commissioners were advised that the practice has developed of a lawyer serving a subpoena duces tecum and obtaining documents without informing opposing counsel. While believing that the language of the original rule required that a subpoena be served in connection with a deposition or trial, the Advisory Commission recommends the additional language to clarify the rule. Under the amendment, service of a subpoena that does not direct the person served to attend a deposition, hearing, or trial would be ineffective and unethical. *See* Tenn. Sup. Ct. R. 8, RPC 3.4(c). [1987.]

Under the Hospital Records as Evidence provisions of Tenn. Code Ann. § 68-11-401 et seq., a custodian can comply with a subpoena duces tecum by sending sealed copies of records to the court clerk or court reporter. Tenn. Code Ann. § 68-11-402(b) contemplates a trial and notice to opposing counsel. If someone other than the patient's lawyer subpoenas hospital records under this statutory procedure, the sealed envelope cannot be opened without the patient's consent. Tenn. Code Ann. § 68-11-404. [1987.]

Advisory Commission Comments [1995]. The amendment to Rule 45.05 deleted the provision prohibiting a trial subpoena for deponent located more than 100 miles from the courthouse on trial day. With this amendment, a lawyer has the option of using the deposition or calling the deponent as a witness.

Advisory Commission Comments [1999].

45.01, 45.04: The Tennessee Constitution, Article VI, Section 12, requires that "all writs and other process ... be signed by the respective clerks." Consequently, Rules 45.01 and 45.04 were amended to forbid others from issuing subpoenas, as they had no constitutional power to do so.

Advisory Commission Comments [2005]. Under prior Rules 45.02 and 45.07, a party seeking the production of books, papers, documents, or tangible things, or inspection of premises, was required to issue a subpoena for the testimony of the custodian. The amendment to Rule 45.02 allows a subpoena for production of documentary evidence without requiring the custodian's attendance at a deposition. The rule also requires the person responding to provide an affidavit authenticating the documentary evidence produced pursuant to the subpoena and stating whether or not all responsive material has been produced. The rule requires that all parties have access to the material produced pursuant to subpoena. The procedures in this rule compel the production of documents for review, but do not necessarily authenticate documents pursuant to Rule 902 of the Tennessee Rules of Evidence. This rule also provides that a subpoena may command the inspection of a premises.

Advisory Commission Comments [2009]. New Rule 45.08 authorizes the person served with a subpoena to object to the requested form or forms. In addition, Rule 45.08 provides that if the subpoena does not specify the form or forms for electronically stored information, the person served with the subpoena must produce electronically stored information in a form or forms in which it is usually maintained or in a form or forms that are reasonably usable. Rule 45.08 also provides that the person producing electronically stored information should not have to produce the same information in more than one form unless so ordered by the court for good cause.

Rule 45.08(2), like amended Rule 26.02(5), adds a procedure for assertion of privilege or of protection as trial-preparation materials after production. The receiving party may submit the information to the court for resolution of the privilege claim, as under Rule 26.02(5).

With reference to Rule 45.08(1)(C), Guideline 6 of the *Guidelines for State Trial Courts Regarding Discovery of Electronically-Stored Information*, Conference of Chief Justices (2006), states: "In the absence of agreement among the parties, a judge should ordinarily require electronically-stored information to be produced in no more than one format and should select the form of production in which the information is ordinarily maintained or in a form that is reasonably usable."

Compiler's Notes. Rules 26.02, 30.02, and 37.02, referred to in Rule 45.04, were amended after the promulgation of Rule 45.04; the present rules may be broader or narrower in scope than the original rules discussed in Rule 45.04.

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 6, 2005, was ratified and approved by 2005 House Resolution 12 and Senate Resolution 7. The order promulgating the amendment of this rule provided that the amendment take effect July 1, 2005.

The adoption of § 45.08 of this rule, as promulgated and adopted by the Supreme Court in its order dated January 8, 2009, was ratified and approved by 2009 House Resolution 18 and Senate Resolution 19. The order promulgating the amendment of this rule provided that it take effect July 1, 2009.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), § 263.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-45.01-2, 1-45.02-1, 1-45.04-1, 1-45.05-1, 1-45.06-1.

Tennessee Jurisprudence. 25 Tenn. Juris., Witnesses, § 3.

Tennessee and Federal Rules of Civil Procedure (Donald F. Paine), 27 Tenn. B.J. 25.

The Tennessee Court System — Circuit Court (Frederic S. Le Clercq), 8 Mem. St. U.L. Rev. 241.

NOTES TO DECISIONS

1. Harmless Error.

In modification of child custody case, although trial court erred when it quashed notices of deposition and subpoenas of the children, error was harmless as trial court allowed the children to testify at trial and explain where they wanted to live and where they wanted to go to school, and their trial testimony was favorable to the father; thus, the father failed to demonstrate how his case was prejudiced by trial court's refusal to allow him to depose the children. Pippin v. Pippin, 277 S.W.3d 398, 2008 Tenn. App. LEXIS 339 (Tenn. Ct. App. June 4, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 954 (Tenn. Dec. 15, 2008).

RULE 46

EXCEPTIONS UNNECESSARY

Formal exceptions to rulings or orders of the court are unnecessary. [As amended by orders entered January 20 and 24, 1989, effective August 1, 1989, and by order entered January 25, 1991, effective July 1, 1991.]

Advisory Commission Comments. This Rule makes formal exceptions to all rulings and orders unnecessary, provided that the aggrieved party, at the time of the adverse ruling or order, makes known the action which he desires or his objections and, on request of the court, his grounds therefor.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), No. 1-46-1.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 36-41, 43, 105, 117, 169, 222; 3 Tenn. Juris., Argument and Conduct of Counsel, § 12; 11 Tenn. Juris., Evidence, §§ 80, 82, 110; 17 Tenn. Juris., Jury, § 32; 25 Tenn. Juris., Witnesses, § 31.

Tennessee Law of Evidence (Paine, Schaffner, and Ulin), §§ 183, 184.

Law Reviews. Civil Procedure and Evidence — Tennessee Survey 1970 (Jerry J. Phillips), 38 Tenn. L. Rev. 127.

The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure, II. Initiation of An Appeal (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 4.

NOTES TO DECISIONS

1. Illustrative Cases.

Where, in condemnation suit by plea, the defendants demanded a jury to hear the suit, but thereafter the parties presented to the trial court an agreed order wherein all parties waived a jury trial and agreed that the suit would be tried before the judge without a jury; and where the trial judge refused to sign the order and impaneled a jury to hear the issues, although the record did not reveal an objection or exception by the defendants to the ruling of the trial judge that the issues would be submitted to a jury, under Tenn. R. Civ. P. 46, an objection at that point was not necessary, since at the time the motion was tendered and the action of the trial judge was sought, both parties made known to the judge the action desired on the motion, namely, to waive the jury. Smith v. Williams, 575 S.W.2d 503, 1978 Tenn. App. LEXIS 321, 9 A.L.R.4th 1033 (Tenn. Ct. App. 1978).

RULE 47

JURORS

47.01. Examination of Jurors. The court shall permit the parties or their attorneys to conduct the examination. At or near the beginning of jury selection, the court shall permit counsel to introduce themselves and make brief, non-argumentative remarks that inform the potential jurors of the general nature of the case. The court, upon motion of a party or on its own motion, may direct that any portion of the questioning of a prospective juror be conducted out of the presence of the tentatively selected jurors and other prospective jurors.

47.02. Additional Jurors. The court may direct prior to the start of jury selection that one or more jurors in addition to the regular jury of twelve persons be called and impaneled. The additional jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath, and shall have the same functions, powers, facilities, and privileges as the regular jurors. If one or more additional jurors are called, each party is entitled to one peremptory challenge for each such additional juror, up to the maximum provided by law. Such additional peremptory challenges may be used against any regular or additional juror. The trial court in its discretion may use either of the following methods to select and impanel additional jurors:

(1) During the jury selection or the trial of the case, there shall be no distinction made by the court as to which jurors are additional jurors and which jurors are regular jurors. Before the jury retires to consider its verdict, the court shall select by lot the names of the requisite number of jurors to reduce the jury to a body of twelve or such other number as the law provides. A juror who is not selected to be a member of the final jury shall be discharged when that jury retires to consider its verdict.

(2) Following the selection of the jury of twelve regular jurors or such other number as the law provides, the additional jurors shall be selected and impaneled as alternate jurors. Alternate jurors in the order in which they are called shall replace regular jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. An

alternate juror who does not replace a regular juror shall be discharged when the jury retires to consider its verdict.

47.03. Procedures for Exercising Peremptory Challenges. After prospective jurors have been passed for cause, counsel will submit simultaneously and in writing, to the trial judge, the name of any juror in the group of the first twelve (or more if additional jurors are seated) who has been seated that either counsel elects to challenge peremptorily. Upon each submission, each counsel shall submit either a challenge or a blank sheet of paper. Neither party shall make known the fact that the party has not challenged. Replacement jurors will be seated in the panel of twelve (or more) in the order of their selection. If necessary, additional replacement jurors will then be examined for cause and, after passed, counsel will again submit simultaneously, and in writing, to the trial judge, the name of any juror in the group of twelve (or more) that counsel elects to challenge peremptorily. This procedure will be followed until a full jury has been selected and accepted by counsel. The trial judge will keep a list of those challenged and, if the same juror is challenged by both parties, each will be charged with the challenge. The trial judge shall not disclose to any juror the identity of the party challenging the juror. [As amended by order filed January 31, 2003, effective July 1, 2003.]

Advisory Commission Comments [2003]. The new material in the second and third sentences of Rule 47.01 provides two new procedures designed to assist jurors in understanding the proceedings and in protecting their privacy while encouraging juror candor. The new language gives counsel the right to make brief, non-argumentative statements near the beginning of the jury selection process. These statements may be made before selection begins or when counsel is first permitted to ask questions of prospective jurors. During these remarks counsel should introduce themselves and briefly describe the nature of the case. This process should give jurors a better sense of the participants in the trial and the nature of the responsibility the jurors may be chosen to undertake.

The new language also specifically authorizes courts to use individual voir dire of potential jurors when appropriate. It is likely this will occur primarily in cases where potential jurors are questioned about sensitive matters. By substantially reducing the audience present when the juror must answer such questions, jurors should be more candid and feel that their privacy is respected. This rule mirrors existing Criminal Procedure Rule 24(a).

Amended Rule 47.02 permits the trial court to use one of two alternative methods for selecting and impaneling additional jurors in civil cases. The rule parallels the existing system set out in Criminal Procedure Rule 24(e) governing jury trials in criminal cases. In adopting the two alternative methods, Amended Rule 47.02 essentially formalizes current practice in civil cases, under which individual trial courts already use either of these methods.

Rule 47.02(1), the first alternative method, eliminates the distinction between regular and alternate jurors. If the court decides to seat extra jurors in case a regular juror becomes unable to serve, the additional jurors are combined with the other jurors for all purposes during the trial. Thus, if a court decides to use twelve jurors plus two additional jurors, all fourteen jurors are considered to be the jurors during the entire trial. Under this alternative, before the jury retires to deliberate the court will randomly deselect the additional jurors, leaving the desired number of jurors, ordinarily twelve. The deselected jurors are then discharged when the remaining jurors retire to deliberate.

Rule 47.02(2), the second alternative method, provides for the more traditional practice of selecting the regular jurors and then selecting additional jurors, who are designated as alternate jurors. Under this method, an alternate juror would replace a regular juror who becomes unable or disqualified to perform his or her duties; an alternate juror who does not replace a regular juror is discharged when the jury retires to consider its verdict.

Rule 47.02, as amended, also modifies the use of peremptory challenges in the selection of additional jurors by reducing the number of peremptory challenges per additional juror from two to one. The amendment, however, specifically authorizes the practice of "backstriking" by which peremptory challenges, including those authorized for the additional juror(s), may be used against any juror. This procedure should provide lawyers with more flexibility in the exercise of peremptory chal-

lenges. Under prior law, the extra challenges could only be used against an alternate juror.

This rule must be read in conjunction with Tenn. Code Ann. § 22-3-105, which places a limit on the total number of peremptory challenges in a civil case. Under this statute, each side in a civil case, irrespective of the number of parties on that side, is limited to a maximum of eight peremptory challenges. That maximum number is not changed by additional peremptory challenges for additional jurors. For example, under Tenn. Code Ann. § 22-3-105 a civil plaintiff is entitled to four peremptory challenges. If an additional juror is seated, that plaintiff is now entitled to five peremptory challenges (four under Tenn. Code Ann. § 22-3-105 and one for the additional juror). If there are two plaintiffs, under the statute each is entitled to four peremptory challenges. If the court seats additional jurors, no additional peremptory challenges are given to the two plaintiffs since the statutory maximum of eight peremptory challenges per side has been reached.

The new procedure in Rule 47.03 adopts the procedure long used in Tennessee criminal cases and required by Criminal Procedure Rule 24(c). It provides a well-tried and widely adopted method of exercising peremptory challenges in a way that does not divulge which lawyer excluded the juror. Under this model, lawyers for all parties write their decision whether to exercise a peremptory challenge on a piece of paper, which is given to the judge. The judge then announces the result. No one should be able to detect which lawyer exercised the peremptory challenge. If more than one counsel excludes a particular juror, each counsel is charged with one peremptory challenge. Peremptory challenges may be used against any regular or additional juror, pursuant to Rule 47.02.

Advisory Commission Comments [2018]. The 2018 amendment corrects an outdated statutory cross-reference in the 2003 Advisory Commission Comment: as a result of 2008 Tenn. Pub. Acts, ch. 1159, the statutory limit on peremptory challenges now appears at Tenn. Code Ann. §22-3-104; and so the three cross references in the penultimate paragraph of the 2003 Advisory Commission Comment now should be to "Tenn. Code Ann. §22-3-104," instead of to "Tenn. Code Ann. §22-3-105."

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 31, 2003, was ratified and approved by 2003 House Resolution 21 and Senate Resolution 8. The order promulgating the 2003 amendment of this rule provided that it take effect on July 1, 2003.

The amendment of Rule 47 by the addition of [2018] Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated January 8, 2018, was ratified and approved by 2018 House Resolution 202 and Senate Resolution 163. The order promulgating the amendment of Rule 47 by adding [2018] Advisory Commission Comments, provided that it take effect July 1, 2018.

Cross-References. Disability of juror, T.C.A. § 20-9-203.

Examination of prospective jurors by parties, T.C.A. § 22-3-101.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-47.01-1, 1-47.01-2.

Tennessee Jurisprudence. 17 Tenn. Juris., Jury, §§ 21, 35.

Law Reviews. Better, Happier Juries (Neil P. Cohen), 39 No. 6 Tenn. B.J. 16 (2003).

For a symposium, "Communicating With Juries," see 67 Tenn. L. Rev. 517 (2000).

For an article, "Picking a Jury: Who Are You Talking To?" see 67 Tenn. L. Rev. 517 (2000).

For an article, "The Timing of Opinion Formation By Jurors In Civil Cases: An Empirical Examination," see 67 Tenn. L. Rev. 627 (2000).

Trial, 4 Mem. St. U.L. Rev. 335.

NOTES TO DECISIONS

1. Discretion of Court.

During voir dire, plaintiff patient's counsel attempted to ask the jurors about the patient's expert; upon the defendant doctors' objection, the trial court precluded patient's counsel from asking the jurors any further questions concerning the patient's expert; the trial court properly sustained the doctors' objection as it could have construed the patient's question as an attempt to exact a pledge from the jury that they would accept or believe the patient's expert's testimony. Sneed v. Stovall, 156 S.W.3d 1, 2004 Tenn. App. LEXIS 201 (Tenn. Ct. App. 2004), review or rehearing denied, — S.W.3d —, 2004 Tenn. LEXIS 922 (Tenn. 2004).

RULE 48

JURIES OF LESS THAN TWELVE: MAJORITY VERDICT

The parties may stipulate that the jury shall consist of any number less than that provided by law, or that a verdict or a finding of a stated majority of the jurors shall be taken as the verdict or finding of the jury.

Law Reviews. For an article, "Six-Member Juries: Does Size Really Matter?" see 67 Tenn. L. Rev. 743 (2000).

Twelve Men Good and True (Dent Morriss), 20 Tenn. Bar J. 5 (1984).

NOTES TO DECISIONS

1. Number of Jurors.

Where defendant knowingly and voluntarily submitted to a trial by a jury of six persons without objection, this conduct constituted a waiver of the right to a twelve-person jury. Norris v. Nationwide Mut. Fire Ins. Co., 728 S.W.2d 335, 1986 Tenn. App. LEXIS 3533 (Tenn. Ct. App. 1986).

RULE 49

SPECIAL VERDICTS AND INTERROGATORIES

49.01. Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answers or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instructions concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand, the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

NOTES TO DECISIONS

1. Verdict Form Language Appropriate.

In a medical malpractice case, language in a verdict form using the term "legal cause" was not misleading because the language did not conflict with the jury instructions, which adequately defined the term. Stanfield v. Neblett, 339 S.W.3d 22, 2010 Tenn. App. LEXIS 373 (Tenn. Ct. App. June 4, 2010), appeal denied, — S.W.3d —, 2011 Tenn. LEXIS 39 (Tenn. Jan. 13, 2011).

49.02. General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation and instruction as may be necessary to enable the jury to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When

the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict, or may return the jury for further consideration of its answers and verdict, or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but shall return the jury for further consideration of its answers and verdict or shall order a new trial.

Cross-References. Defective verdict, T.C.A. § 20-11-103.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-49.01-1, 1-49.01-2, 1-49.02-1.

Tennessee Jurisprudence. 10 Tenn. Juris., Ejectment, § 25; 11 Tenn. Juris., Equity, § 73.

Law Reviews. Twelve Men Good and True (Dent Morriss), 20 No. 1 Tenn. B.J. 5 (1984).

NOTES TO DECISIONS

Analysis

1. Special Verdict.
2. Inconsistent Verdict.
3. Failure to Submit Issues at Trial.
4. Improper Issue Submitted at Trial.
5. Necessity for Objection at Trial.
6. Cases Arising Under § 56-7-103.
7. Verdict Form.

1. Special Verdict.

A special verdict is one in which the jury reports to the court specific findings upon controlling issues of fact usually submitted to the jury in the form of factual questions for consideration of determination from the evidence and such special verdict must on its face embrace a finding of all facts that may be required to warrant a judgment. Cook v. State, 506 S.W.2d 955, 1973 Tenn. Crim. App. LEXIS 244 (Tenn. Crim. App. 1973).

Tenn. R. Civ. P. 49 governs the use of a special verdict by a jury in chancery proceedings. Smith County Education Asso. v. Anderson, 676 S.W.2d 328, 1984 Tenn. LEXIS 936 (Tenn. 1984).

In chancery proceedings where the special verdict of the jury contains conclusions of law which are inconsistent with findings of fact, it is for the jury to determine the facts and the trial judge to apply the appropriate principles of law to those facts. Smith County Education Asso. v. Anderson, 676 S.W.2d 328, 1984 Tenn. LEXIS 936 (Tenn. 1984).

2. Inconsistent Verdict.

When an inconsistent jury verdict is properly challenged, no judgment whatever may be pronounced thereon. Slaten v. Earl Campbell Clinic Hospital, 565 S.W.2d 483, 1978 Tenn. LEXIS 546 (Tenn. 1978).

Ordinarily when there is an inconsistent verdict the appropriate procedure is to set it aside and order a new trial. Slaten v. Earl Campbell Clinic Hospital, 565 S.W.2d 483, 1978 Tenn. LEXIS 546 (Tenn. 1978).

3. Failure to Submit Issues at Trial.

Tenn. R. Civ. P. 49 specifically deals with the situation where the trial court fails to submit all issues of fact raised by the pleadings or the evidence. Williams v. Van Hersh, 578 S.W.2d 373, 1978 Tenn. App. LEXIS 278 (Tenn. Ct. App. 1978).

4. Improper Issue Submitted at Trial.

Tenn. R. Civ. P. 49 does not specifically deal with the procedure to be followed in the situation where the judge allegedly submits an improper issue to the jury. Williams v. Van Hersh, 578 S.W.2d 373, 1978 Tenn. App. LEXIS 278 (Tenn. Ct. App. 1978).

5. Necessity for Objection at Trial.

As a general rule a party who complains of a special issue submitted to the jury under Tenn. R. Civ. P. 49 must at the trial raise the question in some way, as by objection, exception, motion or request before he can contend on motion for a new trial that the court erred in submitting the particular question to the jury. Williams v. Van Hersh, 578 S.W.2d 373, 1978 Tenn. App. LEXIS 278 (Tenn. Ct. App. 1978).

A party may not acquiesce in the special issues submitted by the court and then, after a verdict unfavorable to him, object to a particular question as submitted. Williams v. Van Hersh, 578 S.W.2d 373, 1978 Tenn. App. LEXIS 278 (Tenn. Ct. App. 1978).

6. Cases Arising Under § 56-7-103.

In cases arising under T.C.A. § 56-7-103, regarding misrepresentation made in a con-

tract or policy of insurance, the jury may determine whether the answers were false and, if so, whether there was intent to deceive, but only the trial judge may determine whether false answers materially increased the risk of loss which is a question of law. The use of a special verdict is appropriate in this situation. Womack v. Blue Cross & Blue Shield, 593 S.W.2d 294, 1980 Tenn. LEXIS 398 (Tenn. 1980).

7. Verdict Form.

Tenn. R. Civ. P. 49 accords trial courts great latitude in using special verdict forms and tailoring special interrogatories to meet the needs of each unique case; generally, the verdict form should repeat and highlight the issues covered in the jury charge and should be couched in the same terms as the jury instructions. Hickson Corp. v. Norfolk S. Ry. Co., 260 F.3d 559, 2001 FED App. 257P, 2001 U.S. App. LEXIS 17261 (6th Cir. Tenn. 2001).

Jury instructions and the verdict form should be considered together to determine whether they presented the issues to the jury in a clear and fair manner. Hickson Corp. v. Norfolk S. Ry. Co., 260 F.3d 559, 2001 FED App. 257P, 2001 U.S. App. LEXIS 17261 (6th Cir. Tenn. 2001).

RULE 50

MOTION FOR A DIRECTED VERDICT

50.01. When Made — Effect. A motion for a directed verdict may be made at the close of the evidence offered by an opposing party or at the close of the case. The court shall reserve ruling until all parties alleging fault against any other party have presented their respective proof-in-chief. A party who moves for a directed verdict at the close of the evidence offered by an opponent may offer evidence in the event that the motion is not granted, without having reserved the right so to do and to the same extent as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. The order of the court granting a motion for a directed verdict is effective without any assent of the jury.

NOTES TO DECISIONS

Analysis

1. Appeal.
2. Motion Denied.

1. Appeal.

In a wrongful death and survivor action, arising from a nursing home resident's care and treatment, where plaintiff did not make a motion for a directed verdict pursuant to Tenn. R. Civ. P. 50 at the close of plaintiff's proof and at the close of all of the proof, an issue on appeal regarding the sufficiency of the evidence to support a finding of recklessness for a punitive damage award was procedurally waived. McLemore v. Elizabethton Med. Investors, Ltd. P'ship, 389 S.W.3d 764, 2012 Tenn. App. LEXIS 415 (Tenn. Ct. App. June 22, 2012), appeal denied, McLemore v. Elizabethton Med. Investors LP, — S.W.3d —, 2012 Tenn. LEXIS 892 (Tenn. Nov. 27, 2012).

2. Motion Denied.

In an insurance coverage dispute, the trial court did not err by denying the insurer's motion for a directed verdict as to whether the insured proved his interest in the property because the insured did so with numerous witnesses and a bankruptcy petition, which also acknowledged his interest in the property. Riad v. Erie Ins. Exch., 436 S.W.3d 256, 2013 Tenn. App. LEXIS 712 (Tenn. Ct. App. Oct. 31, 2013), appeal denied, Riad v. Erie Ins. Exch., — S.W.3d —, 2014 Tenn. LEXIS 196 (Tenn. Mar. 4, 2014), superseded by statute as stated in, Lindenberg v. Jackson Nat'l Life Ins. Co., — F. Supp. 2d —, 2014 U.S. Dist. LEXIS 184081 (W.D. Tenn. Dec. 9, 2014).

50.02. Reservation of Decision on Motion. Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Within thirty (30) days after the entry of judgment a party who has moved for

a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict; or if a verdict was not returned, such party, within thirty (30) days after the jury has been discharged, may move for a judgment in accordance with such party's motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned, the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

NOTES TO DECISIONS

ANALYSIS

1. No Relief Warranted.
2. New Trial Granted.

1. No Relief Warranted.

Instead of presenting the judgment notwithstanding the verdict (JNOV) issues in its appellate brief, defendant attempted to raise the issues for the first time in a petition to rehear, which was not timely; because the opportunity to grant a JNOV was considered and rejected by the trial court, a determination that had not been appealed on its merits, defendant was not entitled to relief on these issues. Payne v. CSX Transp., Inc., 467 S.W.3d 413, 2015 Tenn. LEXIS 547 (Tenn. July 1, 2015).

PowerPoint slide contained minimal reference to the cesium contamination and the jury was promptly instructed to disregard the slide, plus plaintiff offered no proof of cesium contamination; the reference to the cesium contamination was insubstantial, having no effect on the verdict, and a new trial was not warranted. Payne v. CSX Transp., Inc., 467 S.W.3d 413, 2015 Tenn. LEXIS 547 (Tenn. July 1, 2015).

Defendant claimed a new trial was warranted because the jury was shown a photograph of a locomotive emitting a cloud of dark black smoke, but the photograph was not admitted into evidence, defendant did not object to its use, and the amount of smoke in the photo was explained as atypical, thereby mitigating any possible prejudice to defendant, and this was not a proper basis for the reversal of the verdict. Payne v. CSX Transp., Inc., 467 S.W.3d 413, 2015 Tenn. LEXIS 547 (Tenn. July 1, 2015).

Because defendant had not successfully challenged the jury's finding of liability based upon a theory of negligence per se, plaintiff was not obligated to demonstrate the foreseeability of the injury, rendering harmless any error in the jury instruction on foreseeability; overall, there was no basis for granting a motion for a new trial on the ground of evidentiary or instructional issues. Payne v. CSX Transp., Inc., 467 S.W.3d 413, 2015 Tenn. LEXIS 547 (Tenn. July 1, 2015).

Because a doctor's misdiagnosis of thyroid cancer was relevant to his credibility as an expert and the validity of his opinion as to the issues, the admission of his testimony about the misdiagnosis was not erroneous and did not amount to a substantial error in the admission of evidence warranting a new trial. Payne v. CSX Transp., Inc., 467 S.W.3d 413, 2015 Tenn. LEXIS 547 (Tenn. July 1, 2015).

2. New Trial Granted.

Instructions defined the legal issues involved and did not mislead the jury, and because the jury found defendant to be negligent per se, the Federal Employers' Liability Act did not allow for the reduction or apportionment of damages based on contributory negligence; it was error for the judge to allow the jury to change the amount of its verdict, and the proper remedy was to remand for a new trial only to the issue of the amount of damages to be awarded. Payne v. CSX Transp., Inc., 467 S.W.3d 413, 2015 Tenn. LEXIS 547 (Tenn. July 1, 2015).

50.03. Conditional Rulings on Grant of Motion. If the motion for judgment entered in accordance with a motion for a directed verdict, provided for in 50.02, is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for a new trial. If the motion for a new trial is thus

conditionally granted, the order thereon does not affect the finality of the judgment. If the motion for a new trial is thus conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

The party whose verdict has been set aside on motion to have judgment entered in accordance with a motion for a directed verdict, as provided for in 50.02, may serve a motion for a new trial not later than thirty (30) days after entry of the judgment granting the motion.

50.04. Denial of Motion. If the motion for judgment entered in accordance with a motion for a directed verdict, as provided for in 50.02, is denied, the party who prevailed on that motion may, as appellee, by assignments of error assert grounds entitling him to a new trial. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial or from directing the trial court to determine whether a new trial shall be granted.

50.05. Motion for New Trial Not Necessary after Directed Verdict. Whenever a court shall have granted a directed verdict, it shall not be necessary for the party against whom the verdict was directed to file a motion for a new trial in order to obtain appellate review of such action of the court.

Advisory Commission Comments. 50.01: It is not the intention of these Rules to affect constitutional powers or jurisdictional rules. This Rule therefore does not enlarge or restrict a chancery court's authority to withdraw issues from the jury. It simply describes the procedure to be followed in directing verdicts in chancery cases as well as in circuit cases, subject always to any constitutional or jurisdictional limitations.

50.02: This Rule permits a trial judge to take under advisement a motion for directed verdict without actually granting or denying it at the trial. The power of the court to grant a directed verdict on post-trial motion, either following a verdict or in event of a mistrial because of disagreement of the jury, has long been recognized in Tennessee. This Rule, however, does permit the filing of a post trial motion for directed verdict without its being incorporated into a motion for a new trial although the latter is still permitted.

50.05: This Rule eliminates the previous requirement that a party against whom a verdict has been directed must file a motion for a new trial in order to obtain appellate review of the action of the court in directing the verdict. The former rule was technical in the extreme, especially when the directed verdict came on post-trial motion of the defendant; in such cases, if the plaintiff failed to make a subsequent motion for new trial, he or she could not obtain review of the action of the trial court. *See Howell v. Wallace E. Johnson, Inc.*, 42 Tenn. App. 15, 298 S.W.2d 753 (1956).

The action of a trial court in directing a verdict, of course, is not the action of the jury. Previous procedure has not required a motion for a new trial in nonjury proceedings. Tenn. Code Ann. § 27-303 et seq. [repealed]. This Rule seems to the Committee therefore to be consistent with the previous rules in nonjury proceedings.

Advisory Commission Comments. [1998]. Adding the sentence in Rule 50.01 concerning reservation of a ruling was thought necessary in light of Tennessee's adoption of comparative fault.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 214, 215, 659.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-50.01-1, 1-50.02-1, 1-50.03-1, 1-58.02-2, 1-59.02-1, 1-62.02-1.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 30, 130.

Law Reviews. A Survey of Civil Procedure in Tennessee — 1977, IV. Pretrial Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 308.

Tort — Premises Liability — Worsham v. Pilot Oil Corp.: Imputing Constructive Notice to the Proprietor of a Self-Service Establishment in Tennessee, 19 Mem. St. U.L. Rev. 109 (1989).

NOTES TO DECISIONS

Analysis

1. In General.
2. Constitutionality.
3. Judgment Notwithstanding Verdict.
4. New Trial.
5. Nonjury Trial.
6. Failure to Rest on Motion.
7. Appeal.
8. Denial of Motion.
9. —Held Proper.
10. —Held Improper.
11. Motion Improperly Granted.
12. Motion Properly Granted.
13. Failure to File Post-trial Motion.

1. In General.

A verdict should not be directed during, or after, trial except where a reasonable mind could draw but one conclusion; thus, neither the trial judge nor the reviewing court is privileged to weigh the preponderance of the evidence when passing upon a motion for a directed verdict or for a Holmes v. Wilson, 551 S.W.2d 682, 1977 Tenn. LEXIS 528 (Tenn. 1977).

In action for the wrongful death of a bicyclist who was killed when he was struck by a car in which defendant was a passenger, there was no material evidence upon which the jury might have based a verdict against defendant under any of the theories advanced by plaintiffs, and thus a directed verdict for defendant was proper. Cecil v. Hardin, 575 S.W.2d 268, 1978 Tenn. LEXIS 690 (Tenn. 1978), superseded by statute as stated in, Pureworks, Inc. v. Brady Corp., — F. Supp. 2d —, 2010 U.S. Dist. LEXIS 97688 (M.D. Tenn. Sept. 15, 2010), superseded by statute as stated in, Woods v. Wolosko, — F. Supp. 2d —, 2012 U.S. Dist. LEXIS 14309 (M.D. Tenn. Feb. 7, 2012).

On review of the grant of a directed verdict on motion of a defendant, it is not the office of an appellate court to weigh the evidence. Rather, it must take the strongest legitimate view of the evidence in favor of the plaintiff, indulging in all reasonable inferences in his favor, and disregarding any evidence to the contrary. The trial judge's action may be sustained only if there is no material evidence in the record that would support a verdict for the plaintiff, under any of the theories that he has advanced. Cecil v. Hardin, 575 S.W.2d 268, 1978 Tenn. LEXIS 690 (Tenn. 1978), superseded by statute as stated in, Pureworks, Inc. v. Brady Corp., — F. Supp. 2d —, 2010 U.S. Dist. LEXIS 97688 (M.D. Tenn. Sept. 15, 2010), superseded by statute as stated in, Woods v. Wolosko, — F. Supp. 2d —, 2012 U.S. Dist. LEXIS 14309 (M.D. Tenn. Feb. 7, 2012).

It was the purpose of Tenn. R. Civ. P. 50 to eliminate a "technical in the extreme" requirement from previous practice, one that had no reasonable basis and which served needlessly to delay and prolong litigation. Crosslin v. Alsup, 594 S.W.2d 379, 1980 Tenn. LEXIS 399 (Tenn. 1980).

Trial judges and the appellate courts are required to take the strongest legitimate view of the evidence in favor of the petitioner, allow all reasonable inferences in his favor, discard all countervailing evidence, and deny the motion where there is any doubt as to the conclusions to be drawn from the whole evidence. A verdict should be directed only where a reasonable mind could draw but one conclusion. Crosslin v. Alsup, 594 S.W.2d 379, 1980 Tenn. LEXIS 399 (Tenn. 1980).

When material issues of fact exist, a directed verdict is inappropriate. Wharton Transport Corp. v. Bridges, 606 S.W.2d 521, 1980 Tenn. LEXIS 504, 24 A.L.R.4th 1295 (Tenn. 1980).

Courts do not reweigh the evidence or reevaluate the witnesses' credibility when they rule on a motion under Tenn. R. Civ. P. 50. Grissom v. Metropolitan Government of Nashville, 817 S.W.2d 679, 1991 Tenn. App. LEXIS 324 (Tenn. Ct. App. 1991).

Tenn. R. Civ. P. 50 does not permit a plaintiff to move for a directed verdict at the close of its own case in chief. Grissom v. Metropolitan Government of Nashville, 817 S.W.2d 679, 1991 Tenn. App. LEXIS 324 (Tenn. Ct. App. 1991).

In the case of a motion for directed verdict, the trial court must take the strongest legitimate view of the evidence against the directed verdict and must deny the motion in any case where all reasonable persons would not reach the same conclusion. Smith v. Inman Realty Co., 846 S.W.2d 819, 1992 Tenn. App. LEXIS 777 (Tenn. Ct. App. 1992), rehearing denied, — S.W.2d —, 1992 Tenn. App. LEXIS 781 (Tenn. Ct. App. 1992).

For appellant to succeed on claim that it was entitled to a judgment in accordance with its motion for a directed verdict made at the close of all the proof, it must convince the court that a reasonable mind could draw but one conclusion, after taking the strongest legitimate view of the evidence in favor of the appellee, indulging in all reasonable inferences in his favor, and disregarding the contrary evidence. Flynn v. Shoney's, Inc., 850 S.W.2d 458, 1992 Tenn. App. LEXIS 883 (Tenn. Ct. App. 1992), rehearing denied, — S.W.2d —, 1992 Tenn. App. LEXIS 960 (Tenn. Ct. App. Dec. 2, 1992).

Tenn. R. Civ. P. 50 is mandatory, and should be followed by the trial court whenever a motion for J.N.O.V. and a motion for a new trial are filed and the J.N.O.V. is granted. Huskey v. Crisp, 865 S.W.2d 451, 1993 Tenn. LEXIS 379 (Tenn. 1993).

The court must remove any conflict in the evidence by constructing it in the light most

favorable to the nonmovant and discarding all countervailing evidence. The court may grant the motion only if, after assessing the evidence according to the foregoing standards, it determines that reasonable minds could not differ as to the conclusions to be drawn from the evidence. Eaton v. McLain, 891 S.W.2d 587, 1994 Tenn. LEXIS 316 (Tenn. 1994).

Where a verdict has been returned, the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of a judgment as if the requested verdict had been directed. Wasielewski v. K Mart Corp., 891 S.W.2d 916, 1994 Tenn. App. LEXIS 489 (Tenn. Ct. App. 1994), rehearing denied, Wasielewski v. K-Mart Corp., — S.W.2d —, 1994 Tenn. App. LEXIS 533 (Tenn. Ct. App. Sept. 16, 1994).

Directed verdicts are appropriate only when reasonable minds can reach but one conclusion. Richardson v. Miller, 44 S.W.3d 1, 2000 Tenn. App. LEXIS 551 (Tenn. Ct. App. 2000).

A case should go to the jury even if the facts are undisputed when reasonable persons could draw conflicting conclusions from the facts; these conclusions, however, must be based on more than speculation, conjecture and guesswork. Richardson v. Miller, 44 S.W.3d 1, 2000 Tenn. App. LEXIS 551 (Tenn. Ct. App. 2000).

2. Constitutionality.

Plaintiff's constitutional right to a trial by jury was not violated when the trial court directed a verdict for the defendant after declaring a mistrial because the jury was unable to agree. Harris v. Buckspan, 984 S.W.2d 944, 1998 Tenn. App. LEXIS 565 (Tenn. Ct. App. 1998).

3. Judgment Notwithstanding Verdict.

Where the trial court has granted J.N.O.V. and has conditionally granted a new trial, the appellate court, upon reversal of the J.N.O.V., should, as a general rule, remand the action for a new trial; under exceptional circumstances, however, the appellate court may exercise sound judicial discretion and reinstate the verdict of the jury. Holmes v. Wilson, 551 S.W.2d 682, 1977 Tenn. LEXIS 528 (Tenn. 1977); Young v. Reliance Electric Co., 584 S.W.2d 663, 1979 Tenn. App. LEXIS 315 (Tenn. Ct. App. 1979).

Under Tenn. R. Civ. P. 50.03, when a motion for a judgment notwithstanding the verdict is joined with an alternative motion for a new trial and the trial court grants the judgment notwithstanding the verdict, it must also rule on the motion for a new trial by determining whether it should be granted if the judgment notwithstanding the verdict is thereafter vacated or reversed. Mairose v. Fed. Express Corp., 86 S.W.3d 502, 2001 Tenn. App. LEXIS 516 (Tenn. Ct. App. 2001), superseded by statute as stated in, Consol. Waste Sys., LLC v. Metro Gov't of Nashville, — S.W.3d —, 2005 Tenn. App. LEXIS 382 (Tenn. Ct. App. June 30, 2005).

4. New Trial.

Where trial judge refused to grant motion for new trial upon the grounds that there was some evidence to support the verdict and that viewing all the evidence the verdict was not unreasonable, he abdicated his responsibility as the thirteenth juror to weigh the evidence to determine if it preponderated in favor of the plaintiff or defendant or was evenly balanced, hence the appellate court remanded the case for a new trial. James E. Strates Shows, Inc. v. Jakobik, 554 S.W.2d 613, 1977 Tenn. LEXIS 642 (Tenn. 1977).

Where the judge said that he could not say that the verdict of the jury was right, as the thirteenth juror, he should have set aside the verdict and granted a new trial. Sherlin v. Roberson, 551 S.W.2d 700, 1976 Tenn. App. LEXIS 221 (Tenn. Ct. App. 1976).

5. Nonjury Trial.

Although motions for dismissal in nonjury cases under Tenn. R. Civ. P. 41.02(2) and motions for directed verdicts in jury cases under Tenn. R. Civ. P. 50 are somewhat similar, they should not be confused since a motion for directed verdict is neither necessary nor proper in a case which is being tried without a jury. Columbia v. C.F.W. Constr. Co., 557 S.W.2d 734, 1977 Tenn. LEXIS 678 (Tenn. 1977).

Motions for directed verdicts pursuant to Tenn. R. Civ. P. 50 are appropriate in jury trials but have no place in nonjury trials. Smith v. Inman Realty Co., 846 S.W.2d 819, 1992 Tenn. App. LEXIS 777 (Tenn. Ct. App. 1992), rehearing denied, — S.W.2d —, 1992 Tenn. App. LEXIS 781 (Tenn. Ct. App. 1992).

6. Failure to Rest on Motion.

A defendant waives his right to rely on error in the denial of his motion for directed verdict made at the end of the plaintiff's proof if he goes forward with his own proof rather than resting on the motion. Searle v. Bryant, 713 S.W.2d 62, 1986 Tenn. LEXIS 761 (Tenn. 1986).

Where the trial court denies the defendant's motion for a directed verdict at the end of the plaintiff's proof, and the defendant then goes forward with his own proof rather than resting on the motion, such action by the defendant prevents the trial court from directing a verdict during the defendant's presentation of his proof even when the trial court purports only to correct his original ruling on the motion made at the end of the plaintiff's proof. Searle v. Bryant, 713 S.W.2d 62, 1986 Tenn. LEXIS 761 (Tenn. 1986).

7. Appeal.

Where defendant's motion for a directed verdict was denied by the trial judge, his post-trial motion for judgment notwithstanding the ver-

dict was sufficient for purposes of an appellate review pursuant to Tenn. R. Civ. P. 50, however, the appellate court was constrained to determine only if there was any evidence to support the verdict, as a determination regarding the sufficiency of evidence is proper only on a motion for a new trial. Rupe v. Durbin Durco, Inc., 557 S.W.2d 742, 1976 Tenn. App. LEXIS 269 (Tenn. Ct. App. 1976).

On review of the grant of a directed verdict for defendant, it is not the office of an appellate court to weigh the evidence, but it must take the strongest legitimate view of the evidence in favor of the plaintiff, indulging in all reasonable inferences in his favor and disregarding any evidence to the contrary; and the trial judge's action may be sustained only if there is no material evidence in the record that would support a verdict for the plaintiff, under any of the theories that he has advanced. Wharton Transport Corp. v. Bridges, 606 S.W.2d 521, 1980 Tenn. LEXIS 504, 24 A.L.R.4th 1295 (Tenn. 1980).

An appeal of right is granted from the trial court's ruling on a Tenn. R. Civ. P. 50.02 motion only when no motion for a new trial has been filed. Hutchison v. ARO Corp., 653 S.W.2d 738, 1983 Tenn. App. LEXIS 584 (Tenn. Ct. App. 1983).

When reviewing a trial court's disposition of a motion for directed verdict, appellate courts do not resolve disputes in the evidence, weigh the evidence or evaluate the credibility of the witnesses. Richardson v. Miller, 44 S.W.3d 1, 2000 Tenn. App. LEXIS 551 (Tenn. Ct. App. 2000).

8. Denial of Motion.

9. —Held Proper.

Repeated references to an employee's age by the company representative while informing the employee of his termination is evidence from which the jury could infer that age was a factor in his termination, and thus the trial court did not err in denying the company's motion for directed verdict in an action for unlawful age-based discharge. Flynn v. Shoney's, Inc., 850 S.W.2d 458, 1992 Tenn. App. LEXIS 883 (Tenn. Ct. App. 1992), rehearing denied, — S.W.2d —, 1992 Tenn. App. LEXIS 960 (Tenn. Ct. App. Dec. 2, 1992).

The trial court did not err in refusing to direct a verdict on the ground that experts' testimony failed to provide material evidence on causation; weighing the evidence is the jury's task, and weak or strong, the testimony at least created a jury question on causation. Richardson v. Miller, 44 S.W.3d 1, 2000 Tenn. App. LEXIS 551 (Tenn. Ct. App. 2000).

Employee's motion for a directed verdict was properly denied where the employee's retaliatory discharge claim was dismissed where, under T.C.A. § 50-1-304 and common law, the regulatory infraction by the company on which the employee relied did not implicate fundamental policy concerns and the employee's refusal to drive the truck with a photocopy of the cab card did not further an important public policy interest embodied in the law. Franklin v. Swift Transp. Co., 210 S.W.3d 521, 2006 Tenn. App. LEXIS 467 (Tenn. Ct. App. 2006), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 1126 (Tenn. 2006).

10. —Held Improper.

Trial court erred by not granting defendant nursing home's motion for a directed verdict at the close of plaintiff's proof in a premises liability case where it was not reasonably foreseeable that plaintiff visitor would be walking on the grassy area where the plaintiff fell. Plunk v. Nat'l Health Investors, Inc., 92 S.W.3d 409, 2002 Tenn. App. LEXIS 397 (Tenn. Ct. App. 2002).

11. Motion Improperly Granted.

Directed verdict in a products liability case was reversed because admissible expert testimony was presented regarding the likelihood and seriousness of injury to an operator of a forklift without a door, and such would have prevented an injury without hindering the usefulness of the product. The trial court erred in excluding expert testimony under Tenn. R. Evid. 702 and Tenn. R. Evid. 703 since a consideration of all five factors for the admissibility of expert testimony was not mandated; only the factors necessary to reasonably measure reliability of the methodology were required. Brown v. Crown Equip. Corp., 181 S.W.3d 268, 2005 Tenn. LEXIS 868 (Tenn. 2005).

12. Motion Properly Granted.

Estate was entitled to a directed verdict with regard to the decedent's fiancée's claims for her lost bank compensation, pursuant to Tenn. R. Civ. P. 50.01 and 50.02, because the record lacked evidence to support her claim for lost salary and benefits. While she desired to base the claim on promises allegedly made to her by the decedent, T.C.A. § 24-1-203 prevented her from testifying about her agreement with the decedent. In re Estate of Marks, 187 S.W.3d 21, 2005 Tenn. App. LEXIS 560 (Tenn. Ct. App. 2005), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 145 (2006).

In an action stemming from an automobile accident, the appellate court declined to hold that the trial court erred by not granting the manufacturer's motions for a directed verdict at the close of the driver's case-in-chief and at the close of all of the evidence; while it had doubts regarding the sufficiency of the driver's evidence regarding her claim for punitive damages, the trial court decided to avoid the risk of a second trial by permitting the jury to consider whether the driver had demonstrated that she was entitled to recover punitive damages, and such a cautious approach was advisable in close

cases. Duran v. Hyundai Motor Am., Inc., 271 S.W.3d 178, 2008 Tenn. App. LEXIS 79 (Tenn. Ct. App. Feb. 13, 2008), rehearing denied, 271 S.W.3d 178, 2008 Tenn. App. LEXIS 127 (Tenn. Ct. App. Feb. 27, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 632 (Tenn. Aug. 25, 2008).

Trial court properly directed a verdict for defendants in the claimant's wrongful death action because the claimant did not satisfy her burden of proof to show that any negligence of the paramedics in choosing to wait on the train rather than taking an alternate route was the cause of the deceased's death. Marsee v. CSX Transp., Inc., 269 S.W.3d 570, 2008 Tenn. App. LEXIS 124 (Tenn. Ct. App. Mar. 4, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 740 (Tenn. Sept. 29, 2008).

Where an employee sued a railroad company under the Federal Employees Liability Act, 45 U.S.C. §§ 51-60, for damages caused by toxic encephalopathy and asbestosis, but the railroad stated that the three-year statute of limitations for filing his claim had expired and that there was absolutely no evidence linking the employee's headaches or bloating to his conditions, a directed verdict in the employee's favor was proper because the railroad did not present the evidence needed to establish a statute of limitations defense. Hensley v. CSX Transp., Inc., 278 S.W.3d 282, 2008 Tenn. App. LEXIS 147 (Tenn. Ct. App. Mar. 14, 2008), rehearing denied, 278 S.W.3d 282, 2008 Tenn. App. LEXIS 204 (Tenn. Ct. App. Apr. 3, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 867 (Tenn. Nov. 17, 2008), rev'd, 173 L. Ed. 2d 1184, 129 S. Ct. 2139, 556 U.S. 838, 2009 U.S. LEXIS 3974 (U.S. 2009).

13. Failure to File Post-trial Motion.

Failure of defendants to file a post-trial motion to have the judgment set aside, in accordance with their motion for a directed verdict, precluded appellate review of the matter. Cortez v. Alutech, Inc., 941 S.W.2d 891, 1996 Tenn. App. LEXIS 463 (Tenn. Ct. App. 1996), rehearing denied, — S.W.2d —, 1996 Tenn. App. LEXIS 579 (Tenn. Ct. App. Sept. 13, 1996).

RULE 51

INSTRUCTIONS TO JURY: OBJECTION

51.01. Requests for Instructions. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court may, in its discretion, entertain requests for instructions at any time before the jury retires to consider its verdict. [As amended by order filed January 1, 2003, effective July 1, 2003.]

51.02. Objection — Failure to Object. After the judge has instructed the jury, the parties shall be given opportunity to object, out of hearing of the jury, to the content of an instruction given or to failure to give a requested instruction, but failure to make objection shall not prejudice the right of a party to assign the basis of the objection as error in support of a motion for a new trial.

NOTES TO DECISIONS

1. Review.

In a wrongful death and survivor action arising from care and treatment of a nursing home resident, where defendants did not object to the medical malpractice jury instruction under Tenn. R. Civ. P. 51.02, and review of the issue was not necessary to achieve fairness and justice in the circumstances under T.R.A.P. 13(b) and 36(a), review thereof was declined. McLemore v. Elizabethton Med. Investors, Ltd. P'ship, 389 S.W.3d 764, 2012 Tenn. App. LEXIS 415 (Tenn. Ct. App. June 22, 2012), appeal denied, McLemore v. Elizabethton Med. Investors LP, — S.W.3d —, 2012 Tenn. LEXIS 892 (Tenn. Nov. 27, 2012).

51.03. Timing. (1) At Beginning of Trial. Immediately after the jury is sworn, the court shall instruct the jury concerning its duties, its conduct, the order of proceedings, the general nature of the case, and the elementary legal principles that will govern the proceeding.

(2) Before and After Closing Argument. Jury instructions on the applicable law may be given before closing argument, in the court's discretion. All or part of such instructions may be repeated after closing argument. Additional instructions concerning organizational and related matters also may be given after closing argument. [Added by order filed January 31, 2003, effective July 1, 2003.]

51.04. Written Form. If any party requests that the instructions given under Rule 51.03(2) be reduced to writing, or if the judge sua sponte elects to reduce the instructions to writing, the judge shall give the jury one or more copies of the written instructions, in their entirety, for use in the jury room during deliberations. After the deliberations are concluded, the written charge shall be returned to the judge. [Added by order filed January 31, 2003, effective July 1, 2003; amended by order filed January 8, 2009, effective July 1, 2009.]

Advisory Commission Comments. 51.01: This Rule leaves the timing of the submission of requests to the discretion of the trial judge, and it eliminates the common law rule that such requests may only be received at the conclusion of the general charge. Gilreath, *History of a Lawsuit*, § 368 (8th ed. 1963).

51.02: This Rule is the opposite of the Federal Rule insofar as requiring counsel to state objections to the charge at trial. The Committee felt that the Federal Rule places too great a burden on trial counsel and fails to take into account the difficulties of stating objections accurately after merely hearing a charge without opportunity to see a transcript of it. The Committee felt that the trial judge has the duty to charge the jury accurately, and the parties litigant should not be deprived of an opportunity to seek a new trial because of an inaccurate charge merely because counsel did not make an oral objection at the trial; such errors in the charge should be available as grounds for relief on motion for new trial or on appeal, subject to the rules regarding harmless error.

Advisory Commission Comments [2003]. The deleted language of Rule 51.01 delaying final jury instructions until after arguments to the jury has been replaced by the addition of Rule 51.03(2).

New Rule 51.03 deals with the timing of jury instructions. Rule 51.03(1) requires the court to give basic instructions on procedures and law at the beginning of the trial. This requirement should better enable jurors to understand the evidence and apply the proof to the applicable law. With this background, jurors will be able to put the proof in the context of the legal rules involved in the dispute.

Rule 51.03(2) provides the court the option of giving the bulk of the final jury instructions before closing argument. This procedure may improve the utility of counsel's closing argument by enabling the lawyers to make specific reference to the law at issue in the case. This option should greatly assist jurors in their efforts to apply the facts to the law. If such instructions are given before closing argument, the court should provide additional housekeeping instructions after that argument. The court may also repeat some of the substantive instructions already given before the closing argument.

Advisory Commission Comments [2009]. Revised Rule 51.04 gives any party the right to require the jury charge to be reduced to writing and given to the jury. The new language incorporates T.C.A. § 20-9-501.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 31, 2003, were ratified and approved by 2003 House Resolution 21 and Senate Resolution 8. The order promulgating the amendment of this rule provided that it take effect on July 1, 2003.

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 8, 2009, was ratified and approved by 2009 House Resolution 15 and Senate Resolution 16. The order promulgating the amendment of this rule provided that it take effect July 1, 2009.

Cross-References. Charge to jury in writing, T.C.A. § 20-9-501.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-51.02-1, 1-51.02-2.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 38, 105, 183, 190; 15 Tenn. Juris., Instructions, §§ 4, 5, 16, 23; 20 Tenn. Juris., New Trials, § 4.

Law Reviews. Better, Happier Juries (Neil P. Cohen), 39 No. 6 Tenn. B.J. 16 (2003).

For an article, "Jury Trials: Lay Jurors, Pattern Jury Instructions, and Comprehension Issues," see 67 Tenn. L. Rev. 701 (2000).

For an article, "The Timing of Jury Instructions," see 67 Tenn. L. Rev. 681 (2000).

Waiting for the Jury (George W. Jenkins III), 20 No. 4 Tenn. B.J. 31 (1984).

10 Significant Differences Between State and Federal Civil Procedure, 38 No. 7 Tenn. B.J. 27 (2002).

NOTES TO DECISIONS

ANALYSIS

1. Failure to Object.
2. Refusal by Court to Inform Counsel.
3. Objection on Motion for New Trial.
4. Objection Raised on Appeal.
5. Waiver.
6. Assignment of Error.
7. Lawful Charge.
8. Curative Instruction.
9. Argument to Jury.
10. Presence of Counsel.

1. Failure to Object.

Where plaintiffs contended they were entitled to new trial because judge did not specifically give them an opportunity to object to charge, court held that Tenn. R. Civ. P. 51 does not require trial judge to make an affirmative request for objections to the charge as given and that purpose of Tenn. R. Civ. P. 51 was to remove burden from attorneys of having to supply instanter any portion of charge deemed insufficient or erroneous. Long v. Allen, 497 S.W.2d 743, 1973 Tenn. App. LEXIS 301 (Tenn. Ct. App. 1973).

Tenn. R. Civ. P. 51 has not abolished or changed the proposition that in order to predicate error upon an alleged omission in instructions given to the jury, that person must have pointed out such omission to a trial judge at trial by an appropriate request for instructions. Rule v. Empire Gas Corp., 563 S.W.2d 551, 1978 Tenn. LEXIS 532 (Tenn. 1978); Austin v. Memphis, 684 S.W.2d 624, 1984 Tenn. App. LEXIS 3086 (Tenn. Ct. App. 1984), aff'd in part, rev'd in part, Austin v. State, 796 S.W.2d 449, 1990 Tenn. LEXIS 299 (Tenn. 1990).

Under Tenn. R. Civ. P. 51 a charge which is erroneous not merely because of an omission but because it misstates the law and misleads the jury can be assigned as error on appeal even if there has been no objection at trial. Taliaferro v. Green, 622 S.W.2d 829, 1981 Tenn. App. LEXIS 482 (Tenn. Ct. App. 1981), overruled, Matlock v. Simpson, 902 S.W.2d 384, 1995 Tenn. LEXIS 44 (Tenn. 1995).

In a Federal Employees Liability Act, 45 U.S.C. §§ 51-60, case, because the railroad company did not merely fail to object at the trial to the jury instructions and verdict form, but affirmatively acquiesced in them, explicitly asserting that they were legally correct, it invited the error it complained of and was not entitled to a new trial under Tenn. R. Civ. P. 51.02. Hensley v. CSX Transp., Inc., 278 S.W.3d 282, 2008 Tenn. App. LEXIS 147 (Tenn. Ct. App. Mar. 14, 2008), rehearing denied, 278 S.W.3d 282, 2008 Tenn. App. LEXIS 204 (Tenn. Ct. App. Apr. 3, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 867 (Tenn. Nov. 17, 2008), rev'd, 173 L. Ed. 2d 1184, 129 S. Ct. 2139, 556 U.S. 838, 2009 U.S. LEXIS 3974 (U.S. 2009).

2. Refusal by Court to Inform Counsel.

The trial court is under a mandatory duty to inform counsel, in advance of argument, of its proposed action on each special request and failure to do so is error, although an inadvertent noncompliance is not reversible error unless material prejudice is shown to exist, but, where the judge consciously and affirmatively refuses to abide by this rule, the error is reversible unless there is a showing of a lack of prejudice. Moredock v. McMurry, 527 S.W.2d 462, 1975 Tenn. LEXIS 645 (Tenn. 1975).

The court's failure to inform counsel of its proposed action upon any special jury instruction request does not automatically require reversal in every case, but reversal is required if material prejudice is shown to exist. Underwood v. Waterslides of Mid-America, Inc., 823 S.W.2d 171, 1991 Tenn. App. LEXIS 197 (Tenn. Ct. App. 1991).

3. Objection on Motion for New Trial.

Positive error in jury instructions can be assigned for the first time on motion for a new trial, regardless of whether objection had been made or a special request submitted, but the doctrine of waiver or consent may apply to prevent counsel from assigning error. Henry County Board of Education v. Burton, 538 S.W.2d 394, 1976 Tenn. LEXIS 490 (Tenn. 1976); Wallace v. Knoxville's Community Development Corp., 568 S.W.2d 107, 1978 Tenn. App. LEXIS 288 (Tenn. Ct. App. 1978).

Tenn. R. Civ. P. 51 does permit a party to allege error in his motion for new trial based upon inaccuracy of the charge as given or failure to give a requested appropriate instruction, although no objection or exception in this respect was made at the trial. Rule v. Empire Gas Corp., 563 S.W.2d 551, 1978 Tenn. LEXIS 532 (Tenn. 1978).

4. Objection Raised on Appeal.

Objections to jury instructions may be raised for the first time on appeal. Stephens v. Jones, 710 S.W.2d 38, 1984 Tenn. App. LEXIS 2973 (Tenn. Ct. App. 1984).

A party cannot allege error for omissions in the charge without submitting a request setting forth the correct instructions. Jones v. Tennessee Farmers Mut. Ins. Co., 896 S.W.2d 553, 1994 Tenn. App. LEXIS 555 (Tenn. Ct. App. 1994).

5. Waiver.

Where special requests for instructions submitted by plaintiffs' counsel referred to a single verdict, counsel was deemed to have consented to a single verdict and waived the right to object on motion for new trial that each plaintiff should have been awarded a separate verdict. Henry County Board of Education v. Burton, 538 S.W.2d 394, 1976 Tenn. LEXIS 490 (Tenn. 1976).

When the defendant did not object to the judge's instruction at the time it was given to the jury, he waived the objection and could not raise it on appeal. Fletcher v. Coffee County Farmers Cooperative, 618 S.W.2d 490, 1981 Tenn. App. LEXIS 502 (Tenn. Ct. App. 1981).

6. Assignment of Error.

Where plaintiff assigned error to part of the trial court's charge on appeal, but rather than merely having failed to object following the charge had taken affirmative action by asking for permission to amend his theory of the case to conform to the charge of the court and approved the charge, his assignment of error was not authorized by Tenn. R. Civ. P. 51. Haddock v. Lummus Cotton Gin Co., 552 S.W.2d 390, 1976 Tenn. App. LEXIS 209 (Tenn. Ct. App. 1976).

7. Lawful Charge.

A party is not entitled to a perfect charge, and thus a charge which states the law with substantial accuracy and fairly submits the issues to the jury is not grounds for reversal. Gross v. Nashville Gas Co., 608 S.W.2d 860, 1980 Tenn. App. LEXIS 398 (Tenn. Ct. App. 1980).

8. Curative Instruction.

Tenn. R. Civ. P. 51 did not prevent a trial court from giving a curative instruction in its charge to the jury after the party's lawyer made a closing argument that contained an erroneous, misleading statement of law; therefore, the trial court's response to the legal errors in the closing arguments of the husband's family's attorney concerning the definition of marital property, in which the trial court gave its own definition of marital property, was appropriate. Levine v. March, 266 S.W.3d 426, 2007 Tenn. App. LEXIS 728 (Tenn. Ct. App. Nov. 27, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 352 (Tenn. Apr. 28, 2008).

9. Argument to Jury.

It is not permissible to predict to the jury what the judge will charge. Zang v. Leonard, 643 S.W.2d 657, 1982 Tenn. App. LEXIS 434 (Tenn. Ct. App. 1982).

10. Presence of Counsel.

Instructing the jury outside the presence of counsel, where the supplemental instructions are given in open court and all the supplemental proceedings are on the record, is not per se reversible. In re Estate of Depriest, 733 S.W.2d 74, 1986 Tenn. App. LEXIS 3223 (Tenn. Ct. App. 1986).

RULE 52

FINDINGS BY THE COURT

NOTES TO DECISIONS

1. Lack of Findings.

Although the trial court ruled that the decedent was domiciled in Tennessee at the time of the decedent's death without making any of the requisite factual findings, the appellate court, after a careful review of the hearing testimony, soldiered on with a de novo review of the record in the appeal because the appellate court concluded that the factual basis for the trial court's decision was readily ascertainable. In re Estate of Dell'Aquila, — S.W.3d —, 2019 Tenn. App. LEXIS 34 (Tenn. Ct. App. Jan. 25, 2019).

52.01. Findings Required. In all actions tried upon the facts without a jury, the court shall find the facts specially and shall state separately its conclusions of law and direct the entry of the appropriate judgment. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law

appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rule 12 or 56 or any other motion except as provided in Rules 41.02 and 65.04(6). [As amended by order filed January 8, 2009, effective July 1, 2009.]

Advisory Commission Comments [2002]. Although Rule 56 motions for summary judgment are excluded from Rule 52.01, amended Rule 56 requires on request a statement of "the legal grounds" for granting judgment summarily.

Advisory Commission Comments [2009]. The heading and first sentence of Rule 52.01 are amended. No longer must counsel request the judge to make findings of fact and conclusions of law in nonjury trials.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 8, 2009, was ratified and approved by 2009 House Resolution 15 and Senate Resolution 16. The order promulgating the amendment of this rule provided that it take effect July 1, 2009.

NOTES TO DECISIONS

ANALYSIS

1. Findings Required.
2. Findings Not Required.
3. Lack of Findings.
4. Findings Sufficient.
5. —Oral Findings.
6. Findings Insufficient.

1. Findings Required.

Trial court, in finding a driver in violation of the implied consent law, was required, pursuant to Tenn. R. Civ. P. 52.01, to set forth specific findings of fact and conclusions of law with regard to its ruling; the trial court was exercising civil jurisdiction, pursuant to Tenn. R. Civ. P. 1, by adjudicating the violation of an administrative rule. Therefore, the Rules of Civil Procedure applied. State v. Freeman, 402 S.W.3d 643, 2012 Tenn. App. LEXIS 726 (Tenn. Ct. App. Oct. 16, 2012), appeal denied, — S.W.3d —, 2013 Tenn. LEXIS 272 (Tenn. Mar. 5, 2013).

Appellate court erred by affirming a trial court's contempt findings and ordering a mother to pay the grandparents seeking visitation $32,000 of their attorney's fees because the trial court declined to make specific findings of fact as to the contempt. Lovlace v. Copley, 418 S.W.3d 1, 2013 Tenn. LEXIS 718 (Tenn. Sept. 6, 2013).

Trial court established a parenting schedule without identifying the legal principles applied or the factual basis, and thus the trial court failed to satisfy the rule's mandate; no evidence to support a finding that either parent was better suited to have substantially more parenting time than the other, and given this, and the fact that the General Assembly has established the aspirational goal for the courts to maximize each parent's participation in the life of the child, the judgment was reversed and the case was remanded with instructions. Gooding v. Gooding, 477 S.W.3d 774, 2015 Tenn. App. LEXIS 276 (Tenn. Ct. App. Apr. 29, 2015).

Wife cohabited with her new husband and thus the presumption was raised that she no longer needed alimony, T.C.A. § 36-5-121(g)(2)(C); the trial court's order terminating transitional alimony did not comply with Tenn. R. Civ. P. 52.01 as it did not contain sufficient findings that showed the wife successfully rebutted the presumption. Beasley v. Beasley, — S.W.3d —, 2020 Tenn. App. LEXIS 465 (Tenn. Ct. App. Oct. 20, 2020).

2. Findings Not Required.

Trial court was not required to make findings of fact, pursuant to Tenn. R. Civ. P. 52.01, when enforcing a settlement agreement between partnerships and a general partner because the partnerships' motion to enforce the agreement was neither a Tenn. R. Civ. P. 41.02 nor 65.04(6) motion. PNC Multifamily Capital Institutional Fund XXVI L.P. v. Mabry, 402 S.W.3d 654, 2012 Tenn. App. LEXIS 810 (Tenn. Ct. App. Nov. 26, 2012).

Because the trial court's decision regarding a motion to deem requests for admissions admitted was not a ruling concerning a motion for involuntary dismissal or a temporary injunction, it was not necessary for the trial court to make associated findings of fact. Lundell v. Hubbs, — S.W.3d —, 2020 Tenn. App. LEXIS 528 (Tenn. Ct. App. Nov. 23, 2020).

3. Lack of Findings.

When an award of grandparent visitation was vacated, the case had to be remanded because the trial court's failure to make specific findings was fatal to appellate review, since whether the mother offered the grandparents any visitation, and whether the grandparents refused such offer, was significantly disputed, requiring resolution based on the parties' relative credibility, which the trial court had to find. Manning v. Manning, 474 S.W.3d 252, 2015 Tenn. App. LEXIS 114 (Tenn. Ct. App. Mar. 10, 2015).

Although a trial court's final written order contained no findings of fact or conclusions of

law of any kind to support the trial court's ruling, because the trial court's reasoning was somewhat evident from its oral pronouncements, the appellate court exercised its discretion to proceed to consider the merits of the appeal, instead of vacating the judgment and remanding for further findings. Foster-Henderson v. Memphis Health Ctr., Inc., 479 S.W.3d 214, 2015 Tenn. App. LEXIS 582 (Tenn. Ct. App. July 22, 2015), appeal denied, Foster v. Memphis Health Ctr., Inc., — S.W.3d —, 2015 Tenn. LEXIS 1074 (Tenn. Dec. 14, 2015).

Despite a chancellor's failure to make the specific finding of willfulness that was required to support an award of attorneys' fees pursuant to the Tennessee Public Records Act, T.C.A. § 10-7-101 et seq., an appellate court conducted its own independent review of the record to determine if the evidence presented at trial supported a finding that a City acted willfully. Clarke v. City of Memphis, 473 S.W.3d 285, 2015 Tenn. App. LEXIS 584 (Tenn. Ct. App. July 23, 2015).

Trial court erred in denying a mother's motion to alter or amend an order finding her guilty of criminal contempt for non-payment of child support because its failure to make specific findings of fact and conclusions of law in its order, together with its apparent failure to even consider the excessiveness of the sentence imposed, created an injustice or error of law sufficient to justify reconsideration. Burris v. Burris, 512 S.W.3d 239, 2016 Tenn. App. LEXIS 698 (Tenn. Ct. App. Sept. 20, 2016).

Trial court's valuation of marital property was vacated because it appeared that the trial violated the statutory directive found subsection (b)(1)(A), and the wife did not object to certified appraisals or to the appraisers' testimony at trial; the court of appeals could not determine whether the trial court applied an incorrect legal standard or relied on reasoning that caused an injustice because it did not know what legal standard the trial court applied or what reasoning it employed. Trezevant v. Trezevant, 568 S.W.3d 595, 2018 Tenn. App. LEXIS 213 (Tenn. Ct. App. Apr. 25, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 622 (Tenn. Sept. 18, 2018).

Because the trial court's order contained no specific finding as to the husband's income or the wife's reasonable expenses, both the wife's need and the husband's ability to pay were highly disputed at trial, and voluminous testimony was submitted as to each issue, the court vacated the trial court's award of alimony to the wife and remanded for an order fully compliant with this rule. Masserano v. Masserano, — S.W.3d —, 2019 Tenn. App. LEXIS 251 (Tenn. Ct. App. May 22, 2019).

Although the trial court failed to make specific findings of fact concerning the evidence presented and the applicable statutory factors, the court of appeals reviewed the matter because it had the ability to "soldier on" review the appellate record, in the interest of judicial economy, as to the trial court's determination that a wife was not entitled to an award of spousal support. Pierce v. Pierce, — S.W.3d —, 2019 Tenn. App. LEXIS 306 (Tenn. Ct. App. June 21, 2019).

Due to the absence of sufficient factual findings and legal conclusions in the trial court's order setting aside the default judgment, the order was vacated. Bane v. Bane, — S.W.3d —, 2019 Tenn. App. LEXIS 320 (Tenn. Ct. App. June 28, 2019).

Because the record did not contain required findings as to either the existence of a material change of circumstances or an analysis of the best interest of the child, the court remanded the matter to the trial court for failure to comply with this rule. Cantey v. Cantey, — S.W.3d —, 2019 Tenn. App. LEXIS 342 (Tenn. Ct. App. July 9, 2019).

Trial court's division of marital property was vacated, and a remand was appropriate because the trial court did not make a finding regarding the value of any of the assets, including those assigned to the wife as her separate property, and those upon which the parties disagreed as to their value; the trial court's order did not refer to subsection, or make a finding regarding any of the factors prescribed therein. Long v. Long, — S.W.3d —, 2019 Tenn. App. LEXIS 409 (Tenn. Ct. App. Aug. 23, 2019).

Because of the relatively small record on appeal and the dearth of evidence presented on the issue of a father's request to change the surname of a child to the father's surname, the appellate court chose to remedy the trial court's deficient factual findings by conducting a de novo review of the record to determine whether sufficient evidence was presented by the father to support the requested name change. Knipper v. Enfinger, — S.W.3d —, 2020 Tenn. App. LEXIS 393 (Tenn. Ct. App. Aug. 31, 2020).

Appellate court could not properly review the trial court's decision to exercise subject matter jurisdiction over the grandmother's petition for visitation because the record contained no specific findings by the trial court resolving the father's residence at the time the petition was filed and his family's ongoing connection to Tennessee and the county, and the record was wholly silent as to any adjudication of the father's challenge to the trial court's subject matter jurisdiction. In re Paisley H., — S.W.3d —, 2020 Tenn. App. LEXIS 407 (Tenn. Ct. App. Sept. 10, 2020).

Trial court's order concerning child support was vacated because it failed to make factual findings as required by this rule, failed to timely rule on the father's pre-trial motions, and failed to provide adequate explanation at least as to why the father's motion to participate was denied. In addition, it did not appear that the trial court's ruling was predicated on

any properly admitted evidence. State ex rel. Moody v. Roker, — S.W.3d —, 2021 Tenn. App. LEXIS 87 (Tenn. Ct. App. Mar. 9, 2021).

4. Findings Sufficient.

Trial court included comprehensive and detailed findings of fact, which fully complied with mandate. Commerce Union Bank v. Bush, 512 S.W.3d 217, 2016 Tenn. App. LEXIS 451 (Tenn. Ct. App. June 29, 2016), appeal denied, — S.W.3d —, 2016 Tenn. LEXIS 881 (Tenn. Nov. 16, 2016).

Although the findings of facts contained in a trial court's judgment were scant and the trial court engaged in no discussion of the evidence or testimony that was actually presented at trial, because there was a clear legal question —statutory interpretation—the appellate court proceeded with its analysis. Trustmark Nat'l Bank v. Sunshine Carwash No. 5 Partners, 558 S.W.3d 157, 2018 Tenn. App. LEXIS 179 (Tenn. Ct. App. Apr. 5, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 495 (Tenn. Aug. 8, 2018).

Trial court incorporated its oral findings into its final order by reference and made findings spanning eight pages of transcript concerning the causation element alone, and thus appellant's claim of insufficient findings lacked merit. Terry v. Jackson-Madison Cty. Gen. Hosp. Dist., 572 S.W.3d 324, 2018 Tenn. App. LEXIS 372 (2018).

Trial court did more than simply state its decision but rather it provided sufficient findings of act to reveal the steps it following to reach its ultimate decision regarding primary residential custody and parenting time. Nelson v. Justice, — S.W.3d —, 2019 Tenn. App. LEXIS 35 (Tenn. Ct. App. Jan. 25, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 480 (Tenn. Sept. 18, 2019).

Although the termination order was not a model of clarity, when read as a whole, it provided sufficient findings of fact and conclusions of law to support the decision to terminate a mother's parental rights and did not necessitate a remand for additional findings where the trial court first found that each statutory ground for termination was proven, and then it made several pages of factual findings that could arguably have applied to one or more of those grounds. In re Jaxx M., — S.W.3d —, 2019 Tenn. App. LEXIS 185 (Tenn. Ct. App. Apr. 17, 2019).

Although a trial court in a divorce proceeding did not specifically state that a spouse was in need of alimony, the explicit and implicit findings by the court concerning the spouse's health and lack of employment inferentially led to that conclusion as the court found that the spouse suffered from various physical ailments such that the spouse could not then work full-time. Howell v. Howell, — S.W.3d —, 2019 Tenn. App. LEXIS 554 (Tenn. Ct. App. Nov. 13, 2019).

Trial court's ruling in a dissolution of marriage on a property in Texas contained sufficient findings to indicate its reasoning so as to enable the appellate court to review whether the trial court erred in classifying the property as both marital and separate. Wright v. Wright, — S.W.3d —, 2020 Tenn. App. LEXIS 99 (Tenn. Ct. App. Mar. 6, 2020).

Trial court's order did not specifically mention the best interest factors, but the findings and conclusions were sufficient to facilitate appellate review and contained the requisite best interest analysis; the trial court found that the mother had served as the primary residential parent since the child was 26 months old, the father never completed the steps necessary to have more parenting time under that original plan, he was residentially unstable, and his actions, in part calling the police on the mother, were vindictive and malicious. Rawson v. Monroe, — S.W.3d —, 2020 Tenn. App. LEXIS 286 (Tenn. Ct. App. June 24, 2020).

Probate court's order for the appointment of a conservator was sufficient because, while the order did not contain a recitation of the testimony from each witness, it did contain the required information concerning how the court reached its ultimate conclusion based upon the facts presented. The court's order, therefore, provided sufficient findings of fact and conclusions of law to illuminate the steps the court took to reach its ultimate conclusion. In re Winston, — S.W.3d —, 2020 Tenn. App. LEXIS 351 (Tenn. Ct. App. Aug. 6, 2020).

5. —Oral Findings.

Trial court's oral ruling, in which it set forth orally its findings of fact and conclusions of law supporting its ruling that the implied consent violation was civil in nature, was sufficient to comply with Tenn. R. Civ. P. 52.01. State v. Freeman, 402 S.W.3d 643, 2012 Tenn. App. LEXIS 726 (Tenn. Ct. App. Oct. 16, 2012), appeal denied, — S.W.3d —, 2013 Tenn. LEXIS 272 (Tenn. Mar. 5, 2013).

6. Findings Insufficient.

Simply stating the trial court's decision on alimony, without more, did not fulfill the requirements of the rule, and the record failed to disclose how the trial court reached the conclusion that the amount of $2,400 per month was appropriate; given the wife's expenses, it appeared that ordering her to pay the husband $2,400 each month in alimony would create a substantial deficit for the wife, and the matter was remanded for reconsideration. Cain-Swope v. Swope, 523 S.W.3d 79, 2016 Tenn. App. LEXIS 986 (Tenn. Ct. App. Dec. 23, 2016), appeal denied, Cain-Swope v. Swope, — S.W.3d —, 2017 Tenn. LEXIS 227 (Tenn. Apr. 12, 2017).

Tennessee Claims Commissioner's order concluding that the injured child's parents failed to establish that the State's negligence was the proximate cause of their child's injuries was vacated because the Commissioner's conclusions of law were deficient and only addressed

one of the parents' claims for negligence, and therefore the order did not comply with this rule, as it did not address the claim that the inn was negligent in allowing the child to access an unoccupied fifth floor guest room with a balcony. Heun Kim v. State, — S.W.3d —, 2019 Tenn. App. LEXIS 101 (Tenn. Ct. App. Feb. 26, 2019).

Chancery court erred in modifying a father's child support obligation because it failed to provide sufficient findings of fact and conclusions of law, and the appellate court unable to effectively review the issues raised on appeal. Paterson v. Paterson, — S.W.3d —, 2019 Tenn. App. LEXIS 246 (Tenn. Ct. App. May 21, 2019).

Because of the lack of findings by a trial court regarding the best interest of the child in the modification of an existing parenting plan, the appellate court vacated the order of the trial court and remanded the case for the trial court to make additional findings of fact. In re Makinna B., — S.W.3d —, 2019 Tenn. App. LEXIS 285 (Tenn. Ct. App. June 6, 2019).

Judgment was vacated because the legal basis for the money judgment awarded to a county employee was not apparent from the judgment and memorandum opinion; the trial court had previously dismissed the employee's negligent misrepresentation claim as barred by the Governmental Tort Liability Act (GTLA), and in order for the general negligence claim to survive under the GTLA, it would need to explain how it found the claim to be distinguishable from negligent misrepresentation. Lee v. Hamilton Cty., — S.W.3d —, 2019 Tenn. App. LEXIS 324 (Tenn. Ct. App. June 28, 2019).

Judgment was vacated because the trial court's final order did not sufficiently explain the operation of the statute of limitations set forth in the Governmental Tort Liability Act; pursuant to the discovery rule, the employee's negligence claim would have been timely if she did not discover or could not reasonably have been expected to discover her injury prior to one year before she filed her complaint. Lee v. Hamilton Cty., — S.W.3d —, 2019 Tenn. App. LEXIS 324 (Tenn. Ct. App. June 28, 2019).

Trial court's final order did not sufficiently explain the legal basis upon which a money judgment was awarded to a county employee because the trial court did not expressly enter findings of fact and conclusions of law regarding whether a coworker owed a duty of care to the employee, whether her conduct was below the standard of care to such a degree that it amounted to a breach of that duty, or whether the negative impact on the employee amounted to cause in fact and proximate cause. Lee v. Hamilton Cty., — S.W.3d —, 2019 Tenn. App. LEXIS 324 (Tenn. Ct. App. June 28, 2019).

Legal basis for the money judgment awarded to a county employee was not apparent from the judgment and memorandum opinion because in order for immunity to be lifted from the county under the Governmental Tort Liability Act, a coworker must have been acting in the scope of her employment when she made the comment upon which the employee relied; the trial court made no specific finding concerning whether the coworker was acting within the scope of her employment when she made the comment. Lee v. Hamilton Cty., — S.W.3d —, 2019 Tenn. App. LEXIS 324 (Tenn. Ct. App. June 28, 2019).

Judgment was vacated because the legal basis for the money judgment awarded to a county employee was not apparent from the judgment and memorandum opinion; the court of appeals could not presume solely from the transcript that the trial court dismissed the employee's contract claim, and the trial court did not state in its order or attached memorandum opinion that its judgment was based on the employee's remaining claim of negligence under the Governmental Tort Liability Act. Lee v. Hamilton Cty., — S.W.3d —, 2019 Tenn. App. LEXIS 324 (Tenn. Ct. App. June 28, 2019).

Because a trial court's order approving a modified parenting plan did not comply with the Tennessee Rules of Civil Procedure and the record lacked a sufficient basis to support a best interest of the children determination, the appellate court vacated the modification of the parenting plan and remanded for the trial court to conduct a new evidentiary hearing on whether modification of the parenting plan was in the children's best interest and to enter an order compliant with the rules. Carmen v. Murray, — S.W.3d —, 2019 Tenn. App. LEXIS 474 (Tenn. Ct. App. Sept. 25, 2019).

Trial court's order did not contain sufficient findings of fact and conclusions of law as to the best interest factors of this section, and therefore the order denying the father equal time was vacated, because the trial court used a standardized form in which the only judicial analysis as to 14 factors was checking a box in favor of one parent or the other. The trial court chose to provide a factual analysis with regard to only one of the 15 factors but its findings were somewhat inconsistent and it did not state which testimony it credited. Nelvis v. Baptist, — S.W.3d —, 2019 Tenn. App. LEXIS 524 (Tenn. Ct. App. Oct. 29, 2019).

Trial court's order as to modifying the primary residential parent was vacated and remanded because most of the order consisted of the court's detailed recitation of the testimony presented during trial, without finding which testimony was credible or otherwise making sufficient findings of fact regarding the evidence presented to support its ruling as to changing the primary residential parent. The trial court's judgment regarding modification of the residential parenting schedule did make sufficient findings of fact as to the schedule. Rosebrough v. Caldwell, — S.W.3d —, 2019

Tenn. App. LEXIS 608 (Tenn. Ct. App. Dec. 18, 2019).

On remand, the trial court failed to remedy the deficiencies of its original order terminating the parents' rights because it did not determine the relevant time period for abandonment and failed to make a determination on the willfulness criterion as it was silent regarding the parents' ability to pay. The trial court also again failed to independently weigh the best interest factors, and rather than engaging in the required independent analysis it simply adopted appellee's filings and conclusions over the parents' objections. In re Nathan C., — S.W.3d —, 2020 Tenn. App. LEXIS 61 (Tenn. Ct. App. Feb. 12, 2020).

Because a trial court's findings as to its reduction of a former wife's reasonable expenses were deficient, the vacating of the trial court's order regarding modification of the wife's alimony and the remand of the matter for the trial court to make specific findings of fact and conclusions of law was appropriate. McCormick v. McCormick, — S.W.3d —, 2020 Tenn. App. LEXIS 93 (Tenn. Ct. App. Mar. 4, 2020).

Trial court failed to elaborate the basis for its deviating from the parties' agreed parenting plan before concluding that the parents could not jointly parent, and, more egregiously, was silent concerning the child's best interest. Thus, the vacating of the trial court's permanent parenting plan and remand for further findings were necessary because the trial court's findings were not sufficient either to support its refusal to enter the parties' proposed parenting plan, or to support the parenting plan arrived at by the trial court. Wright v. Wright, — S.W.3d —, 2020 Tenn. App. LEXIS 99 (Tenn. Ct. App. Mar. 6, 2020).

Trial court's decision to modify child custody was remanded as the trial court had not made any specific findings of fact with respect to the best interest analysis, and given the limited statement of evidence and the crucial credibility findings, an independent appellate review was inappropriate. Wassenberg v. Wassenberg, — S.W.3d —, 2020 Tenn. App. LEXIS 309 (Tenn. Ct. App. July 9, 2020).

Vacating of order terminating a father's parental rights and remanding of the case for further proceedings was appropriate because the appellate court found that it was unable to review the trial court's decision as there were significant deficiencies in the trial court's order in that the order lacked necessary findings of fact and conclusions of law. The trial court failed to fully analyze one of the grounds for termination upon which it based its ruling and failed to address all of the relevant factors regarding the best interest analysis. In re Autumn D., — S.W.3d —, 2020 Tenn. App. LEXIS 487 (Tenn. Ct. App. Oct. 28, 2020).

Because the trial court in a divorce case did not assign classifications and values to all of the relevant property subject to division in the case, the appellate court was unable to determine if the property distribution was equitable. Therefore, upon remand, the trial court was to enter an order containing sufficient findings and conclusions regarding the classification and valuation of all relevant property, including the possessory interest in the marital home, along with its analysis of the statutory factors for the property distribution. Green v. Green, — S.W.3d —, 2021 Tenn. App. LEXIS 150 (Tenn. Ct. App. Apr. 12, 2021).

52.02. Amendment. Upon motion of a party made not later than thirty (30) days after entry of judgment the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may be made with a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may be raised on appeal whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment.

Advisory Commission Comments. This Rule conforms generally to Tenn. Code Ann. § 27-1-113.

Cross-References. Nonjury cases, time for decision, T.C.A. § 20-9-506.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 229, 231, 619, 659, 671, 674.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-52.01-1, 1-52.01-2, 1-52.02-1 — 52.02-3, 1-62.02-1, 1-65.04-1.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 116, 198, 223; 11 Tenn. Juris., Equity, § 56; 20 Tenn. Juris., New Trials, § 32.

Law Reviews. Appealability of District Court Orders Disapproving Proposed Settlements in Shareholder Derivative Suits, 32 Vand. L. Rev. 985.

NOTES TO DECISIONS

ANALYSIS

1. Unrequested Findings.
2. Who Prepares Findings.
3. Sufficiency.
4. Failure to Make Findings.
5. Filing of Findings.
6. Motion to Amend.
7. Appeal.

1. Unrequested Findings.

Express findings of fact by the trial court in a compensation case, although not requested by either party, are entitled to the same effect as findings requested by a party. Murray Ohio Mfg. Co. v. Vines, 498 S.W.2d 897, 1973 Tenn. LEXIS 463 (Tenn. 1973).

2. Who Prepares Findings.

Although it is generally improper to permit or require counsel for the successful party to prepare written findings of fact, no error was found where there was nothing in the record nor in the bill of exceptions to substantiate the allegation that the trial judge required the successful counsel to prepare the findings of fact adopted and signed by him. Murray Ohio Mfg. Co. v. Vines, 498 S.W.2d 897, 1973 Tenn. LEXIS 463 (Tenn. 1973).

Before adopting findings prepared by counsel, the trial judge should carefully examine them to establish that they accurately reflect his views and conclusions and not those of counsel, that they adequately dispose of all material issues, and that matters not a proper part of the determination have not been included. Delevan-Delta Corp. v. Roberts, 611 S.W.2d 51, 1981 Tenn. LEXIS 402 (Tenn. 1981).

Although findings prepared by the trial judge which represent his independent labor are preferable, the court does not disapprove of party-prepared findings. Goolsby v. Upper Cumberland Oil, Inc., 34 S.W.3d 309, 2000 Tenn. App. LEXIS 310 (Tenn. Ct. App. 2000), rehearing denied, Goolsby v. Upper Cumberland Oil, 34 S.W.3d 309, 2000 Tenn. App. LEXIS 409 (Tenn. Ct. App. 2000).

In an action over the parties' duties under a construction contract, the trial court did not err in relying on party-prepared findings of fact; there was no indication that the trial judge did not carefully review the party-prepared findings to ensure the findings reliably reflected his opinion based on his observation of the witnesses and evidence produced at trial and there was likewise no indication that the trial court did not review the party-prepared findings to ensure they disposed of all relevant issues before the court. A party who disagreed with a trial court's findings of fact could file a motion to alter or amend pursuant to Tenn. R. Civ. P. 52.02 and no motion was filed; thus, the chancellor's findings were entitled to the ordinary presumption of correctness. Madden Phillips Constr. v. Ggat Dev. Corp., 315 S.W.3d 800, 2009 Tenn. App. LEXIS 645 (Tenn. Ct. App. Sept. 25, 2009), appeal denied, Madden Phillips Constr., Inc. v. GGAT Dev. Corp., — S.W.3d —, 2010 Tenn. LEXIS 291 (Tenn. Mar. 15, 2010).

3. Sufficiency.

Where appellant assigned as error the trial judge's failure to include his conclusions of law in his findings of fact as required by Tenn. R. Civ. P. 52, the appellate court overruled the assignments of error since the only question of law involved was whether or not the court had jurisdiction to render judgment increasing child support payments and requiring payment of the amount in arrearage, and the judge could not have stated his conclusion more plainly than he did by rendering such judgment over the objections of the appellant. Koehler v. Koehler, 559 S.W.2d 944, 1977 Tenn. App. LEXIS 308 (Tenn. Ct. App. 1977), superseded by statute as stated in, Aubin v. Aubin, — S.W.2d —, 1989 Tenn. App. LEXIS 101 (1989).

It was not necessary for the trial court to treat separately each fact or question at issue so long as its findings as a whole covered all relevant facts necessary to a determination of the case. Hodge v. Provident Life & Acci. Ins. Co., 664 S.W.2d 297, 1983 Tenn. App. LEXIS 655 (Tenn. Ct. App. 1983).

4. Failure to Make Findings.

Failure of the trial court to render findings of fact and/or conclusions of law is not necessarily reversible error. Bruce v. Bruce, 801 S.W.2d 102, 1990 Tenn. App. LEXIS 618 (Tenn. Ct. App. 1990).

Although the trial court refused defendant's request for, and did not make, oral or written findings of facts, where the issues in the case were sufficiently clear to enable defendant to determine which version of the facts the court believed from the content of the court's final judgment and the comments by the court from the bench at the conclusion of the evidentiary hearing, the court's failure to make oral or written findings of fact was harmless error. Bruce v. Bruce, 801 S.W.2d 102, 1990 Tenn. App. LEXIS 618 (Tenn. Ct. App. 1990).

Trial court erred in denying a mother's motion to alter or amend an order finding her guilty of criminal contempt for non-payment of child support because its failure to make specific findings of fact and conclusions of law in its order, together with its apparent failure to even consider the excessiveness of the sentence imposed, created an injustice or error of law sufficient to justify reconsideration. Burris v. Burris, 512 S.W.3d 239, 2016 Tenn. App. LEXIS 698 (Tenn. Ct. App. Sept. 20, 2016).

5. Filing of Findings.

Although the rules of civil and appellate procedure contemplate, and good practice demands, that a letter from the trial court containing findings of fact and law be filed with the clerk, appellee was not prejudiced by the court's failure to so file where appellee received the letter and subsequently filed objections thereto. Davis v. Davis, 924 S.W.2d 351, 1996 Tenn. LEXIS 356 (Tenn. 1996).

6. Motion to Amend.

Trial court did not abuse its discretion when it determined that it did not have jurisdiction to consider a builder's motion styled "motion to reconsider findings of fact and conclusions of law," because that motion was filed after the builder filed a notice of appeal. Although the motion was substantively a motion to amend or make additional findings of fact made pursuant to Tenn. R. Civ. P. 52.02 and Tenn. R. Civ. P. 59.01 and 59.02, the court stated that, had it considered the motion, it would have been denied. Holladay v. Speed, 208 S.W.3d 408, 2005 Tenn. App. LEXIS 828 (Tenn. Ct. App. 2005), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 743 (Tenn. Aug. 21, 2006).

7. Appeal.

Appeal was timely filed following a court's resolution of several post-judgment motions because, while not titled as such, the post-judgment motions filed by appellants were most properly characterized as motions for additional findings. Such a motion tolled the time for the filing of a notice of appeal. U.S. Bank Nat'l Ass'n v. Ingram, — S.W.3d —, 2019 Tenn. App. LEXIS 196 (Tenn. Ct. App. Apr. 26, 2019).

RULE 53

MASTERS

53.01. Appointment and Compensation. The court in which any action is pending may appoint a Special Master therein. The compensation to be allowed to a master shall be fixed by the court, and shall be charged upon such of the parties or paid out of any fund or subject matter of the action, which is in the custody and control of the court as the court may direct. The master shall not retain the report as security for compensation; but when the party ordered to pay the compensation allowed by the court does not pay it after notice and within the time prescribed by the court, the master is entitled to a writ of execution against the delinquent party.

53.02. Powers. The order of reference to the master may specify or limit the master's powers and may direct the master to report only upon particular issues or to do or perform particular acts or to receive and report evidence only, and may fix the time and place for beginning and closing the hearings and for the filing of the master's report. Subject to the specifications and limitations stated in the order, the master has and shall exercise the power to regulate all proceedings in every hearing before him or her and to do all acts and take all measures necessary or proper for the efficient performance of the duties under the order. The master may require the production before him or her of evidence upon all matters embraced in the reference, including the production of all books, papers, vouchers, documents, and writings applicable thereto. The master may rule upon the admissibility of evidence unless otherwise directed by the order of reference and has the authority to put witnesses on oath and may personally examine them and call the parties to the action and examine them upon oath. When a party so requests, the master shall make a record of the evidence offered and excluded in the same manner and subject to the same limitations as provided in Tennessee Rule of Evidence 103. [As amended by order entered January 26, 1999, effective July 1, 1999.]

53.03. Proceedings. (1) MEETINGS. When a reference is made, the clerk shall forthwith furnish the master with a copy of the order of reference. Upon receipt thereof unless the order of reference otherwise provides, the master shall forthwith set a time and place for the first meeting of the parties or their attorneys to be held within twenty (20) days after the date of the order of reference and shall notify in writing the parties or their attorneys. It is the duty of the master to proceed with all reasonable diligence. Either party, on notice to the parties and master, may apply to the court for an order requiring the master to speed the proceedings and to make a report. If a party fails to appear at the time and place appointed, the master may proceed ex parte or, in his or her discretion, may adjourn the proceedings to a future day, giving notice in writing to the absent party of the adjournment.

(2) WITNESSES. The master or the parties may procure the attendance of witnesses before the master by the issuance and service of subpoenas as provided in Rule 45. If without adequate excuse a witness fails to appear or give evidence, the witness may be punished as for a contempt and be subjected to the consequences, penalties, and remedies provided in Rules 37 and 45.

(3) STATEMENT OF ACCOUNTS. When matters of accounting are in issue before the master, the master may prescribe the form in which the accounts shall be submitted and in a proper case may require or receive in evidence a statement by a certified public accountant who is called as a witness. Upon objection of a party to any of the items thus submitted or upon a showing that the form of the statement is insufficient, the master may require a different form of statement to be furnished, or the accounts or specific items thereof to be proved by oral examination of the accounting parties or upon written interrogatories or in such other manner as the master directs.

53.04. Report. (1) CONTENTS AND FILING. The master shall prepare a report upon the matters submitted by the order of reference and, if required to make findings of fact and conclusions of law, the master shall set them forth in the report. The master shall file the report with the clerk of the court and, unless otherwise directed by the order of reference, shall file with it a transcript of the proceedings and of the evidence and the original exhibits. The clerk shall forthwith mail to all parties notice of the filing.

(2) IN NONJURY ACTIONS. In an action to be tried without a jury the court shall act upon the report of the master. Within ten (10) days after being served with notice of the filing of the report, any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6.04. The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions.

(3) IN JURY ACTIONS. In an action to be tried by a jury the master may or may not be directed to report the evidence. The master findings upon the issues submitted to him are admissible as evidence of the matters found and may be read to the jury, subject to the ruling of the court upon any objections in point of law which may be made to the report. The parties may submit additional proof and may cross-examine the master upon his or her findings.

(4) STIPULATION AS TO FINDINGS. The effect of a master's report is the same whether or not the parties have consented to the reference; but, when the parties stipulate that a master's findings of fact shall be final, only questions of law arising upon the report shall thereafter be considered.

(5) DRAFT REPORT. Before filing a report a master may submit a draft thereof to counsel for all parties for the purpose of receiving their suggestions.

53.05. Application to References to Clerks and Masters. The procedures outlined in this rule shall apply to Clerks and Masters of the Chancery Courts as well as to Special Masters appointed pursuant to Rule 53.01.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 251, 252, 256, 260, 263, 271, 272, 274, 403, 407, 495, 635.

Pritchard on Wills and Administration of Estates (4th ed., Phillips and Robinson), §§ 872-875.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-53.01-1, 1-53.02-1, 1-53.03-1, 1-53.04-1, 1-53.04(2).

Tennessee Jurisprudence. 1 Tenn. Juris., Accounts and Accounting, §§ 12, 13; 11 Tenn. Juris., Equity, § 56, 58; 15 Tenn. Juris., Injunctions, § 42; 21 Tenn. Juris., Reference and Commissioners, §§ 2, 8, 18.

Law Reviews. Judicial Review and the Uniform Administrative Procedures Act (Toxey H. Sewell), 6 Mem. St. U.L. Rev. 253.

NOTES TO DECISIONS

ANALYSIS

1. Preservation of Testimony.
2. Transcript of Proceedings.
3. Scope of Review of Master's Report.
4. Report Not Supported by Material Evidence.
5. Notification of Filing of Master's Report.
6. Referrals to Special Masters.

1. Preservation of Testimony.

In order to preserve the testimony of witnesses taken by a special master pursuant to an order of reference, the master must sign and certify the testimony and he must authenticate all exhibits, or in the alternative, the trial judge may, in the absence of other proof, convert the transcript of the testimony before the master by signing an order directing that the original transcript be sent up on appeal as a part of the record and reciting affirmatively that such transcript, properly authenticated by the trial judge, contains all the evidence considered by the lower court. Harrison v. Arnold, 558 S.W.2d 831, 1977 Tenn. LEXIS 662 (Tenn. 1977).

2. Transcript of Proceedings.

The master has the responsibility of filing a transcript unless specifically directed otherwise by the order of reference; however, even though a master erred by failing to file a transcript, it was harmless error where there was sufficient evidence in the record to support the master's report. Christian v. Estate of Tipps (In re Estate of Tipps), 907 S.W.2d 400, 1995 Tenn. LEXIS 546 (Tenn. 1995).

3. Scope of Review of Master's Report.

In suit for the sale for division of property, the chancellor properly heard additional evidence concerning enhanced value and did not err in not confirming the master's report on motion of the plaintiffs, even though the defendant had not filed an objection to the report. Rimel v. Fulton, 564 S.W.2d 364, 1976 Tenn. App. LEXIS 249 (Tenn. Ct. App. 1976).

In suit for the sale for division of property, the chancellor was not bound by testimony and finding of master that house built by defendant did not enhance the value of the property, but rather the chancellor was empowered to find that the house, as a matter of fact, did enhance the value of the property. Rimel v. Fulton, 564 S.W.2d 364, 1976 Tenn. App. LEXIS 249 (Tenn. Ct. App. 1976).

4. Report Not Supported by Material Evidence.

Where report of clerk and master reflected only that clerk and master considered "the pleadings of all the parties and other available data" with no clue given as to the identity of "other available data," the report was not supported by material evidence and amounted to no more than the personal opinion of the master. Glenn v. Gresham, 602 S.W.2d 256, 1980 Tenn. App. LEXIS 360 (Tenn. Ct. App. 1980).

5. Notification of Filing of Master's Report.

In light of Tenn. R. Civ. P. 5.02, requiring service upon counsel when a party is represented by counsel, an interpretation of Tenn. R. Civ. P. 53.04(1) that only parties need be noti-

fied of the filing of a master's report was erroneous. Wester v. Childress, 625 S.W.2d 710, 1981 Tenn. LEXIS 511 (Tenn. 1981).

6. Referrals to Special Masters.

Referrals to a special master by a court were limited to collateral, subordinate, and incidental issues and the ascertainment of ancillary facts, while the main issues in controversy and the principles on which those issues were to be adjudicated had to be determined by the trial court. Frazier v. Bridgestone/Firestone, Inc., 67 S.W.3d 782, 2001 Tenn. LEXIS 805 (Tenn. 2001), aff'd, — S.W.3d —, 2001 Tenn. LEXIS 806 (Tenn. Oct. 19, 2001).

Special masters appointed pursuant to Tenn. R. Civ. P. 53 do not perform the tasks that an imprisoned person is incapable of performing. A state prisoner who sued a doctor and a nurse for medical malpractice was not entitled to appointment of a special master to assist him in the filing of medical expert affidavits to support his claim. Hessmer v. Miranda, 138 S.W.3d 241, 2003 Tenn. App. LEXIS 347 (Tenn. Ct. App. 2003).

RULE 54

JUDGMENTS AND COSTS

54.01. Definition — Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment need not contain a recital of pleadings, the report of a master, or the record of prior proceedings.

Advisory Commission Comments. 54.01: The definition of "Judgment" includes and makes no distinction between "Judgment," "Order" or "Decree."

54.02. Relief — Motion to Intervene. (1) When more than one claim for relief is present in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court, whether at law or in equity, may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of the judgment adjudicating all the claims and the rights and liabilities of all the parties.

(2) Notwithstanding the provisions of subsection (1), any order granting or denying a motion to intervene filed pursuant to Tenn. R. Civ. P. 24 shall be a final judgment for purposes of Tenn. R. App. P. 3. [Added July 1, 1979; and as amended by order filed January 8, 2018, effective July 1, 2018.]

Compiler's Notes. The amendment of Rule 54, which amended subdivision 54.02 and added the [2018] Advisory Comments, as promulgated and adopted by the Supreme Court in its order dated January 8, 2018, was ratified and approved by 2018 House Resolution 202 and Senate Resolution 163. The order promulgating the amendment of subdivision 54.02 and addition of the [2018] Advisory Comments, provided that it take effect July 1, 2018.

NOTES TO DECISIONS

ANALYSIS

1. Judgments Not Final.
2. Final Judgment.
3. Writ of Mandamus.
4. Default Judgments.
5. Partial Default Judgment.
6. Excusable Neglect.
7. Certification Improvidently Granted.
8. Motion to Amend.

9. Costs Properly Awarded.
10. Jurisdiction.
11. Subject-matter Jurisdiction.
12. Motion to Revise.

1. Judgments Not Final.

Pursuant to Tenn. R. Civ. P. 54.02, the trial court had the power to amend its decision at any time prior to the entry of a final order and did not abuse its discretion in considering a second amended motion to dismiss. Lane v. Becker, 334 S.W.3d 756, 2010 Tenn. App. LEXIS 145 (Tenn. Ct. App. Feb. 25, 2010), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 1146 (Tenn. Nov. 24, 2010).

Court of appeals erred in affirming an order granting fraternity members' motion to dismiss vehicle owners' complaint on the ground that it was barred by the one-year statute of limitations, T.C.A. § 28-3-104, because "a person not a party to the suit," for purposes of T.C.A. § 20-1-119, included any defendant previously dismissed pursuant to a written, non-final order under Tenn. R. Civ. P. 54.02; a named defendant ceases to be a "party to the suit," for purposes of § 20-1-119, when the trial court issues an order, whether final or interlocutory, dismissing that defendant. Mann v. Alpha Tau Omega Fraternity, 380 S.W.3d 42, 2012 Tenn. LEXIS 468 (Tenn. July 3, 2012).

In a driver's personal injury action wherein the driver accepted the trial court's suggestion of remittitur in protest, an appellate court held the driver's appeal in abeyance because the trial court had not decided the insurer's motion for a new trial and, as such, the trial court improvidently certified the order suggesting remittitur as final under Tenn. R. Civ. P. 54.02. Johnson v. Beverly Nunis & Farmer's Ins. Exch., 383 S.W.3d 122, 2012 Tenn. App. LEXIS 277 (Tenn. Ct. App. Apr. 27, 2012).

Order setting aside the dismissal of an action was not a final judgment and was not certified as final for purposes of appeal; accordingly, the notice of appeal was prematurely filed, thereby depriving the court of appeals of subject matter jurisdiction. Hampton Reserve Homeowner's Ass'n v. Leipzig, — S.W.3d —, 2021 Tenn. App. LEXIS 70 (Tenn. Ct. App. Feb. 26, 2021).

2. Final Judgment.

In a general contractor's cross-claim for indemnity from a subcontractor, the trial court properly certified an order granting summary judgment as a final judgment, even though the trial court had yet to adjudicate a counterclaim for expenses and attorney's fees, because the dismissal of the indemnity claim disposed of the entire claim against the subcontractor. Baptist Mem. Hosp. v. Argo Constr. Corp., 308 S.W.3d 337, 2009 Tenn. App. LEXIS 502 (Tenn. Ct. App. July 29, 2009), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 179 (Tenn. Feb. 22, 2010).

Trial court's certification of the judgment as final pursuant to Tenn. R. Civ. P. 54.02 was appropriate, because the trial court's order clearly awarded summary judgment to the taxpayer on the grounds that the Commissioner's assessment of sales and use tax was constitutionally impermissible, and the trial court directed entry of its judgment in favor of the taxpayer as final pursuant to Tenn. R. Civ. P. 54.02. Scholastic Book Clubs, Inc. v. Farr, 373 S.W.3d 558, 2012 Tenn. App. LEXIS 57 (Tenn. Ct. App. Jan. 27, 2012), appeal denied, Scholastic Book Clubs, Inc. v. Tenn. Dep't of Revenue, — S.W.3d —, 2012 Tenn. LEXIS 465 (Tenn. June 22, 2012), cert. denied, Scholastic Book Clubs, Inc. v. Roberts, 133 S. Ct. 663, 184 L. Ed. 2d 462, 2012 U.S. LEXIS 9047 (2012).

Trial court did not abuse its discretion in denying a wife's motion to set aside an award of attorney's fees in favor of a husband because the order was not entered pursuant to Tenn. R. Civ. P. 54.02 but was a final order from which there was an appeal as of right since after the order was entered, there were no matters pending before the trial court; the trial court intended the order to bring the case to an end despite any pending motions because the order, with its finality language, denied the wife's motion for reconsideration of the dismissal of the declaratory judgment claim sub silentio. Byrnes v. Byrnes, 390 S.W.3d 269, 2012 Tenn. App. LEXIS 306 (Tenn. Ct. App. May 14, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 908 (Tenn. Dec. 11, 2012).

Patient did not file serial post-judgment motions and did not fail to timely file a notice of appeal because the final order was the trial court's order granting summary judgment on the premises liability claim, which fully and finally disposed of all remaining issues, and the patient filed only one motion pursuant to Tenn. R. Civ. P. 59.01 after entry of that order; the trial court did not direct entry of a final judgment when it granted summary judgment on healthcare liability claims. Estate of Shelton v. Greeneville Urgent Care, 605 S.W.3d 463, 2019 Tenn. App. LEXIS 310 (Tenn. Ct. App. June 24, 2019).

3. Writ of Mandamus.

In a case in which the City of Memphis, Tennessee (city) and the city council appealed a writ of mandamus issued by a chancery court pursuant to Tenn. R. Civ. P. 54.02 and the issue on appeal was whether the statutorily mandated school funding provisions contained in T.C.A. §§ 49-3-314(c) and 49-2-203(a)(10)(A)(ii), the anti-supplanting statutes, and the maintenance of effort (MOE) provisions, were applicable to the city, as a local government, the city could not effectively amend existing law and legislate the Memphis City Schools (MCS) out of existence as a special school district by reducing funding. Both

Shelby County and the city were required to fund the MCS in conformance with the basic education program, the anti-supplanting statutes, and the MOE provisions. State Ex Rel. Bd. of Educ. v. City of Memphis, 329 S.W.3d 465, 2010 Tenn. App. LEXIS 13 (Tenn. Ct. App. Jan. 13, 2010), rehearing denied, State ex rel. Bd. of Educ. v. City of Memphis, 329 S.W.3d 465, 2010 Tenn. App. LEXIS 820 (Tenn. Ct. App. 2010), appeal denied, State ex rel. Bd. of Educ. of the Memphis City Schs v. City of Memphis, — S.W.3d —, 2010 Tenn. LEXIS 788 (Tenn. Aug. 24, 2010).

Trial court's order was a final order because it finally and completely adjudicated the issue of a father's initial child support obligation, which was the only issue remaining from the parties' divorce, and neither party filed a notice of appeal or specified post-trial motion concerning the order. Dawson v. Dawson, — S.W.3d —, 2020 Tenn. App. LEXIS 120 (Tenn. Ct. App. Mar. 24, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 580 (Tenn. Sept. 16, 2020).

4. Default Judgments.

Trial court did not apply an incorrect standard in ruling on a motion for relief from a default judgment as the same test applied for relief under Tenn. R. Civ. P. 54.02 and Tenn. R. Civ. P. 60.02. Discover Bank v. Morgan, 363 S.W.3d 479, 2012 Tenn. LEXIS 215 (Tenn. Mar. 27, 2012).

5. Partial Default Judgment.

Interest in finality is heightened once a final judgment has been entered, and while the same factors must guide the inquiry, relief from a partial default judgment may be granted more liberally under Tenn. R. Civ. P. 54.02 than relief from final default judgments under Tenn. R. Civ. P. 59.04 or Tenn. R. Civ. P. 60.02. Discover Bank v. Morgan, 363 S.W.3d 479, 2012 Tenn. LEXIS 215 (Tenn. Mar. 27, 2012).

Partial default judgment was not "a final judgment" because it did not resolve all the issues in the case; because the partial default judgment did not include a permanent parenting plan, it was a temporary or interlocutory order that the trial court could modify, and as a consequence, the partial default judgment that was entered 16 days before the 90-day period expired did not violate subsection (b). Pack v. Pack, — S.W.3d —, 2019 Tenn. App. LEXIS 206 (Tenn. Ct. App. Apr. 30, 2019).

6. Excusable Neglect.

Credit card company's motion for relief from a default judgment of liability failed under Tenn. R. Civ. P. 54.02 as there was no excusable neglect as: (1) original counsel admitted that he had actual notice of the counter-complaint; (2) he requested, and received, a time extension in which to file an answer; (3) the answer was not filed within the extension period and was more than a month overdue when the debtor moved for default judgment; and (3) alleged mishaps at original counsel's office, pertaining to the hearing on the motion for default judgment, did not justify original counsel's failure to answer the counter-complaint until nine months after the entry of default judgment. Discover Bank v. Morgan, 363 S.W.3d 479, 2012 Tenn. LEXIS 215 (Tenn. Mar. 27, 2012).

When a party seeks relief from a default judgment due to "excusable neglect," whether pursuant to Tenn. R. Civ. P. 54.02 (for interlocutory judgments), Tenn. R. Civ. P. 59.04 (for final judgments within thirty days of entry), or Tenn. R. Civ. P. 60.02 (for final judgments more than thirty days after entry), a reviewing court must first determine whether the conduct precipitating the default was willful; if the court finds that the defaulting party has acted willfully, the judgment cannot be set aside on "excusable neglect" grounds, and the court need not consider the other factors. If the conduct was not willful, however, then the court must consider whether the defaulting party has a meritorious defense and whether the non-defaulting party would be prejudiced by the granting of relief; the court may also consider any other factor that it deems relevant. Discover Bank v. Morgan, 363 S.W.3d 479, 2012 Tenn. LEXIS 215 (Tenn. Mar. 27, 2012).

7. Certification Improvidently Granted.

Trial court erred in certifying a judgment in favor of a hospital as final because, inter alia, any decision made regarding the adjudicated claims against the hospital might encroach upon the unadjudicated claims to be tried against the emergency room physician, there was no basis upon which to conclude that an injustice might result from the delay in awaiting adjudication of the entire case, where the unadjudicated claims against the physician and the adjudicated claims against the hospital were inextricably linked, the order against the physician was still interlocutory and was subject to revision at any time before entry of a final judgment adjudicating all claims against him. Blackburn ex rel. Briton B. v. McLean, — S.W.3d —, 2020 Tenn. App. LEXIS 346 (Tenn. Ct. App. July 31, 2020).

As the trial court's order acknowledged that further issues remained to be decided, there was no final judgment, and the trial court's certification was improvident; the rights at issue on appeal were clearly linked with the undecided issue of damages and the appeal was dismissed. Cross v. River Sound Homeowners Ass'n, — S.W.3d —, 2020 Tenn. App. LEXIS 94 (Tenn. Ct. App. Mar. 4, 2020).

Trial court improperly entered an order certifying certain orders entered over the course of a contentious divorce case as final and appealable orders because some of the claims between the parties were not resolved, the court attempted to permit an appeal of certain of its

existing orders while the remaining orders were deemed non-final, and the court did not reference or discuss any of the relevant factors in making the determination that there was no just reason to delay appellate review or give any explanation for its decision. Adkins v. Adkins, — S.W.3d —, 2020 Tenn. App. LEXIS 584 (Tenn. Ct. App. Dec. 22, 2020).

8. Motion to Amend.

As appellant's timely post-trial motion, asking the trial court to correct erroneous factual and evidentiary rulings and legal errors, was in substance a motion to alter or amend or for a new trial under Tenn. R. Civ. P. 52.02 and 59.04, and as appellant timely filed a notice of appeal after the trial court denied the motion, the appellate court had subject matter jurisdiction to hear the appeal under T.R.A.P. 4(b). U.S. Bank, N.A. v. Tenn. Farmers Mut. INS. Co., 410 S.W.3d 820, 2012 Tenn. App. LEXIS 826 (Tenn. Ct. App. Nov. 29, 2012), appeal denied, U.S. Bank v. Tenn. Farmers Mut. Ins. Co., — S.W.3d —, 2013 Tenn. LEXIS 468 (Tenn. May 8, 2013).

Trial court did not abuse its discretion in denying plaintiffs' motion to alter or amend a grant of summary judgment in favor of defendants pursuant to Tenn. R. Civ. P. 54.02; although plaintiffs asserted that the ownership of the property in question was extremely important to the determination of liability, plaintiffs provided no explanation whatsoever to the trial court as to why they could not have obtained copies of the relevant deeds, which were public record, prior to the trial court's ruling on the motion for summary judgment. Bilbo v. Ocoee Place Condo. Homeowners Ass'n, 462 S.W.3d 490, 2014 Tenn. App. LEXIS 803 (Tenn. Ct. App. Dec. 12, 2014), appeal denied, Bilbo v. OCOEE Place Condo. Homeowners Ass'n, — S.W.3d —, 2015 Tenn. LEXIS 318 (Tenn. Apr. 10, 2015).

9. Costs Properly Awarded.

Court reviewed the affidavit and supporting documentation filed by appellees' attorney in support of their motion for discretionary costs and could not conclude that the award of $11,764.28 was outside the range of reasonableness or that the award constituted an abuse of the trial court's discretion by inclusion of costs that were specifically excluded under Tenn. R. Civ. P. 54.04. Mitchell v. Jackson Clinic, P.A., 420 S.W.3d 1, 2013 Tenn. App. LEXIS 240 (Tenn. Ct. App. Apr. 9, 2013), appeal denied, — S.W.3d —, 2013 Tenn. LEXIS 811 (Tenn. Oct. 17, 2013).

10. Jurisdiction.

While language contained in the judgment might satisfy the requirement of an express direction for the entry of judgment, the judgment lacked a finding that there was no just reason for delay; despite this, the court found good cause to exercise jurisdiction, given the grave nature of the termination proceedings and the importance that statutes placed on expeditious resolution of these matters. In re Josiah T., — S.W.3d —, 2019 Tenn. App. LEXIS 482 (Tenn. Ct. App. Oct. 2, 2019).

Although the order appealed from was not a final order as the trial court failed to rule on several issues concerning the allocation of the decedent's estate and did not certify the order appealed from as final, the appellate court suspended the finality requirements because the interests of justice and judicial economy were best served by the court exercising jurisdiction over the appeal given the protracted litigation, a prior appeal, and the necessity of providing a determination to facilitate the remainder of the distribution of the estate. In re Estate of Schubert, — S.W.3d —, 2020 Tenn. App. LEXIS 419 (Tenn. Ct. App. Sept. 18, 2020).

11. Subject-matter Jurisdiction.

Neither a February 6, 2019 order nor a subsequent April 9, 2019 order in an uninsured motorist case contained the language required by Tenn. R. Civ. P. 54.02 stating that there was no just reason for delay of entry of a final order. In the absence of such language, neither order was final so as to confer subject matter jurisdiction over the appeal to the appellate court. Medders v. Newby, — S.W.3d —, 2020 Tenn. App. LEXIS 183 (Tenn. Ct. App. Apr. 24, 2020).

12. Motion to Revise.

Trial court did not abuse its discretion in denying the husband's motion to set aside judgment because his conduct in failing to respond to the complaint, in failing to meaningfully participate in the proceedings, and in failing to consult with legal counsel until after entry of the decree of divorce was deliberate and not adequately explained and thus, willful. Wilson v. Wilson, — S.W.3d —, 2020 Tenn. App. LEXIS 601 (Tenn. Ct. App. Feb. 12, 2021).

54.03. Demand for Judgment. A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings; but the court shall not give the successful party relief, though such party may be entitled to it, where the propriety of such relief was

not litigated and the opposing party had no opportunity to assert defenses to such relief.

NOTES TO DECISIONS

ANALYSIS

1. Amended Complaint.
2. Default Judgment.

1. Amended Complaint.

Where appellee was granted a default judgment against appellant, as appellee's amended complaint superseded the original complaint, appellee was properly awarded the amount of damages requested in the ad damnum clause of the amended complaint. H.G. Hill Realty Co., LLC v. Re/Max Carriage House, Inc., 428 S.W.3d 23, 2013 Tenn. App. LEXIS 474 (Tenn. Ct. App. July 23, 2013), appeal denied, H.G. Hill Realty Co., LLC v. Re/Max Carriage House Inc., — S.W.3d —, 2013 Tenn. LEXIS 897 (Tenn. Nov. 14, 2013).

2. Default Judgment.

Trial court did not award relief that was not requested by a wife because the wife sought her attorney's fees and costs and requested a default judgment against the husband's brother and sister-in-law; even with the existence of a default judgment entered against the husband's sister-in-law, the amount of damages owed to the wife was a matter to be resolved by the trial court. Sekik v. Abdelnabi, — S.W.3d —, 2020 Tenn. App. LEXIS 516 (Tenn. Ct. App. Nov. 18, 2020), vacated, — S.W.3d —, 2021 Tenn. App. LEXIS 11 (Tenn. Ct. App. Jan. 12, 2021), substituted opinion, — S.W.3d —, 2021 Tenn. App. LEXIS 10 (Tenn. Ct. App. Jan. 13, 2021).

54.04. Costs. (1) Costs included in the bill of costs prepared by the clerk shall be allowed to the prevailing party unless the court otherwise directs, but costs against the state, its officers, or its agencies shall be imposed only to the extent permitted by law.

(2) Costs not included in the bill of costs prepared by the clerk are allowable only in the court's discretion. Discretionary costs allowable are: reasonable and necessary court reporter expenses for depositions or trials, reasonable and necessary expert witness fees for depositions (or stipulated reports) and for trials, reasonable and necessary interpreter fees not paid pursuant to Tennessee Supreme Court Rule 42, and guardian ad litem fees; travel expenses are not allowable discretionary costs. Subject to Rule 41.04, a party requesting discretionary costs shall file and serve a motion within thirty (30) days after entry of judgment. The trial court retains jurisdiction over a motion for discretionary costs even though a party has filed a notice of appeal. The court may tax discretionary costs at the time of voluntary dismissal. In the event an appeal results in the final disposition of the case, under which there is a different prevailing party than the prevailing party under the trial court's judgment, the new prevailing party may request discretionary costs by filing a motion in the trial court, which motion shall be filed and served within thirty (30) days after filing of the appellate court's mandate in the trial court pursuant to Rule 43(a), Tenn. R. App. P. [As amended by order entered January 23, 1986, effective August 1, 1986, and order entered March 18, 1986, by order entered January 25, 1991, effective July 1, 1991, and by order entered January 28, 1993, effective July 1, 1993; and by order filed February 1, 1995, effective July 1, 1995; by order entered January 23, 2001, effective July 1, 2001; and by order entered December 10, 2003, effective July 1, 2004; by order entered January 6, 2005, effective July 1, 2005; and by order filed December 18, 2012, effective July 1, 2013.]

Advisory Commission Comments [1991]. Rule 54.04(3) [deleted in 2001] was formerly numbered Rule 43.06. It is moved here because it has to do with court costs rather than admissibility of evidence.

Advisory Commission Comments [1993]. The amendment to Rule 54.04 is consistent with the Supreme Court's opinion in *Lock v. National Union Fire Insurance Company of Pittsburgh, Pennsylvania*, 809 S.W.2d 483 (Tenn. 1991). The expanded rule defines discretionary costs, provides for a timely motion, and makes clear that a notice of appeal will not deprive the trial court of jurisdiction to entertain a motion for discretionary costs.

If the plaintiff takes a voluntary nonsuit, Rule 41.04 gives the trial judge discretion to require payment of costs upon recommencement of the action. Revised Rule 54.04 would permit assessment of costs at an earlier date, assuming the defendant submits and the court enters an order formally dismissing the case pursuant to plaintiff's nonsuit. A motion for discretionary costs in that instance must be made within thirty days of entry of the order.

Advisory Commission Comments [1995]. This is a clarifying amendment to Rule 54.04(2).

Advisory Commission Comments [2001]. Interpreter fees are added to the list in subsection (2). Consequently prior subsection (3) on court appointed interpreters is no longer needed, as subsection (2) covers both privately retained and judicially appointed interpreters.

Advisory Commission Comments [2004]. Some experts, including medical doctors, are furnishing reports stipulated by adversaries to be accurate and truthful, thereby avoiding the necessity of a deposition. The amendment to Rule 54.04(2) would allow recovery of related expenses as discretionary costs.

Advisory Commission Comments [2005]. In some cases, the "prevailing party" under the trial court's judgment may not be the prevailing party following an appeal of the judgment. The amendment to Rule 54.04(2) provides a procedure for requesting discretionary costs in cases in which: (1) the appellate court's decision is a final disposition of the merits of the case; and (2) the appellate court's decision results in a new prevailing party. The amendment does not cover cases in which the appellate court's decision is not a final disposition of merits of the case, i.e., cases that are remanded for a new trial or for other proceedings on the merits; in such cases, a motion for discretionary costs may be filed following the trial court's ultimate judgment on remand.

Advisory Commission Comments [2013]. Tenn. Sup. Ct. R. 42 was amended (effective July 1, 2012) to govern the payment of costs for services of interpreters used in proceedings covered by that rule. Rule 54.04(2) was amended to provide that any "reasonable and necessary interpreter fees not paid pursuant to Tennessee Supreme Court Rule 42" may be allowed as discretionary costs.

Advisory Commission Comments [2014]. 54.04: Effective July 1, 2012, Tennessee Code Annotated Section 20-12-119 was amended to add subsection (c) which authorizes the trial court, under certain circumstances, to award costs and reasonable and necessary attorney's fees to a party who prevails on a motion to dismiss for failure to state a claim upon which relief may be granted. Section 20-12-119(c) requires the party or parties whose claim or claims were dismissed to pay the awarded costs and fees.

Advisory Commission Comments [2018]. The 2018 amendment renumbers the current text of Rule 54.02 as subsection 54.02(1) and adds subsection 54.02(2), which, in conjunction with changes to Rule 24, Tennessee Rules of Civil Procedure, and Rules 3 and 4, Tennessee Rules of Appellate Procedure, provides for an appeal of right from a trial court's order granting or denying a motion to intervene. Effective July 1, 2018, any order granting or denying a motion to intervene shall be a final judgment, and a timely appeal of that final judgement shall be the only method to appeal the grant or denial of a motion to intervene.

Compiler's Notes. The amendment of Rule 54, as promulgated and adopted by the Supreme Court in its order dated December 10, 2003, was ratified and approved by 2004 House Resolution 233 and Senate Resolution 115. The order promulgating the amendment of Rule 54 provided that it take effect July 1, 2004.

The amendment of Rule 54, as promulgated and adopted by the Supreme Court in its order dated January 6, 2005, was ratified and approved by 2005 House Resolution 12 and Senate Resolution 7. The order promulgating the amendment of Rule 54 provided that it take effect July 1, 2005.

The amendment of Rule 54.04, which amended the second sentence of (2) and added the 2013 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 18, 2012, was ratified and approved by House Resolution 36 and Senate Resolution 12. The order promulgating the amendment of Rule 54.04(2) and the addition of the 2013 Advisory Commission Comments provided that it take effect July 1, 2013.

The amendment of Rule 54, which added the 2014 Advisory Commission Comments as promulgated and adopted by the Supreme Court in its order dated December 16, 2013, was ratified and approved by House Resolution 155 and Senate Resolution 73. The order promulgating the addition of the 2014 Advisory Commission Comments provided that it take effect July 1, 2014.

Cross-References. Costs, T.C.A. §§ 20-12-101 — 20-12-144.

Costs on equal demands of plaintiff and defendant, T.C.A. § 20-6-402.

Judgment molded to facts, T.C.A. § 20-6-403.

Nonjury cases, time for decision, T.C.A. § 20-9-506.

Procedure in actions on bonds, T.C.A. § 20-6-202.

Verdicts, T.C.A. §§ 20-9-502 — 20-9-505.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 236, 239, 505.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-54.02-1, 1-54.02-2, 1-54.04-1.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 23, 25, 28; 8 Tenn. Juris., Costs, § 4; 16 Tenn. Juris., Judgments and Decrees, §§ 21, 82.

Law Reviews. Judgments and Appeal, 4 Mem. St. U.L. Rev. 373.

Removal Jurisdiction (Donald F. Paine), 38 No. 2 Tenn. B.J. 19 (2002).

10 Significant Differences Between State and Federal Civil Procedure, 38 Tenn. B.J. 27 (2002).

Attorney General Opinions. A civil trial court has no authority to assess jurors' meals as discretionary costs, OAG 01-082 (5/18/01).

It would be inappropriate to attach guardian ad litem fees to a person's child support obligation because such fees are not child support, OAG 07-154 (11/21/07).

NOTES TO DECISIONS

ANALYSIS

1. Construction.
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4. Final Judgments.
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1. Construction.

It was not the legislative intent to curb the discretion afforded the trial court in awarding fees and costs under the provisions of T.C.A. § 20-12-119 and Tenn. R. Civ. P. 17.03 and 54.04 by the subsequent enactment of T.C.A. § 34-4-115 [repealed]. In re Webb, 675 S.W.2d 176, 1984 Tenn. App. LEXIS 2724 (Tenn. Ct. App. 1984).

2. Alimony.

A prayer for general relief is not sufficient to support an award of alimony in a case in which the judgment is taken by default. Qualls v. Qualls, 589 S.W.2d 906, 1979 Tenn. LEXIS 513 (Tenn. 1979).

3. Transcript Costs.

Chancellor acted outside his statutory authority in ordering department of human services to pay cost of preparation of transcript for appellant's in forma pauperis appeal. State Dep't of Human Services v. Ogle, 617 S.W.2d 652, 1980 Tenn. App. LEXIS 400 (Tenn. Ct. App. 1980).

4. Final Judgments.

Tenn. R. Civ. P. 54 requires as an absolute prerequisite to an appeal the certification by the trial judge, first, that the court has directed the entry of a final judgment as to one or more but fewer than all of the claims, and, second, make an express determination that there is no just reason for delay. Such certification by the trial judge creates a final judgment appealable as of right under T.R.A.P. 3, and in the absence of such direction and determination by the trial judge, the order is interlocutory and can be revised at any time before the entry of judgment adjudicating all the claims and rights and liabilities of all parties. Fox v. Fox, 657 S.W.2d 747, 1983 Tenn. LEXIS 644 (Tenn. 1983).

Where trial court's orders were not dispositive with respect to any one party or any entire claim, the orders were not reviewable under Tenn. R. Civ. P. 54.02. Town of Collierville v. Norfolk S. Ry. Co., 1 S.W.3d 68, 1998 Tenn. App. LEXIS 180 (Tenn. Ct. App. 1998).

Tenn. R. Civ. P. 54.03 may enable a plaintiff to claim an amount lower than the federal amount in controversy, but nevertheless, seek and recover damages exceeding the amount prayed for. Lewis v. Exxon Mobil Corp., 348 F. Supp. 2d 932, 2004 U.S. Dist. LEXIS 25289 (W.D. Tenn. 2004).

Customer's complaint sought judgment to be determined by a jury, for all incidental, consequential, compensatory and punitive damages; thus, in light of Tenn. R. Civ. P. 54.03, the corporation established that at the time of removal the amount in controversy was more likely than not more than $75,000. Lewis v. Exxon Mobil Corp., 348 F. Supp. 2d 932, 2004 U.S. Dist. LEXIS 25289 (W.D. Tenn. 2004).

5. Judgments Not Final.

Where in divorce action wife had multiple claims for relief and interlocutory decree awarded her attorneys' fees pendente lite and reserved all issues relating to alimony and attorneys' fees for the final hearing, the inter-

locutory decree was not final, was subject to revision at the final hearing, and wife could receive additional attorneys' fees pendente lite even though the husband won the suit, if she could show she did not have adequate means to pay attorneys' fees and litigation expenses. Fox v. Fox, 657 S.W.2d 747, 1983 Tenn. LEXIS 644 (Tenn. 1983).

Order denying class certification but allowing the putative class representative to pursue its individual claim did not adjudicate the claims of any parties as is minimally required by Tenn. R. Civ. P. 54.02 and was not appealable under T.R.A.P. 3. Bayberry Assocs. v. Jones, 783 S.W.2d 553, 1990 Tenn. LEXIS 40 (Tenn. 1990).

In a child custody case, a judge erred in failing to consider or review the original trial judge's parenting plan because it clearly did not resolve all the disputed matters in the pending divorce litigation. Therefore, despite the successor trial judge's apparent distaste for addressing an issue already addressed by the original trial judge, the order was not final. Shofner v. Shofner, 181 S.W.3d 703, 2004 Tenn. App. LEXIS 865 (Tenn. Ct. App. 2004), rehearing denied, 181 S.W.3d 703, 2005 Tenn. App. LEXIS 854 (Tenn. Ct. App. 2005), appeal denied, Shofner v. Kalisz, — S.W.3d —, 2005 Tenn. LEXIS 943 (Tenn. Oct. 24, 2005).

6. Multiple Claims.

Where tort action arising out of automobile accident was filed, and uninsured motorist claim was also filed, return of jury verdict only on tort claim, and adjournment of court without hearing proof of the uninsured motorist claim, did not preclude subsequent litigation of uninsured motorist claim in same court. Gatlin v. Tennessee Farmers Mut. Ins. Co., 741 S.W.2d 324, 1987 Tenn. LEXIS 1013 (Tenn. 1987).

An agreed order of release between plaintiff and one defendant from which no appeal was taken was interlocutory and subject to revision by trial court until entry of judgment in favor of other defendant when it became final, and trial court's vacation of latter judgment did not affect finality of release. Louis Dreyfus Corp. v. Austin Co., 868 S.W.2d 649, 1993 Tenn. App. LEXIS 488 (Tenn. Ct. App. 1993), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 430 (Tenn. 1993).

Assuming the trial court's action in enjoining plaintiff from filing further pleadings arising from the same facts as those in his federal suit was error, it was harmless in view of the finality of the trial judge's order dismissing the action for lack of subject matter jurisdiction. Oliver v. Hydro-Vac Servs., 873 S.W.2d 694, 1993 Tenn. App. LEXIS 749 (Tenn. Ct. App. 1993).

The request for an interlocutory appeal was unnecessary where the trial court had designated its order as final, and therefore the plaintiffs were entitled to an appeal as of right from such order. McCracken v. Brentwood United Methodist Church, 958 S.W.2d 792, 1997 Tenn. App. LEXIS 483 (Tenn. Ct. App. 1997).

Wrongful death claims were prosecuted from the beginning as separate from and unrelated to the probate case involving the conservatorship of the absentee's estate, so they were not the same action as contemplated by Tenn. R. Civ. P. 54.02; thus, the continuing pendency of the conservatorship did not affect the finality of the wrongful death judgment. March v. Levine, 115 S.W.3d 892, 2003 Tenn. App. LEXIS 219 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 771 (Tenn. Sept. 2, 2003).

In a case where the parents were convinced that the husband murdered the absentee, because the parent's wrongful death claims were prosecuted from the beginning as separate from and unrelated to the probate case involving the conservatorship of the absentee's estate, they were not the same action as contemplated by Tenn. R. Civ. P. 54.02; thus, the continuing pendency of the conservatorship did not affect the finality of the wrongful death judgment. March v. Levine, 115 S.W.3d 892, 2003 Tenn. App. LEXIS 219 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 771 (Tenn. Sept. 2, 2003).

7. Discretionary Costs.

It was the supreme court's intent that reasonable and necessary costs, in the preparation and trial of a case, could be assessed as discretionary costs by the trial court, and the awarding of such costs is a discretionary matter with the trial court. Lock v. National Union Fire Ins. Co., 809 S.W.2d 483, 1991 Tenn. LEXIS 154 (Tenn. 1991), rehearing denied, — S.W.2d —, 1991 Tenn. LEXIS 189 (Tenn. 1991).

The trial court did not abuse its discretion in commuting the widow's benefits, but erred in commuting the surviving children's benefits to a lump sum and in assessing the guardian ad litem's fees against the children's award instead of the defendant as discretionary costs. Perdue v. Green Branch Mining Co., 837 S.W.2d 56, 1992 Tenn. LEXIS 489 (Tenn. 1992).

The trial court had the authority to assess costs against the second injury fund as it would against any other party subject to a judgment, through its implied authority under Tenn. R. Civ. P. 54.04(1). Reagan v. American Policyholders' Ins. Co., 842 S.W.2d 249, 1992 Tenn. LEXIS 572 (Tenn. 1992), rehearing denied, — S.W.2d —, 1992 Tenn. LEXIS 629 (Tenn. Nov. 30, 1992).

Where defendant was not given a reasonable opportunity to prepare and present its defenses and objections to the motion for discretionary costs, the allowance of discretionary costs was an abuse of discretion. Oster, Div. of Sunbeam Corp. v. Yates, 845 S.W.2d 215, 1992 Tenn. LEXIS 713 (Tenn. Special Workers' Comp. App. Panel 1992).

Attorney's fees are not allowable as discretionary costs under Tenn. R. Civ. P. 54.04. Duncan v. DeMoss, 880 S.W.2d 388, 1994 Tenn. App. LEXIS 158 (Tenn. Ct. App. 1994).

In a will contest action, the testimony of an executor who was not employed by a party or appointed by the court was not "necessary expert testimony" and, thus, a discretionary costs award for the executor's time spent in defending the contest could not be justified as payment of expert witness fees under Tenn. R. Civ. P. 54.04. Duncan v. DeMoss, 880 S.W.2d 388, 1994 Tenn. App. LEXIS 158 (Tenn. Ct. App. 1994).

A vocational disability and rehabilitation expert was a "necessary expert" and his fee for appearing and testifying at trial was properly charged to the employer as a discretionary cost. Miles v. Marshall C. Voss Health Care Ctr., 896 S.W.2d 773, 1995 Tenn. LEXIS 147 (Tenn. 1995).

In a workers' compensation proceeding, a vocational expert's examination fee should be allowed as discretionary costs in those cases where the trial judge, based on the expert's testimony, makes the required findings and awards more than six times the medical impairment, and the court finds the expert's testimony to have been necessary to such findings. Ingram v. State Indus., 943 S.W.2d 381, 1995 Tenn. LEXIS 623 (Tenn. Special Workers' Comp. App. Panel 1995).

Grant of discretionary costs could not be made in the absence of an affidavit of grounds. DePriest v. 1717-19 West End Assocs., 951 S.W.2d 769, 1997 Tenn. App. LEXIS 154 (Tenn. Ct. App. 1997), rehearing denied, Depriest v. 1717-19 West End Assocs., — S.W.2d —, 1997 Tenn. App. LEXIS 191 (Tenn. Ct. App. 1997).

Assessment of costs against indigent is in discretion of trial court and will not be disturbed on appeal absent showing of abuse of discretion. Roberts v. Blount Mem. Hosp., 963 S.W.2d 744, 1997 Tenn. App. LEXIS 66 (Tenn. Ct. App. 1997), appeal denied, 963 S.W.2d 744, 1997 Tenn. LEXIS 484 (Tenn. 1997), overruled in part, Limbaugh v. Coffee Med. Ctr., 59 S.W.3d 73, 2001 Tenn. LEXIS 756 (Tenn. 2001).

Recovery of expert fees is limited to fees incurred for actual deposition or trial testimony, and does not include fees for preparation. Shahrdar v. Global Hous., Inc., 983 S.W.2d 230, 1998 Tenn. App. LEXIS 254 (Tenn. Ct. App. 1998), rehearing denied, Shahrdar v. Global Hous., — S.W.2d —, 1998 Tenn. App. LEXIS 336 (Tenn. Ct. App. 1998).

Trial court's assessment of discretionary costs against driver found by jury to be 100 percent at fault for automobile accident was not an abuse of discretion where plaintiff/victim was the prevailing party in the suit and, even though the defendant had offered the plaintiff $25,000 to settle the suit (the same amount awarded by the jury), the defendant's settlement offer was not a formal offer of judgment that would have entitled him to an award of costs. Sanders v. Gray, 989 S.W.2d 343, 1998 Tenn. App. LEXIS 719 (Tenn. Ct. App. 1998).

Trial court erred in requiring employer to pay for the "deposition for proof" of an expert witness taken by workers' compensation claimant's attorney where such witness testified at trial. Seals v. England/Corsair Upholstery Mfg. Co., 984 S.W.2d 912, 1999 Tenn. LEXIS 5 (Tenn. 1999).

Discretionary costs for guardian ad litem and court reporter expenses properly awarded to ex-wife in custody proceeding. Placencia v. Placencia, 3 S.W.3d 497, 1999 Tenn. App. LEXIS 232 (Tenn. Ct. App. 1999).

The trial court did not abuse its discretion when denying defendant's motion for discretionary costs in what was a good faith disagreement regarding a boundary dispute between neighbors based on the findings of two licensed, experienced surveyors. Mix v. Miller, 27 S.W.3d 508, 1999 Tenn. App. LEXIS 670 (Tenn. Ct. App. 1999).

The appointment of an interpreter is in the discretion of the trial court considering the drastic nature of a termination of parental rights case, it is particularly incumbent upon the trial court to be careful in exercising discretion for the appointment of an interpreter. In re Valle, 31 S.W.3d 566, 2000 Tenn. App. LEXIS 107 (Tenn. Ct. App. 2000).

There is no bright line rule which limits discretionary costs for expert witnesses to those fees incurred from actual testimony. Stalsworth v. Grummons, 36 S.W.3d 832, 2000 Tenn. App. LEXIS 279 (Tenn. Ct. App. 2000).

The granting of a Tenn. R. Civ. P. 54.04(2) motion is discretionary with the trial court, and if the trial court never has an opportunity to exercise such discretion, further inquiry would be pure guess work. Walker v. Sidney Gilreath & Assocs., 40 S.W.3d 66, 2000 Tenn. App. LEXIS 475 (Tenn. Ct. App. 2000), review or rehearing denied, — S.W.3d —, 2001 Tenn. LEXIS 237 (Tenn. 2001).

Decisions to award expenses under Tenn. R. Civ. P. 54.04(2) are discretionary. Courts generally award discretionary costs if they are reasonable and if the prevailing party has filed a timely, properly supported motion. Scholz v. S.B. Int'l, Inc., 40 S.W.3d 78, 2000 Tenn. App. LEXIS 588 (Tenn. Ct. App. 2000).

Awards of discretionary costs under Tenn. R. Civ. P. 54.04(2) are not intended to punish the defendant either for its conduct that caused the litigation or for its conduct during the litigation; rather, they represent another step toward making an injured plaintiff whole. Scholz v. S.B. Int'l, Inc., 40 S.W.3d 78, 2000 Tenn. App. LEXIS 588 (Tenn. Ct. App. 2000).

Trial court erred in denying the insurer's motion for discretionary costs as the insurer was the prevailing party and there was no

evidence the insurer engaged in any conduct during the litigation that would disentitle it to recover its costs; the insurer, however, was only entitled to those costs that were reasonable and necessary to the litigation. Mass. Mut. Life Ins. Co. v. Jefferson, 104 S.W.3d 13, 2002 Tenn. App. LEXIS 636 (Tenn. Ct. App. 2002), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 43 (Tenn. 2003), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 772 (2003).

In a negligence case, a court erred by awarding plaintiff discretionary costs where plaintiff's expert's fees incident to the preparation of his Tenn. R. Civ. P. 59.04 motion were not fees for giving testimony at deposition or trial. Waggoner Motors, Inc. v. Waverly Church of Christ, 159 S.W.3d 42, 2004 Tenn. App. LEXIS 604 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2005 Tenn. LEXIS 164 (Tenn. Feb. 28, 2005).

Trial court erred in awarding discretionary costs to a doctor in a medical malpractice case under Tenn. R. Civ. P. 54.04 where the doctor expert failed to submit any affidavit supporting his motion for expert fees, and the exhibit to his motion merely listed the names of his experts, a date, and an amount. Carpenter v. Klepper, 205 S.W.3d 474, 2006 Tenn. App. LEXIS 181 (Tenn. Ct. App. 2006), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 901 (Tenn. 2006).

Record was insufficient to permit the court to discern what portion of an award of discretionary costs for an expert's fee, if any, was attributable to trial preparation, the award of the expert's fee was error, and the case was remanded to the trial court to award expert fees only for items permitted under Tenn. R. Civ. P. 54.04(2). Chaffin v. Ellis, 211 S.W.3d 264, 2006 Tenn. App. LEXIS 200 (Tenn. Ct. App. 2006), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 867 (Tenn. 2006).

Trial court erred in awarding discretionary costs to a doctor's employer in a medical malpractice case under Tenn. R. Civ. P. 54.04, where neither the motion, the exhibit to the motion, nor the affidavit, provided a sufficient explanation of which of the many fees listed for an expert witness represented his fee for attending the trial. Carpenter v. Klepper, 205 S.W.3d 474, 2006 Tenn. App. LEXIS 181 (Tenn. Ct. App. 2006), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 901 (Tenn. 2006).

Subdivision that had filed suit against a lot owner to enforce recorded restrictive covenants was entitled to recover discretionary costs that were necessary and reasonable including court reporter expenses but was not entitled to recover document and photography expenses because those were not among the costs specifically identified in Tenn. R. Civ. P. 54.04(2). Trundle v. Park, 210 S.W.3d 575, 2006 Tenn. App. LEXIS 474 (Tenn. Ct. App. 2006), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 1172 (Tenn. 2006).

When a mother voluntarily dismissed a wrongful death suit against a railroad and a conductor brought in the mother's individual capacity, as well as the mother's representative capacity as administratrix of the decedent's estate, it was not error to award the railroad and conductor discretionary costs because: (1) The trial court correctly limited the award to costs specifically identified in Tenn. R. Civ. P. 54.04(2) and denied costs that were not; and (2) Defendants' submissions showed the costs were both reasonable and necessary. Freeman v. CSX Transp., Inc., 359 S.W.3d 171, 2010 Tenn. App. LEXIS 691 (Tenn. Ct. App. Nov. 3, 2010).

When a mother voluntarily dismissed a wrongful death suit against a railroad and a conductor brought in the mother's individual capacity, as well as the mother's representative capacity as administratrix of the decedent's estate, it was not error to award the railroad and conductor discretionary costs because the award was not premature, despite the mother's announced intent to re-file, because: (1) Under Tenn. R. Civ. P. 54.04(2), discretionary costs could be taxed at the time of voluntary dismissal and before re-filing; and (2) The voluntary dismissal made defendants prevailing parties whether or not suit was re-filed. Freeman v. CSX Transp., Inc., 359 S.W.3d 171, 2010 Tenn. App. LEXIS 691 (Tenn. Ct. App. Nov. 3, 2010).

When a mother voluntarily dismissed a wrongful death suit against a railroad and a conductor brought in the mother's individual capacity, as well as the mother's representative capacity as administratrix of the decedent's estate, it was not error to award the railroad and conductor discretionary costs against the mother in the mother's individual capacity because the mother brought suit in the mother's individual capacity. Freeman v. CSX Transp., Inc., 359 S.W.3d 171, 2010 Tenn. App. LEXIS 691 (Tenn. Ct. App. Nov. 3, 2010).

Trial court did not err by awarding $9,000 for defendants' discretionary costs because the record was devoid of any proof suggesting that the costs awarded were not of the type specifically identified in Tenn. R. Civ. P. 54.04, that the costs were not reasonable and necessary, or that defendants engaged in conduct that would warrant depriving them of their discretionary costs. Barnett v. Tenn. Orthopaedic Alliance, 391 S.W.3d 74, 2012 Tenn. App. LEXIS 659 (Tenn. Ct. App. Sept. 19, 2012), appeal dismissed, — S.W.3d —, 2013 Tenn. LEXIS 1 (Tenn. Jan. 2, 2013).

Jury found that plaintiffs had zero damages, and there was no conduct by defendant that justified denying defendant discretionary costs, and the case was remanded for a determination of that award. Boggs v. Rhea, 459 S.W.3d 539, 2014 Tenn. App. LEXIS 720 (Tenn. Ct. App.

Nov. 6, 2014), appeal denied, — S.W.3d —, 2015 Tenn. LEXIS 129 (Tenn. Feb. 12, 2015).

Trial court did not deny a father procedural due process because it held a telephonic, nonevidentiary hearing on a mother's motion for discretionary costs because it provided the father a meaningful opportunity to be heard; the father failed to cite to any authority supporting his contention that due process required an evidentiary hearing before awarding discretionary costs, Nelson v. Justice, — S.W.3d —, 2019 Tenn. App. LEXIS 36 (Tenn. Ct. App. Jan. 25, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 472 (Tenn. Sept. 18, 2019).

Father failed to prove that the trial court abused its discretion in awarding a mother discretionary costs because it limited the mother's recovery of discretionary costs to fees recoverable under subsection (2) and declined to award her fees she had already recovered; the trial court found that the mother was the prevailing party and that she had not engaged in conduct to justify depriving her of discretionary costs. Nelson v. Justice, — S.W.3d —, 2019 Tenn. App. LEXIS 36 (Tenn. Ct. App. Jan. 25, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 472 (Tenn. Sept. 18, 2019).

Trial court erred in denying a wife's motion for discretionary costs because the court prematurely denied the motion before the wife timely filed the motion and then, after the wife filed the motion, a different judge denied the motion on res judicata grounds, so the motion was never adjudicated on the merits or lack thereof. Ellis v. Ellis, — S.W.3d —, 2019 Tenn. App. LEXIS 61 (Tenn. Ct. App. Jan. 31, 2019).

Because the appellate court reversed the trial court's allocation of attorneys' fees, which was the basis for the assessment of discretionary costs against the workers' compensation carrier, the reversal of the assessment of discretionary costs and remand with instructions for the trial court to reconsider the issue was appropriate. Cordova ex rel. Alfredo C. v. Nashville Ready Mix, Inc., — S.W.3d —, 2020 Tenn. App. LEXIS 225 (Tenn. Ct. App. May 19, 2020).

8. Dismissals.

When the court grants a motion to dismiss for failure to state a claim, only extraordinary circumstances would prohibit the plaintiff from exercising the right to amend its complaint. Richland Country Club, Inc. v. CRC Equities, Inc., 832 S.W.2d 554, 1991 Tenn. App. LEXIS 987 (Tenn. Ct. App. 1991).

Court of appeals permitted negligent infliction of emotional distress claims to proceed after trial court designated its order dismissing the claims as final and immediately appealable under Tenn. R. Civ. P. 54.02. Eskin v. Bartee, 262 S.W.3d 727, 2008 Tenn. LEXIS 535 (Tenn. Aug. 14, 2008).

9. Costs Against State.

The statutory power under T.C.A. § 37-1-150 to assess costs against the state is in derogation of the state's sovereignty and must be strictly construed. In re Harris, 849 S.W.2d 334, 1993 Tenn. LEXIS 56 (Tenn. 1993).

The state may not be taxed discretionary or litigation costs absent an express legislative mandate. Phillips v. Tennessee Tech. Univ., 984 S.W.2d 217, 1998 Tenn. LEXIS 715 (Tenn. 1998).

The state may be liable for fees charged to a workers' compensation claimant by a treating physician or specialist, as provided in T.C.A. § 50-6-226(c)(1). Phillips v. Tennessee Tech. Univ., 984 S.W.2d 217, 1998 Tenn. LEXIS 715 (Tenn. 1998).

The state was not required to reimburse claimant for the cost of a court reporter for the claimant's discovery deposition, nor for the fee charged by a vocational disability expert for appearance at trial. Phillips v. Tennessee Tech. Univ., 984 S.W.2d 217, 1998 Tenn. LEXIS 715 (Tenn. 1998).

City council member who made a threshold showing of a violation of the Tennessee Open Meetings Act, T.C.A. §§ 8-44-101 to 8-44-111, had standing as a citizen rather than as a taxpayer because there was no indication that he had demanded remedial measures prior to filing suit and was entitled under the American Rule and Tenn. R. Civ. P. 54.04(2) to costs but not attorney fees in obtaining a halt to council action without public notice. Fannon v. City of LaFollette, 329 S.W.3d 418, 2010 Tenn. LEXIS 1207 (Tenn. Dec. 21, 2010).

10. Default Judgments.

A motion to amend a complaint to increase damages was required to be served on defendants who had defaulted in a personal injury action. Holder v. Drake, 908 S.W.2d 393, 1995 Tenn. LEXIS 563 (Tenn. 1995), rehearing denied, — S.W.2d —, 1995 Tenn. LEXIS 666 (Tenn. Nov. 6, 1995).

Tenn. R. Civ. P. 54 is consistent with prior case law holding that a judgment or a decree which is beyond the fair scope of the pleadings is void. Electric Controls v. Ponderosa Fibres of Am., 19 S.W.3d 222, 1999 Tenn. App. LEXIS 678 (Tenn. Ct. App. 1999).

A default judgment may not extend to matters outside the issues raised by the pleadings or beyond the scope of the relief demanded. Electric Controls v. Ponderosa Fibres of Am., 19 S.W.3d 222, 1999 Tenn. App. LEXIS 678 (Tenn. Ct. App. 1999).

Judgments for attorney's fees could not be sustained because the judgment awarded relief that exceeded the scope of the relief requested in the cross-claims. Electric Controls v. Ponderosa Fibres of Am., 19 S.W.3d 222, 1999 Tenn. App. LEXIS 678 (Tenn. Ct. App. 1999).

11. Standard of Proof.

The "newly discovered evidence" standard need not be satisfied before a trial court revises a partial summary judgment under Tenn. R.

Civ. P. 54.02 on the basis of additional evidence. Trial courts must undertake the following balancing analysis and consider, when applicable: (1) The movant's efforts to obtain evidence to respond to the motion for summary judgment; (2) The importance of the newly submitted evidence to the movant's case; (3) The explanation offered by the movant for its failure to offer the newly submitted evidence in its initial response to the motion for summary judgment; (4) The likelihood that the nonmoving party will suffer unfair prejudice and; (5) Any other relevant factor. Harris v. Chern, 33 S.W.3d 741, 2000 Tenn. LEXIS 687 (Tenn. 2000).

A trial court's ruling on a motion to revise pursuant to Tenn. R. Civ. P. 54.02 will be overturned only when the trial court has abused its discretion. Harris v. Chern, 33 S.W.3d 741, 2000 Tenn. LEXIS 687 (Tenn. 2000).

12. Summary Judgment.

The trial court erred in granting summary judgment on the basis that the evidence in the record was insufficient to establish damages without resorting to "pure speculation"; taken to its logical conclusion, this position would completely insulate an attorney for a party from the consequences of failure to file a Tenn. R. Civ. P. 54.04(2) motion in any case, no matter how meritorious the motion might be. Walker v. Sidney Gilreath & Assocs., 40 S.W.3d 66, 2000 Tenn. App. LEXIS 475 (Tenn. Ct. App. 2000), review or rehearing denied, — S.W.3d —, 2001 Tenn. LEXIS 237 (Tenn. 2001).

When additional evidence is submitted in support of a Tenn. R. Civ. P 54.02 motion to revise a grant of summary judgment, a trial court should consider, when applicable: (1) The movant's efforts to obtain evidence to respond to the motion for summary judgment; (2) The importance of the newly submitted evidence to the movant's case; (3) The explanation offered by the movant for its failure to offer the newly submitted evidence in its initial response to the motion for summary judgment; (4) The likelihood that the nonmoving party will suffer unfair prejudice; and (5) Any other relevant factor. Kenyon v. Handal, 122 S.W.3d 743, 2003 Tenn. App. LEXIS 196 (Tenn. Ct. App. 2003), appeal denied, Kenyon v. Handal, M.D., — S.W.3d —, 2003 Tenn. LEXIS 906 (Tenn. 2003).

Court of Appeals of Tennessee, at Nashville, has consistently used the *Harris v. Chern* standards to review Tenn. R. Civ. P. 59.04 motions. The *Harris v. Chern* factors overlap the factors courts consider under Tenn. R. Civ. P. 6.02 when a party requests an enlargement of time after a deadline has passed; both analyses consider a party's efforts to obtain the needed information, the party's reasons for failing to present the information in a timely manner, and the prejudice to the opposing party. Kenyon v. Handal, 122 S.W.3d 743, 2003 Tenn. App. LEXIS 196 (Tenn. Ct. App. 2003), appeal denied, Kenyon v. Handal, M.D., — S.W.3d —, 2003 Tenn. LEXIS 906 (Tenn. 2003).

Trial court had not erred in granting a doctor's motion to dismiss, which was predicated upon the doctrine of res judicata because the suit against him was barred by an earlier grant of summary judgment to him. The earlier order had been entered pursuant to Tenn. R. Civ. P. 54.02 and it was not appealed from and, with the passage of time, became final. Norris v. East Tenn. Children's Hosp., 195 S.W.3d 78, 2005 Tenn. App. LEXIS 684 (Tenn. Ct. App. 2005), appeal denied, Norris v. E. Tenn. Children's Hosp., — S.W.3d —, 2006 Tenn. LEXIS 544 (Tenn. June 5, 2006).

13. Prevailing Party.

Since plaintiff was found less at fault in multiple tortfeasor litigation than the combined fault of all other persons to whom fault was attributed by the jury, he was a "prevailing party" against automobile company, despite that both plaintiff and automobile company were found to be 13 percent at fault. Walker v. Sidney Gilreath & Assocs., 40 S.W.3d 66, 2000 Tenn. App. LEXIS 475 (Tenn. Ct. App. 2000), review or rehearing denied, — S.W.3d —, 2001 Tenn. LEXIS 237 (Tenn. 2001).

Under the holding on appeal, the guardian ad litem was no longer the prevailing party and the award of discretionary costs against the insurer was reversed. Progressive Casualty Ins. Co. v. Chapin, 243 S.W.3d 553, 2007 Tenn. App. LEXIS 410 (Tenn. Ct. App. July 5, 2007).

Trial court's award of discretionary costs to a doctor and his employer was vacated because they were no longer prevailing parties. McKenzie v. Women's Health Servs. -Chattanooga, P.C., — S.W.3d —, 2018 Tenn. App. LEXIS 484 (Tenn. Ct. App. Aug. 20, 2018), review denied and ordered not published, McKenzie v. Women's Health Services-Chattanooga, P.C., — S.W.3d —, 2019 Tenn. LEXIS 37 (Tenn. Feb. 20, 2019).

At trial, plaintiffs did not prevail on any issue and they were not entitled to recover the expense of their surveyor because this expert's opinion agreed with defendants' surveyor and was contrary to the apparent position plaintiffs personally took; defendants prevailed in their nuisance action, which was upheld on appeal, even if the remedies were curtailed, and thus plaintiff's request for costs was denied. Stinson v. Mensel, — S.W.3d —, 2019 Tenn. App. LEXIS 233 (Tenn. Ct. App. May 17, 2019).

14. Allowable Costs.

In an action stemming from an automobile accident, an award of fees charged by court reporters to attend pretrial hearings was not allowable under Tenn. R. Civ. P. 54.04(2); additionally, fees charged by the driver's witnesses to prepare for trial were also not permitted. Duran v. Hyundai Motor Am., Inc., 271 S.W.3d

178, 2008 Tenn. App. LEXIS 79 (Tenn. Ct. App. Feb. 13, 2008), rehearing denied, 271 S.W.3d 178, 2008 Tenn. App. LEXIS 127 (Tenn. Ct. App. Feb. 27, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 632 (Tenn. Aug. 25, 2008).

In a conservatorship action in which an attorney ad litem was appointed to represent respondent, the trial court did not have discretion to charge any portion of the attorney ad litem's fees to any party but respondent pursuant to T.C.A. § 34-1-125(b) because fees of an attorney ad litem were not listed as allowable costs under Tenn. R. Civ. P. 54.04; and the legislature's specific statutory mandate in T.C.A. § 34-1-125(b) to charge the cost of the attorney ad litem to respondent would prevail over the general provisions in Tenn. R. Civ. P. 17.03 and 54.04. In re Allen, — S.W.3d —, 2020 Tenn. App. LEXIS 160 (Tenn. Ct. App. Apr. 15, 2020).

15. Costs Properly Awarded.

Trial court did not abuse its discretion by including in its award of discretionary costs of $11,764.28 costs relating to videographer fees as the trial court's order specifically stated that these costs reflected those costs in the affidavit of the attorney minus the costs for videographers; thus, the court concluded that the videographer charges were not included in the $11,764.28. Mitchell v. Jackson Clinic, P.A., 420 S.W.3d 1, 2013 Tenn. App. LEXIS 240 (Tenn. Ct. App. Apr. 9, 2013), appeal denied, — S.W.3d —, 2013 Tenn. LEXIS 811 (Tenn. Oct. 17, 2013).

Court reviewed the affidavit and supporting documentation filed by appellees' attorney in support of their motion for discretionary costs and could not conclude that the award of $11,764.28 was outside the range of reasonableness or that the award constituted an abuse of the trial court's discretion by inclusion of costs that were specifically excluded under Tenn. R. Civ. P. 54.04. Mitchell v. Jackson Clinic, P.A., 420 S.W.3d 1, 2013 Tenn. App. LEXIS 240 (Tenn. Ct. App. Apr. 9, 2013), appeal denied, — S.W.3d —, 2013 Tenn. LEXIS 811 (Tenn. Oct. 17, 2013).

Trial court did not award relief that was not requested by a wife because the wife sought her attorney's fees and costs and requested a default judgment against the husband's brother and sister-in-law; even with the existence of a default judgment entered against the husband's sister-in-law, the amount of damages owed to the wife was a matter to be resolved by the trial court. Sekik v. Abdelnabi, — S.W.3d —, 2020 Tenn. App. LEXIS 516 (Tenn. Ct. App. Nov. 18, 2020), vacated, — S.W.3d —, 2021 Tenn. App. LEXIS 11 (Tenn. Ct. App. Jan. 12, 2021), substituted opinion, — S.W.3d —, 2021 Tenn. App. LEXIS 10 (Tenn. Ct. App. Jan. 13, 2021).

16. Motion to Alter or Amend Judgment.

As appellant's timely post-trial motion, asking the trial court to correct erroneous factual and evidentiary rulings and legal errors, was in substance a motion to alter or amend or for a new trial under Tenn. R. Civ. P. 52.02 and 59.04, and as appellant timely filed a notice of appeal after the trial court denied the motion, the appellate court had subject matter jurisdiction to hear the appeal under T.R.A.P. 4(b). U.S. Bank, N.A. v. Tenn. Farmers Mut. INS. Co., 410 S.W.3d 820, 2012 Tenn. App. LEXIS 826 (Tenn. Ct. App. Nov. 29, 2012), appeal denied, U.S. Bank v. Tenn. Farmers Mut. Ins. Co., — S.W.3d —, 2013 Tenn. LEXIS 468 (Tenn. May 8, 2013).

17. Timeliness of Appeal.

Trial court did not reach a conclusion as to plaintiff's motion for discretionary costs at the October 6, 2017 hearing, and it was not ruled upon in its October 13, 2017 order; instead, plaintiff filed an amended motion for discretionary costs on January 18, 2018, which the trial court granted the next day, and this did not affect the timeliness of defendant's appeal, as the retention of the issue of discretionary costs did not prevent a judgment from being final for purposes of appeal. Boyd v. BNSF Ry. Co., 596 S.W.3d 712, 2018 Tenn. App. LEXIS 736 (Tenn. Ct. App. Sept. 12, 2018), appeal denied, Boyd v. BNSF Ry. Co., — S.W.3d —, 2019 Tenn. LEXIS 235 (Tenn. May 20, 2019).

Because the trial court's June 5, 2018 order fully adjudicated all of the substantive claims other than the assessment of discretionary costs, the time for filing a notice of appeal of the trial court's substantive rulings began to run on June 5, 2018. Plaintiffs' notice of appeal, filed on July 23, 2018, was therefore untimely, and the appeal was subject to dismissal for lack of subject matter jurisdiction. Gunn v. Jefferson Cty. Econ. Dev. Oversight Comm., Inc., — S.W.3d —, 2019 Tenn. App. LEXIS 144 (Tenn. Ct. App. Mar. 25, 2019).

RULE 55

DEFAULT

55.01. Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, judgment by default may

be entered as follows:

The party entitled to a judgment by default shall apply to the court. Except for cases where service was properly made by publication, all parties against whom a default judgment is sought shall be served with a written notice of the application at least five days before the hearing on the application, regardless of whether the party has made an appearance in the action. A party served by publication is entitled to such notice only if that party has made an appearance in the action. No judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute. [As amended by order filed January 8, 2009, effective July 1, 2009.]

Advisory Commission Comments [2009]. The amendment to Rule 55.01 deletes the requirement of notice of application for a default judgment where service is properly made by publication, unless an appearance has been made.

Compiler's Notes. The amendment of Rule 55, as promulgated and adopted by the Supreme Court in its order dated January 8, 2009, was ratified and approved by 2009 House Resolution 15 and Senate Resolution 16. The order promulgating the amendment of Rule 55 provided that it take effect July 1, 2009.

Attorney General Opinions. A court has authority to enter a default judgment of contempt in a proceeding for civil contempt if the alleged contemnor fails to respond or appear, as long as the alleged contemnor has been provided with proper notice and the opportunity to respond. OAG 15-36, 2015 Tenn. AG LEXIS 36 (4/21/15).

NOTES TO DECISIONS

1. Proper Entry of Default Judgment.

Trial court did not err in piercing the corporate veil and granting a default judgment against a corporation's president because, by failing to answer appellee's complaint, the president admitted its allegations that the corporation was grossly undercapitalized, that corporate formalities were not observed, and that the president diverted money earmarked for appellee for his own benefit. H.G. Hill Realty Co., LLC v. Re/Max Carriage House, Inc., 428 S.W.3d 23, 2013 Tenn. App. LEXIS 474 (Tenn. Ct. App. July 23, 2013), appeal denied, H.G. Hill Realty Co., LLC v. Re/Max Carriage House Inc., — S.W.3d —, 2013 Tenn. LEXIS 897 (Tenn. Nov. 14, 2013).

55.02. Setting Aside Default. For good cause shown the court may set aside a judgment by default in accordance with Rule 60.02.

NOTES TO DECISIONS

1. Denial of Motion to Set Aside Default Judgment.

Trial court did not err in denying apartment owner's motion to set aside default judgment, Tenn. R. Civ. P. 55.02, in favor of the resident because the owner failed to demonstrate a meritorious defense in its motion to set aside the default judgment, Tenn. R. Civ. P. 60.02(1); the owner did not present evidence showing that it exercised reasonable diligence. Pryor v. Rivergate Meadows Apt. Assocs. L.P., 338 S.W.3d 882, 2009 Tenn. App. LEXIS 181 (Tenn. Ct. App. May 1, 2009), appeal denied, — S.W.3d —, 2009 Tenn. LEXIS 785 (Tenn. Nov. 23, 2009).

Default judgment in a customer's action against a bank arising out of unauthorized charges to a checking account should have been vacated under Tenn. R. Civ. P. 55.02 because the bank demonstrated grounds under Tenn. R. Civ. P. 60.02(1) by showing excusable neglect by counsel as to who was handling the case, a

meritorious defense based on federal banking law, and that the customer did not argue and would not be prejudiced by setting aside the judgment and proceeding to trial. Patterson v. Suntrust Bank, 328 S.W.3d 505, 2010 Tenn. App. LEXIS 305 (Tenn. Ct. App. Apr. 30, 2010), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 1066 (Tenn. Nov. 12, 2010).

Appellant was not entitled to relief from a default judgment; because he did not meet his burden to show that his failure to answer was not willful but was due to excusable neglect, whether he set forth a meritorious defense to the underlying action was irrelevant. H.G. Hill Realty Co., LLC v. Re/Max Carriage House, Inc., 428 S.W.3d 23, 2013 Tenn. App. LEXIS 474 (Tenn. Ct. App. July 23, 2013), appeal denied, H.G. Hill Realty Co., LLC v. Re/Max Carriage House Inc., — S.W.3d —, 2013 Tenn. LEXIS 897 (Tenn. Nov. 14, 2013).

Trial court erred in terminating the mother's parental rights by default because the default was not willful; she informed the court of the progress she made to improve herself in her attempt to reunite with the child and provided documentation in support of her assertion; and the level of prejudice that could occur to the non-defaulting party was minimal in comparison to the insurmountable injustice that occurred as a result of the termination; thus, under this rule, the trial court's refusal to set aside the default judgment was against logic. In re Abigail J. J., — S.W.3d —, 2021 Tenn. App. LEXIS 99 (Tenn. Ct. App. Mar. 15, 2021).

55.03. Plaintiffs, Counterclaims, Cross-Claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54.03.

55.04. Judgment Against the State of Tennessee. No judgment by default shall be entered against the state of Tennessee or any officer or agency thereof unless the claimant establishes his or her claim or right to relief by evidence satisfactory to the court. [Amended by order effective July 1, 1996; and by order effective July 1, 1997; and by order effective July 1, 1998; and by order entered January 28, 2000, effective July 1, 2000.]

Advisory Commission Comments [1996]. The amendment to Rule 55.01 requires notice even to nonappearing parties. One reason for the change is the liberal Tennessee case law allowing Rule 60 relief.

Advisory Commission Comments [1997]. This amendment is technical. Rearrangement of language is intended for clarity.

Advisory Commission Comments [1998]. The former five-day rule has been expanded to thirty days. Consequently, the defendant must be served with written notice of the application at least thirty days before the default hearing.

Advisory Commission Comments [2000]. The amendment [to Rule 55.01] returns the 30 day notice concerning default back to 5 days. Consult Rule 5.02, allowing service by mail, and Rule 6.05, mandating an extra 3 days if mail is used. Also, because Rule 6.01 requires exclusion of weekends and holidays in computing time periods shorter than 11 days, a default judgment on a given Friday after a holiday would require mailing the notice on Monday of the *previous* week.

Advisory Commission Comments [2013]. Tenn. R. Civ. P. 3A ("Enforcement of Foreign Judgments") was adopted in 2013. With the adoption of Rule 3A, no motion for default or entry of a default judgment is required before the clerk may issue requested execution upon a properly enrolled, undisputed foreign judgment.

Compiler's Notes. The amendment of Rule 55, which added the 2013 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 18, 2012, was ratified and approved by House Resolution 36 and Senate Resolution 12. The order promulgating the addition of the 2013 Advisory Commission Comments provided that it take effect July 1, 2013.

Cross-References. Procedure in actions on bonds, T.C.A. § 20-6-202.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 97, 140, 141, 143, 346.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-55.01-1, 1-55.01-2.

Tennessee Jurisprudence. 16 Tenn. Juris., Judgments and Decrees, §§ 79, 80, 82-84.

Law Reviews. A Survey of Civil Procedure in Tennessee — 1977, VI. Motions After Trial (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 357.

Amended Rules (Donald F. Paine), 36 No. 6 Tenn. B.J. 13 (2000).

Asserting Failure to State a Claim After Default Judgment Under Both the Federal and Tennessee Rules of Civil Procedure, 30 U. Mem. L. Rev. 131 (1999).

Discovery, 4 Mem. St. U.L. Rev. 310.

Judgments and Appeal, 4 Mem. St. U.L. Rev. 373.

Service of Process Upon Foreign Defendants Under the Hague Convention (Michael L. Silhol), 28 No. 5 Tenn. B.J. 20 (1992).

Symposium: Default Judgments, 9 Mem. St. U.L. Rev. 491.

Tennessee Civil Procedure — Notice of Appeal from General Sessions to Circuit Court, 41 Tenn. L. Rev. 369.

The Tennessee Court System — Circuit Court (Frederic S. Le Clercq), 8 Mem. St. U.L. Rev. 241.

NOTES TO DECISIONS

ANALYSIS

1. In General.
2. Waiver.
3. Jurisdiction.
4. Sufficiency of Responsive Pleading.
5. Notice to Opposing Counsel.
6. Notice Not Required.
7. Appearance.
8. Meritorious Defense.
9. Discretion of Court.
10. Choice of Remedies.
11. Scope of Relief.
12. Discretionary Costs.

1. In General.

Because of the similarity between default judgments and dismissals, those factors that are used to determine if a default judgment should be vacated under Tenn. R. Civ. P. 60.02(1), including whether the default was willful, whether the defendant has a meritorious defense, and whether the non-defaulting party would be prejudiced if relief were granted, these same factors should apply in cases when relief from an order of dismissal is sought under Tenn. R. Civ. P. 60.02(1). Henry v. Goins, 104 S.W.3d 475, 2003 Tenn. LEXIS 409 (Tenn. 2003).

2. Waiver.

Where defendant in divorce suit insisted that plaintiff's failure to answer counter complaint resulted in admission of facts alleged, court held that rule is not interpreted to mean that party can go to trial without calling to attention of trial court the complete absence of necessary pleadings, and where defendant did not make application for default judgment, it was waived. Edwards v. Edwards, 501 S.W.2d 283, 1973 Tenn. App. LEXIS 312 (Tenn. Ct. App. 1973).

3. Jurisdiction.

Within both the letter and the spirit of Tenn. R. Civ. P. 55, the attorney representing the husband had "appeared" in the wife's suit, for divorce, where the process had his name signed to it as having accepted service on behalf of the husband, in accord with the condition prescribed by the attorney for the wife before accepting service for his client in a suit for divorce by the husband, the day both suits were filed. Wright v. Roberts, 573 S.W.2d 468, 1978 Tenn. LEXIS 670 (Tenn. 1978).

4. Sufficiency of Responsive Pleading.

A motion for summary judgment filed in accordance with the applicable rule is a sufficient pleading to preclude a default judgment. Creed v. Valentine, 967 S.W.2d 325, 1997 Tenn. App. LEXIS 568 (Tenn. Ct. App. 1997).

5. Notice to Opposing Counsel.

Suspension of attorney from the practice of law for a period of six months was justified by his unethical and unprofessional conduct in advising his client in a divorce action to violate a restraining order and in surreptitiously taking a default judgment and final decree of divorce without notice to opposing counsel who had appeared in the case and without notice to the judge who awarded the decree that the opposing attorney's client had a divorce action pending in another division of the court that had been filed prior to the wife's action. Wright v. Roberts, 573 S.W.2d 468, 1978 Tenn. LEXIS 670 (Tenn. 1978).

Lack of notice to defendant that case was going to be tried amounted to a collateral attack on the circuit court's default judgment because the circuit court violated defendant's right to due process. Cumberland Bank v. Smith, 43 S.W.3d 908, 2000 Tenn. App. LEXIS 676 (Tenn. Ct. App. 2000).

6. Notice Not Required.

A defendant who had not appeared in the action was not entitled to notice five days prior to the hearing on the application for judgment. Patterson v. Rockwell International, 665 S.W.2d 96, 1984 Tenn. LEXIS 730 (Tenn. 1984), superseded by statute as stated in, Pirkle v. Parker, — S.W.3d —, 2003 Tenn. App. LEXIS 16 (Tenn. Ct. App. Jan. 13, 2003).

7. Appearance.

The Tennessee Rules of Civil Procedure do not define an appearance, and the court must turn to court decisions for guidance. Patterson v. Rockwell International, 665 S.W.2d 96, 1984 Tenn. LEXIS 730 (Tenn. 1984), superseded by statute as stated in, Pirkle v. Parker, — S.W.3d —, 2003 Tenn. App. LEXIS 16 (Tenn. Ct. App. Jan. 13, 2003).

An appearance may be expressly made by formal written or oral declaration, or record entry, to the effect that the defendant appears, or it may be implied from some act done with

the intention of appearing and submitting to the court's jurisdiction. Patterson v. Rockwell International, 665 S.W.2d 96, 1984 Tenn. LEXIS 730 (Tenn. 1984), superseded by statute as stated in, Pirkle v. Parker, — S.W.3d —, 2003 Tenn. App. LEXIS 16 (Tenn. Ct. App. Jan. 13, 2003).

8. Meritorious Defense.

When relief is sought under these provisions of the rules, the defendant is invoking equitable principles; although it is not expressly stipulated in the rules, it is universally recognized that, as a condition to obtaining relief, the defendant, in addition to showing that his default was brought about by mistake, inadvertence or excusable neglect, must also demonstrate that he has a meritorious defense to the plaintiff's claim, except in the case in which the judgment is void. Patterson v. Rockwell International, 665 S.W.2d 96, 1984 Tenn. LEXIS 730 (Tenn. 1984), superseded by statute as stated in, Pirkle v. Parker, — S.W.3d —, 2003 Tenn. App. LEXIS 16 (Tenn. Ct. App. Jan. 13, 2003).

Where the fault in regard to the failure to appear for the trial lies in the manner in which the case was set for trial, the clerk's failure to notify defense counsel that the case was set and in defense counsel's office which failed to notice that the trial was set when plaintiff's counsel informed it of this fact, such lapses have been held to be excusable neglect by Tennessee courts. Tennessee Dep't of Human Services v. Barbee, 689 S.W.2d 863, 1985 Tenn. LEXIS 515 (Tenn. 1985).

One requirement to get a default judgment set aside, almost invariably applied, is for the defendant to show it has a meritorious defense. Yearwood, Johnson, Stanton & Crabtree, Inc. v. Foxland Dev. Venture, 828 S.W.2d 412, 1991 Tenn. App. LEXIS 934 (Tenn. Ct. App. 1991).

Since plaintiffs failed to properly notify defendants of their application for default judgment, defendants' failure to assert a meritorious defense was not fatal to their motion to set aside the default judgment. Reynolds v. Battles, 108 S.W.3d 249, 2003 Tenn. App. LEXIS 13 (Tenn. Ct. App. 2003), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 509 (Tenn. 2003).

9. Discretion of Court.

The setting aside of a default judgment lies within the sound discretion of the court. Henson v. Diehl Machines, Inc., 674 S.W.2d 307, 1984 Tenn. App. LEXIS 2868 (Tenn. Ct. App. 1984); In re Estate of Mayes, 843 S.W.2d 418, 1992 Tenn. App. LEXIS 294 (Tenn. Ct. App. 1992).

10. Choice of Remedies.

The fact that the plaintiff had a statutory basis under former T.C.A. § 36-2-106(b) upon which to pursue summary judgment did not preclude the plaintiff from seeking a default judgment where the requisite elements for such relief were also present. Walker v. Baker, 738 S.W.2d 194, 1987 Tenn. App. LEXIS 2736 (Tenn. Ct. App. 1987).

11. Scope of Relief.

A default judgment may not extend to matters outside the issues raised by the pleadings or beyond the scope of the relief demanded. Electric Controls v. Ponderosa Fibres of Am., 19 S.W.3d 222, 1999 Tenn. App. LEXIS 678 (Tenn. Ct. App. 1999).

Judgments for attorney's fees could not be sustained because the judgment awarded relief that exceeded the scope of the relief requested in the cross-claims. Electric Controls v. Ponderosa Fibres of Am., 19 S.W.3d 222, 1999 Tenn. App. LEXIS 678 (Tenn. Ct. App. 1999).

12. Discretionary Costs.

Because an appellate court partially reversed a trial court's ruling in favor of an attorney on a former client's fraud claim, necessitating further proceedings in the trial court on remand, the appellate court also vacated the award of discretionary costs. Vazeen v. Sir, — S.W.3d —, 2021 Tenn. App. LEXIS 81 (Tenn. Ct. App. Mar. 8, 2021).

RULE 56

SUMMARY JUDGMENT

Compiler's Notes. Acts 2011, ch. 498, § 2 provided that the act (which enacted T.C.A. § 20-16-101, which overruled the summary judgment standard for parties who do not bear the burden of proof at trial set forth in *Hannan v. Alltel Publishing Co.*, 270 S.W.3d 1 (Tenn. 2008)), except as set forth in the act, did not change Rule 56 of the Tennessee Rules of Civil Procedure.

Law Reviews. Comin' Through the Rye: A Requiem for the Tennessee Summary Judgment Standard, 83 Tenn. L. Rev. 1027 (2016).

Unclear Boundaries — Rye v. Women's Care Center of Memphis, MPLLC: The Transformation of Tennessee's Summary Judgment Burden of Production, 47 U. Mem. L. Rev. 981 (2017).

56.01. For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of thirty (30) days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

Law Reviews. Trick or Treat? Summary Judgment in Tennessee after Hannan v. Alltel Publishing Co. (Judy M. Cornett), 77 Tenn. L. Rev. 305 (2010).

Why Denials of Summary Judgment Should Be Appealable, 80 Tenn. L. Rev. 45 (2012).

56.02. For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

Law Reviews. Trick or Treat? Summary Judgment in Tennessee after Hannan v. Alltel Publishing Co. (Judy M. Cornett), 77 Tenn. L. Rev. 305 (2010).

Why Denials of Summary Judgment Should Be Appealable, 80 Tenn. L. Rev. 45 (2012).

56.03. Specifying Material Facts. In order to assist the Court in ascertaining whether there are any material facts in dispute, any motion for summary judgment made pursuant to Rule 56 of the Tennessee Rules of Civil Procedure shall be accompanied by a separate concise statement of the material facts as to which the moving party contends there is no genuine issue for trial. Each fact shall be set forth in a separate, numbered paragraph. Each fact shall be supported by a specific citation to the record.

Any party opposing the motion for summary judgment must, not later than five days before the hearing, serve and file a response to each fact set forth by the movant either (i) agreeing that the fact is undisputed, (ii) agreeing that the fact is undisputed for purposes of ruling on the motion for summary judgment only, or (iii) demonstrating that the fact is disputed. Each disputed fact must be supported by specific citation to the record. Such response shall be filed with the papers in opposition to the motion for summary judgment.

In addition, the non-movant's response may contain a concise statement of any additional facts that the non-movant contends are material and as to which the non-movant contends there exists a genuine issue to be tried. Each such disputed fact shall be set forth in a separate, numbered paragraph with specific citations to the record supporting the contention that such fact is in dispute.

If the non-moving party has asserted additional facts, the moving party shall be allowed to respond to these additional facts by filing a reply statement in the same manner and form as specified above. [As amended by order entered January 28, 2000, effective July 1, 2000.]

Law Reviews. Trick or Treat? Summary Judgment in Tennessee after Hannan v. Alltel Publishing Co. (Judy M. Cornett), 77 Tenn. L. Rev. 305 (2010).

NOTES TO DECISIONS

Analysis

1. Compliance.
2. Trial Court Discretion.

1. Compliance.

Although a trial court may waive the requirements regarding a statement of undisputed facts in an appropriate case, trial courts are cautioned that the nonmoving party in a summary judgment proceeding should be sufficiently apprised of the moving party's asserted basis for summary judgment. If the moving party contends that a particular fact is material to the entry of summary judgment in his or her favor, the nonmoving party should not be deprived of the opportunity to show that there is a genuine issue as to the existence of that fact. Bobo v. City of Jackson, 511 S.W.3d 14, 2015 Tenn. App. LEXIS 952 (Tenn. Ct. App. Dec. 4, 2015), appeal denied, — S.W.3d —, 2016 Tenn. LEXIS 277 (Tenn. Apr. 7, 2016).

State of Tennessee was entitled to summary judgment in an action alleging that a non-attorney had engaged in the unauthorized practice of law because the non-attorney denied generally that the non-attorney's activities amounted to the unauthorized practice of law, which was a legal argument and not a proper response to the State's statement of undisputed facts. Moreover, the non-attorney failed to dispute each of the State's submitted facts let alone give any specific citations to the record disputing any material fact. State v. Trotter, — S.W.3d —, 2019 Tenn. App. LEXIS 38 (Tenn. Ct. App. Jan. 28, 2019).

2. Trial Court Discretion.

Former city manager's argument that summary judgment was inappropriate on his defamation action because the city councilor failed to comply with the requirements of Tenn. R. Civ. P. 56.03 was rejected where all of the facts pertinent to the dispositive issue of legislative privilege were captured on videotape and provided to the court, and thus, it was not an abuse of discretion to allow the hearing to proceed as scheduled. Miller v. Wyatt, 457 S.W.3d 405, 2014 Tenn. App. LEXIS 93 (Tenn. Ct. App. Feb. 26, 2014), appeal denied, — S.W.3d —, 2014 Tenn. LEXIS 1001 (Tenn. Nov. 20, 2014).

56.04. Motion and Proceedings Thereon. The motion shall be served at least thirty (30) days before the time fixed for the hearing. The adverse party may serve and file opposing affidavits not later than five (5) days before the hearing. Subject to the moving party's compliance with Rule 56.03, the judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. The trial court shall state the legal grounds upon which the court denies or grants the motion, which shall be included in the order reflecting the court's ruling. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. [As amended by order entered January 26, 1999, effective July 1, 1999; by order filed January 31, 2002, effective July 1, 2002; and by order filed January 2, 2007, effective July 1, 2007.]

Law Reviews. Trick or Treat? Summary Judgment in Tennessee after Hannan v. Alltel Publishing Co. (Judy M. Cornett), 77 Tenn. L. Rev. 305 (2010).

Workers' Compensation Appeals Board Decisions. The employee suffered crush injuries to his left middle and ring fingers for which he received authorized medical treatment provided by the employer. The self-represented employee filed a petition seeking temporary and permanent disability benefits and requested an expedited hearing. The trial court canceled a scheduled expedited hearing and scheduled a trial as a result of the employee's failure to comply with regulations concerning submittals to be made prior to the expedited hearing. The employer thereafter filed a motion for summary judgment, which the trial court granted. The trial court dismissed the employee's case with prejudice. The employee has appealed, but failed to make any meaningful argument on appeal to indicate how the trial court may have erred. He submitted a handwritten letter, but did not cite any authority or explain how the trial court's analysis is incorrect. The grant of summary judgment was affirmed. Unfortunately, the Workers' Compensation Appeals Board was unable to address the

appropriateness of the trial court's dismissal of the employee's case with prejudice, thereby concluding his right to reasonable and necessary future medical care, due to his failure to raise any issues on appeal. Cosey v. Jarden Corporation, 2019 TN Wrk Comp App Bd LEXIS 3.

Following the employee's report of a work-related back injury, the employer provided a panel of physicians from which the employee selected a doctor for treatment. The doctor's initial report included a statement indicating the doctor did not "feel" the employee's condition "could be considered greater than 50% related to her employment." Based primarily on this report, the employer filed a motion for summary judgment less than thirty days after the issuance of a dispute certification notice. The employee did not file a written response to the motion. The trial court denied the motion, determining the employer's submittals did not negate an essential element of the employee's claim. The employer has appealed. The Workers Compensation Appeal Board affirmed the trial court's determination that the employer did not negate an essential element of the employee's claim. However, it vacated the trial court's order denying the motion for summary judgment and remanded the case for the court to determine whether the employer demonstrated that the employee's evidence was insufficient as a matter of law to establish her claim. Watts v. JTEKT North America, 2019 TN Wrk Comp App Bd LEXIS 5.

An employee received authorized medical treatment for her physical injuries resulting from an attack by a patient, but the employer did not provide treatment for the alleged mental injuries. The employee filed a petition for benefits more than one year after the employer's last voluntary payment of benefits, prompting the employer to file a motion for summary judgment asking that the suit be dismissed as time-barred. The trial court found that, although the petition was filed beyond the one-year limitations period, there were disputes of material fact regarding the reasons for delay in filing the claim, and denied the motion. However, the trial court did not sufficiently state the legal grounds for its decision to deny the motion. The order did not identify any particular disputed facts the court found to be material to the issue of untimeliness, nor did it explain a legal basis for its decision to deny the motion. The order was vacated and the case was remanded for additional findings by the trial court. Linsey v. Acadia Healthcare Company, 2019 TN Wrk Comp App Bd LEXIS 7.

An employee alleged various injuries caused by a fall at work. After some discovery was conducted, the employer filed a motion for summary judgment, alleging the employee's evidence was insufficient as a matter of law to establish a compensable injury. After requesting and receiving additional time to respond to the motion, the employee's counsel filed a motion to withdraw. The trial court scheduled a hearing on both motions, requiring the employee's counsel to present his client's argument in response to the motion for summary judgment prior to its entertaining the motion to withdraw. During his argument, the employee's counsel acknowledged he had no expert medical evidence to submit in opposition to the employer's motion for summary judgment. Following the hearing, the trial court granted the motion to withdraw but denied the motion for summary judgment. The employer has appealed. Upon careful consideration of the record, the trial court's order denying the motion for summary judgment was reversed and the case was remanded for entry of an order granting the motion. King v. Kasai North America, Inc., 2019 TN Wrk Comp App Bd LEXIS 16.

An employee, a mechanic, alleged suffering work-related injuries to his back while replacing a belt on a conveyor. The claim was accepted as compensable, and the employer provided workers' compensation benefits. The parties settled the case prior to the expiration of the original compensation period, leaving open the employee's right to seek increased or extraordinary benefits. At the end of his initial benefit period, the employee filed a petition seeking increased and/or extraordinary benefits. The employer filed a motion for summary judgment alleging the employee was unable to show by clear and convincing evidence that limiting his benefits to the original award would be inequitable. The trial court denied the motion, concluding the employer did not negate an essential element of the employee's claim or show that the evidence was insufficient to prove an essential element of his claim. The trial court correctly denied the motion. The parties disputed the extent of the employee's vocational disability and presented competing theories on how the trial court should resolve the issue. The trial court was thus faced with different means of analyzing the issue of the employee's vocational disability, an issue that is, ultimately, a determination of fact. As the trial court observed, an employee's failure to make any effort to return to work is but one factor to consider when determining whether Employee is entitled to extraordinary benefits. Warren v. The Pictsweet Co., 2019 TN Wrk Comp App Bd LEXIS 60.

Following a work-related back injury, an employee alleged she suffered several falls at work caused by back spasms, one of which was reported to have occurred on June 8, 2016, resulting in injuries to her right foot and ankle. She filed a petition for benefits on March 7, 2018. After the employer filed a motion for summary judgment, asserting the expiration of the statute of limitations, the employee failed to respond in writing, but argued at a subsequent

hearing that she "disputed everything." The trial court properly granted the employer's motion for summary judgment. The employer met its burden of production with respect to its motion for summary judgment by asserting, without contradiction, that the employee's petition for benefits was filed more than one year after the alleged injury and that the employer made no voluntary payment of benefits that would extend the time for filing a petition. The burden then shifted to the employee to demonstrate the existence of a genuine issue of material fact regarding the timeliness of her petition. She failed to do so. Bush v. Stones River Center/RHA Health Services, 2019 TN Wrk Comp App Bd LEXIS 68.

An employee, a truck driver, alleged suffering work-related injuries to his wrists while working for the employer, a trucking company. The employee admitted giving notice of his alleged November 2016 work injuries in April 2017 and, further, admitted attending an unauthorized medical evaluation for his wrists in February 2017. His petition for benefits was filed in October 2018, which the employer claimed was more than one year after its last voluntary payment of benefits. The trial court properly granted the employer's motion for summary judgment and dismissed the case as untimely. Judy v. Covenant Transport, Inc., 2019 TN Wrk Comp App Bd LEXIS 74.

An employee's surviving spouse filed a petition for death benefits following the employee's death, which was caused by diseases she alleged were the result of his employment. The employer denied the claim, asserting the statute of limitations had expired, thus extinguishing the surviving spouse's claim for benefits. The trial court found there were disputed issues of material fact with respect to when the employee became incapacitated from working and denied the motion for summary judgment. On appeal, the employer maintained that the employee's statute of limitations for seeking benefits began to run when he knew or should have known he had a compensable claim, which it asserted was the date he received benefits from the federal government. Because more than one year passed between the receipt of those benefits and the filing of the petition for death benefits, the employer contended the employee's surviving spouse was barred from receiving benefits. In order to accept the employer's position and reverse the trial court's decision and dismiss the case, the Board would have to conclude that the assignment of a medical impairment rating or the receipt of compensation for an impairment rating is conclusive proof that an injured or ill worker has been incapacitated from working. It declined to adopt such a bright-line rule. While an injured worker's anatomical impairment rating is a relevant factor to consider, the impairment rating alone does not establish that an employee is incapacitated from working. Furthermore, questions involving the commencement of the running of the statute of limitations in workers' compensation cases most often are factual in nature, and thus summary judgment should be entered cautiously. The decision of the trial court was affirmed. Morgan v. Lockheed Martin Corporation, 2019 TN Wrk Comp App Bd LEXIS 76

An employee alleged she injured her low back and/or aggravated a pre-existing arthritic condition in her right hip as a result of a work-related accident. Following a course of authorized treatment with two physicians, the employee asserted she was entitled to additional medical treatment. In response to the employer's motion for summary judgment, which was supported by the opinions of three physicians, the employee submitted the sworn declaration of a physician's assistant. The trial court properly granted the employer's motion for summary judgment and dismissed the employee's claim. The employer presented sufficient evidence that the employee's medical conditions and current need for treatment did not arise primarily from the work accident. As a result, the burden shifted to the employee to come forward with sufficient evidence showing a genuine issue of material fact as to the cause of her medical conditions and need for additional treatment. However, the sworn declaration of a physician's assistant, without more, cannot create a genuine issue of material fact as to the issue of causation. A physician's assistant, like a nurse practitioner, is not qualified to offer an expert opinion on medical causation. Moreover, the physician assistant couched her opinions in terms such as "may be reasonably referable" and "may be related." Such opinions, even if admissible, do not meet the standards to satisfy causation. Thus, the employee did not come forward with sufficient evidence at the summary judgment stage to show a genuine issue of material fact as to the issue of medical causation. Adiole v. Logan Senior Care, LLC, 2019 TN Wrk Comp App Bd LEXIS 78.

An employee alleged injuries as a result of receiving an electrical shock in the course of her employment. After receiving treatment from an unauthorized dentist as well as from authorized medical care providers, the employee filed a petition alleging entitlement to additional benefits. She subsequently requested a hearing in which she sought to compel the employer to provide benefits for dental injuries she alleged she suffered as a result of the workplace incident. Following the hearing, the trial court denied benefits for the employee's alleged dental injuries but awarded other medical benefits. Thereafter, the employer filed a motion for summary judgment supported by statements of allegedly undisputed facts. In response, the employee submitted numerous documents, including a letter from a dentist stating that the

dental work she needed "could very well be due to the electrical shock." The trial court granted the employer's motion for summary judgment in part and dismissed the employee's claims for injuries to her mouth, eyes, and hearing. The trial court denied the employer's motion as it related to the employee's claim of dental injuries. The employer has appealed. The trial court's grant of summary judgment dismissing the employee's alleged non-dental injuries was affirmed, but the trial court's denial of summary judgment as to the employee's alleged dental injuries was reversed. A dentist's opinion that the work that needed to be performed to save the employee's teeth "could very well be" the result of the electric shock was insufficient as a matter of law to support an award of benefits for the employee's alleged dental injuries. Armstrong v. Chattanooga Billiard Club, 2020 TN Wrk Comp App Bd LEXIS 40.

An employee filed a petition for benefits alleging she was diagnosed with chronic obstructive pulmonary disease ("COPD") while working for the employer. Following an expedited hearing, the trial court denied the employee's request for benefits. The employer subsequently filed a motion for summary judgment. Concluding the employer affirmatively negated an essential element of the employee's claim based upon the doctrines of accord and satisfaction and res judicata, the trial court granted summary judgment and dismissed the employee's claim. The employee has appealed, but failed to identify any issues or make any meaningful argument on appeal. The board affirmed the trial court's grant of summary judgment in favor of the employer and certifed as final its order dismissing the employee's claim. Hardy v. Hershey Co., 2020 TN Wrk Comp App Bd LEXIS 43.

An employee alleged suffering an electrical shock while working at the employer's vegetable packaging facility. The employer initially provided workers' compensation benefits but denied the claim when the authorized physician opined that the employee's ongoing complaints were causally related to his uncontrolled diabetes rather than the alleged work injury. Following an expedited hearing on the record, the trial court determined the employee had not presented sufficient evidence to establish he would likely prevail at trial and denied the employee's requested benefits. The employer subsequently filed a motion for summary judgment, which the trial court granted, finding that the undisputed facts established that the employee's injury was not causally related to his employment. The employee appealed but failed to identify any issues on appeal, failed to provide any argument to support his position, and failed to explain how the trial court erred. The trial court's decision was affirmed. Coble v. Pictsweet Co., 2020 TN Wrk Comp App Bd LEXIS 21.

NOTES TO DECISIONS

Analysis

1. Construction.
2. Statement of Legal Grounds.
3. Issue of Fact.
4. Summary Judgment Proper.
5. Motion to Dismiss.
6. Arguments of Parties.
7. Burden of Proof.

1. Construction.

Supreme Court of Tennessee overrules Hannan v. Alltel Publishing Co. and returns to a summary judgment standard consistent with Fed. R. Civ. P. 56. The court holds, therefore, that a moving party may satisfy its initial burden of production and shift the burden of production to the nonmoving party by demonstrating that the nonmoving party's evidence is insufficient as a matter of law at the summary judgment stage to establish the nonmoving party's claim or defense. Rye v. Women's Care Ctr. of Memphis, MPLLC, 477 S.W.3d 235, 2015 Tenn. LEXIS 906 (Tenn. Oct. 26, 2015), cert. denied, Rye v. Women's, 195 L. Ed. 2d 265, 136 S. Ct. 2452, 2016 U.S. LEXIS 3386 (U.S. 2016).

2. Statement of Legal Grounds.

Trial court erred in granting a health care provider summary judgment because it failed to comply with the rule since it did not state its grounds, and the record provided no basis for imputing the reasons included in the orders prepared by the provider's counsel to the trial court; the orders were not the product of the trial court's independent judgment because the provider's counsel prepared detailed orders adopting all the arguments made in favor of the motions. Smith v. UHS of Lakeside, Inc., 439 S.W.3d 303, 2014 Tenn. LEXIS 565 (Tenn. July 15, 2014).

Rule should be enforced in proper circumstances when the absence of stated grounds in the trial court's order does not significantly hamper the review of the trial court's decision; however, the resolution of issues relating to a trial court's compliance or lack of compliance should also take into consideration the fundamental importance of assuring that a trial court's decision either to grant or deny a summary judgment is adequately explained and is the product of its independent judgment. Smith v. UHS of Lakeside, Inc., 439 S.W.3d 303, 2014 Tenn. LEXIS 565 (Tenn. July 15, 2014).

Rule is not inconsistent with local rules of court that call upon counsel for the prevailing party to submit an order reflecting the trial court's ruling; if, however, the local rules were inconsistent with the rule, the rule would prevail. Smith v. UHS of Lakeside, Inc., 439 S.W.3d 303, 2014 Tenn. LEXIS 565 (Tenn. July 15, 2014).

Rule requires the trial court, upon granting or denying a motion for summary judgment, to state the grounds for its decision before it invites or requests the prevailing party to draft a proposed order; not only will this assure that the decision is the trial court's, it will also assure the parties that the trial court independently considered their arguments, enable the reviewing courts to ascertain the basis for the trial court's decision, and promote independent, logical decision-making. Smith v. UHS of Lakeside, Inc., 439 S.W.3d 303, 2014 Tenn. LEXIS 565 (Tenn. July 15, 2014).

Rule is not inconsistent with the custom of permitting trial courts to request and consider proposed orders prepared by the prevailing party, but the rule must be interpreted in a way that assures that a trial court's decision whether to grant or deny a motion for summary judgment is its own; findings of fact, conclusions of law, opinions, and orders prepared by trial judges themselves are preferable to those prepared by counsel. Smith v. UHS of Lakeside, Inc., 439 S.W.3d 303, 2014 Tenn. LEXIS 565 (Tenn. July 15, 2014).

Trial court may comply with the requirement of the rule in a number of ways; the trial court may state the grounds for its decision at the same time it announces its decision on the record, it may announce its decision and inform counsel that it will provide the grounds in a subsequently filed memorandum or memorandum opinion, after announcing its decision, the trial court may notify the parties of the grounds by letter, as long as it has been provided to all parties and made part of the record. Smith v. UHS of Lakeside, Inc., 439 S.W.3d 303, 2014 Tenn. LEXIS 565 (Tenn. July 15, 2014).

Appellate court had to vacate a trial court order granting partial summary judgment and remand the case for further proceedings because the judgment at issue involved questions of law that required analysis and explanation, but the trial court failed to state the legal grounds on which it was granting summary judgment as required by the civil rule. Potter's Shopping Ctr., Inc. v. Szekely, 461 S.W.3d 68, 2014 Tenn. App. LEXIS 643 (Tenn. Ct. App. Oct. 8, 2014).

3. Issue of Fact.

Summary judgment was appropriately granted on the medical practice claim because the doctor established that he did not deviate from the applicable standard of care, that he did not cause harm to the patient, and that any alleged malpractice could not have occurred after 2005; because the patient did not properly respond to the summary judgment motion, the facts were undisputed. The patient failed to present any evidence expert testimony or otherwise, on any material fact because her only medical expert admitted that she was not qualified, her testimony was excluded by order of the trial court, and the discovery deadline had passed. Barnett v. Tenn. Orthopaedic Alliance, 391 S.W.3d 74, 2012 Tenn. App. LEXIS 659 (Tenn. Ct. App. Sept. 19, 2012), appeal dismissed, — S.W.3d —, 2013 Tenn. LEXIS 1 (Tenn. Jan. 2, 2013).

4. Summary Judgment Proper.

In a suit brought by plaintiff arising out of an incident in which a clerk accused plaintiff of doing a "money switch," the trial court properly dismissed on summary judgment plaintiff's claim for intentional infliction of emotional distress as the conduct on which plaintiff based his suit fell squarely within the realm of mere insults, indignities, and annoyances, which were insufficient to support such a claim. Brown v. Mapco Express, Inc., 393 S.W.3d 696, 2012 Tenn. App. LEXIS 576 (Tenn. Ct. App. Aug. 22, 2012), appeal denied, Brown v. MAPCO Express, Inc., — S.W.3d —, 2013 Tenn. LEXIS 29 (Tenn. Jan. 8, 2013).

Hospital was entitled to a grant of partial summary judgment in an action in state court because, under the law of the case doctrine, there were no genuine issues of material fact relevant to a doctor's tort claims as a federal district court had made findings of fact regarding the underlying incident which led to the claims and a federal circuit court had affirmed the findings on appeal. Stratienko v. Chattanooga-Hamilton County Hosp. Auth., 435 S.W.3d 189, 2013 Tenn. App. LEXIS 755 (Tenn. Ct. App. Nov. 21, 2013), appeal denied, Stratienko v. Chattanooga-Hamilton County Hosp. Auth., — S.W.3d —, 2014 Tenn. LEXIS 296 (Tenn. Apr. 10, 2014).

Trail court fully complied with Tenn. R. Civ. P. 56.04 where the trial court listed 133 undisputed facts, discussed the elements of a deceptive practices claim, including deception, unfairness, reliance and causation, held that all necessary elements had been shown, and the factual findings and legal conclusions were not challenged on appeal. State ex rel. Slatery v. HRC Med. Ctrs., Inc., 603 S.W.3d 1, 2019 Tenn. App. LEXIS 408 (Tenn. Ct. App. Aug. 23, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 251 (Tenn. Apr. 16, 2020).

Trial court's summary judgment procedure, although not ideal, did not require that the summary judgment order be vacated where the court invited both parties to draft proposed findings and conclusions, and the order merely narrowed the issues for trial. Highlands Physicians, Inc. v. Wellmont Health Sys., — S.W.3d

—, 2020 Tenn. App. LEXIS 430 (Tenn. Ct. App. Sept. 25, 2020).

5. Motion to Dismiss.

When the defendant raised the issue of personal jurisdiction, the trial court should have followed the procedures applicable to the hearing and disposition of Tenn. R. Civ. P. 12.02(2) motions challenging personal jurisdiction rather than the procedures commonly associated with motions for summary judgment under Tenn. R. Civ. P. 56. The parties and the courts below focused on whether any genuine issue as to any material fact existed and whether either moving party was entitled to judgment as a matter of law; however, instead, the proper question in the case was whether, taking the plaintiff's factual allegations as true and resolving all reasonably disputed facts in the plaintiff's favor, the plaintiff showed, by a preponderance of the evidence, that Tennessee courts could properly exercise jurisdiction over the defendant. State v. NV Sumatra Tobacco Trading Co., 403 S.W.3d 726, 2013 Tenn. LEXIS 335 (Tenn. Mar. 28, 2013).

6. Arguments of Parties.

Rule does not require the trial court to address each argument the parties made in rendering its decision. Hulan v. Coffee Cty. Bank, — S.W.3d —, 2019 Tenn. App. LEXIS 42 (Tenn. Ct. App. Jan. 28, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 280 (Tenn. June 20, 2019).

7. Burden of Proof.

The Rye summary judgment standard applies whether the moving party is a plaintiff or a defendant and without regard to which party has the burden of proof at trial. When the moving party does not bear the burden of proof at trial, the moving party may satisfy its burden of production either (1) by affirmatively negating an essential element of the nonmoving party's claim; or (2) by demonstrating that the nonmoving party's evidence at the summary judgment stage is insufficient to establish the nonmoving party's claim or defense. TWB Architects, Inc. v. Braxton, LLC, — S.W.3d —, 2019 Tenn. LEXIS 293 (Tenn. July 22, 2019), substituted opinion, TWB Architects, Inc. v. Braxton, LLC, — S.W.3d —, 2019 Tenn. LEXIS 294 (Tenn. Aug. 1, 2019).

56.05. Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

Law Reviews. Trick or Treat? Summary Judgment in Tennessee after Hannan v. Alltel Publishing Co. (Judy M. Cornett), 77 Tenn. L. Rev. 305 (2010).

56.06. Form of Affidavits — Further Testimony — Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but his or her response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse

party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party. Expert opinion affidavits shall be governed by Tennessee Rule of Evidence 703.

Law Reviews. Trick or Treat? Summary Judgment in Tennessee after Hannan v. Alltel Publishing Co. (Judy M. Cornett), 77 Tenn. L. Rev. 305 (2010).

NOTES TO DECISIONS

ANALYSIS

1. Hearsay.
2. Compliance.

1. Hearsay.

Trial court's reliance upon an email which was sent by an employee of a government agency was in error because the email was unauthenticated hearsay and was inadmissible as contemplated by Tenn. R. Civ. P. 56.06. City of Memphis v. Tandy J. Gilliland Family, L.L.C., 391 S.W.3d 60, 2012 Tenn. App. LEXIS 595 (Tenn. Ct. App. Aug. 29, 2012), appeal denied, City of Memphis v. Family, — S.W.3d —, 2013 Tenn. LEXIS 30 (Tenn. Jan. 9, 2013).

Health club member offered a recitation of the statement purportedly made by staff member of the health club to prove that the health club had prior knowledge of the criminal conduct of another member of the health club. Accordingly, the staff member's statement was inadmissible at trial because the purported statement was hearsay, as it was offered for the truth of the matter asserted, and could not be considered in an affidavit at the summary judgment stage. Boswell v. YMCA, — S.W.3d —, 2019 Tenn. App. LEXIS 160 (Tenn. Ct. App. Mar. 29, 2019).

2. Compliance.

Dismissal of a bank customer's claims against the bank was appropriate because the customer, who appeared pro se, failed to file a response to the bank's motion for summary judgment or to the statement of undisputed material facts, despite being given additional time by the court to file a response. Butler v. First South Fin. Credit Union, — S.W.3d —, 2019 Tenn. App. LEXIS 220 (Tenn. Ct. App. May 7, 2019), appeal denied, Butler v. First S. Fin. Fed. Credit Union, — S.W.3d —, 2019 Tenn. LEXIS 430 (Tenn. Aug. 19, 2019).

It was not error for a trial court to consider the affidavit of an expert witness in addition to the deposition testimony of the expert witness because affidavits were allowed in response to motions for summary judgment to set forth specific facts showing that there was a genuine issue for trial. Davis v. Ellis, — S.W.3d —, 2020 Tenn. App. LEXIS 493 (Tenn. Ct. App. Nov. 5, 2020).

Tenn. R. Civ. P. 72 permits a party to file an unsworn declaration in support of or in opposition to a motion for summary judgment because Tenn. R. Civ. P. 56.06 requires or permits an affidavit to be filed concomitantly therewith, demonstrating a genuine issue of material fact; in this case, the declaration was made under the penalty of perjury, signed, and dated and the trial court erred by not considering the declaration filed in opposition to defendants' motion for summary judgment. Lundell v. Hubbs, — S.W.3d —, 2020 Tenn. App. LEXIS 528 (Tenn. Ct. App. Nov. 23, 2020).

56.07. When Affidavits Are Unavailable. Should it appear from the affidavits of a party opposing the motion that such party cannot for reasons stated present by affidavit facts essential to justify the opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Law Reviews. Trick or Treat? Summary Judgment in Tennessee after Hannan v. Alltel Publishing Co. (Judy M. Cornett), 77 Tenn. L. Rev. 305 (2010).

NOTES TO DECISIONS

1. No Continuance Proper.

In a case involving an insurance contract, a trial court did not abuse its discretion by refusing to continue a summary judgment hearing to allow for additional discovery because an insured's attempt to discover evidence relating to a dual agency was not relevant to the issue of whether a state lawsuit was barred by claim preclusion due to an earlier federal lawsuit based upon the same insurance contract. The

requested discovery could not have aided the insured in opposing a motion for summary judgment filed by several excess insurers. Regions Fin. Corp. v. Marsh Usa, Inc., 310 S.W.3d 382, 2009 Tenn. App. LEXIS 76 (Tenn. Ct. App. Feb. 19, 2009).

Patient's request for an extension in her medical malpractice case was properly denied because she had requested and received at least three extensions from the trial court to arrange for the requisite certificate of good faith and expert medical proof. Barnett v. Tenn. Orthopaedic Alliance, 391 S.W.3d 74, 2012 Tenn. App. LEXIS 659 (Tenn. Ct. App. Sept. 19, 2012), appeal dismissed, — S.W.3d —, 2013 Tenn. LEXIS 1 (Tenn. Jan. 2, 2013).

Trial court did not abuse its discretion in denying a borrower's request for additional discovery, when the assignee of a foreclosure sale purchaser filed a motion for summary judgment in an unlawful detainer action, because the evidence demonstrated that the borrower's debt was not discharged, and further discovery related to private mortgage insurance would not have assisted the borrower in demonstrating any genuine issue of material fact. Fannie Mae v. Daniels, 517 S.W.3d 706, 2015 Tenn. App. LEXIS 978 (Tenn. Ct. App. Dec. 21, 2015), appeal dismissed, — S.W.3d —, 2016 Tenn. LEXIS 308 (Tenn. Apr. 14, 2016).

Given the multiple opportunities that a former patient had to produce the necessary evidence to prove the patient's health care liability action and the patient's failure to explain why the patient needed more time to produce evidence which the patient did not have, there was no error in the trial court's decision to deny the patient's motion for an enlargement of time to conduct discovery. Akers v. Heritage Med. Assocs., P.C., — S.W.3d —, 2019 Tenn. App. LEXIS 5 (Tenn. Ct. App. Jan. 4, 2019).

56.08. Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused the other party to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt. [Amended by order effective July 1, 1993; and by order effective July 1, 1997.]

Advisory Commission Comments. The Committee deems the adoption of the provisions of this Rule to be one of the most important and desirable additions to Tennessee procedure contained in the Rules of Civil Procedure. Previously there has been no procedure for disposition of a case in the trial courts without an actual trial on the merits if the case could not be disposed of on demurrer or plea in abatement. A majority of the states have adopted procedures similar to those contained in this Rule, which follows the Federal Rule. The Committee considers this Rule to be a substantial step forward to the end that litigation may be accelerated, insubstantial issues removed, and trial confined only to genuine issues.

The time periods contained herein differ from those contained in the Federal Rule. The Committee felt that the 30-day period was more realistic and also more uniform with the other Rules.

Previously the term "Summary Judgment" was known in Tennessee procedure only in connection with the provisions of Tenn. Code Ann. § 25-3-101 et seq., dealing with summary remedies against certain public officers and with actions by sureties. Rule 56 in no way repeals the provisions of these statutes.

Advisory Commission Comments [1993]. The last sentence of Rule 56.05 [now 56.06] changes the result of *Omni Aviation v. Perry*, 807 S.W.2d 276 (Tenn. App. 1990), which held that facts supporting an expert's opinion must have a "foundation in the record." Tennessee Rule of Evidence 703 permits expert opinions based on facts outside the record if reasonably relied upon by such experts and if trustworthy.

Advisory Commission Comments [1997]. New Rule 56.03 tracks the language of a local federal rule of the Middle District of Tennessee. The Commission believes it will not only assist the Court in focusing on the crucial portions of the record, but it will cause lawyers to ascertain whether there is "a genuine issue as to any material fact."

Advisory Commission Comments [1999]. 56.04: The second sentence of Rule 56.04 was amended to require opposing affidavits to be served five days, not one day, before motion day. It was thought that counsel could be better prepared for oral argument with the new deadline.

Advisory Commission Comments [2000]. The amendment requires service and filing of a non movant's response five days before the motion hearing. This change corresponds to the advance filing requirement for opposing affidavits.

Advisory Commission Comments [2002]. Rule 56.04 is amended to require on request

that grounds be stated for granting a motion for summary judgment. In contrast with findings and conclusions under Rule 52.01, however, the statement of grounds need not be elaborate.

Advisory Commission Comments [2007]. Previously Rule 56.04 required a trial judge "upon request" to state the legal grounds for granting summary judgment. The amendment extends that principle to a denial of summary judgment. The amendment also deletes the words "upon request."

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 2, 2007, was ratified and approved by House Resolution 18 and Senate Resolution 11. The order promulgating the amendment of this rule provided that it take effect July 1, 2007.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 149, 150, 556, 558, 559, 560.

Pritchard on Wills and Administration of Estates (4th ed., Phillips and Robinson), § 367.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-54.02-1, 1-54.02-2, 1-56-1 — 1-56-3, 1-56.04-1, 1-56.04-2, 1-56.06-1, 1-56.07-1.

Tennessee Jurisprudence. 9 Tenn. Juris., Demurrers and Motions to Dismiss, § 22; 9 Tenn. Juris., Dismissal, Discontinuance and Nonsuit, §§ 10, 22; 16 Tenn. Juris., Judgments and Decrees, §§ 90, 91.

Law Reviews. Amended Rules (Donald F. Paine), 36 No. 6 Tenn. B.J. 13 (2000).

As a Matter of Law: Summary Judgment in Medical Malpractice Litigation in Tennessee, 15 Mem. St. U.L. Rev. 55 (1984).

Bye, Bye Byrd?: Summary Judgment After Hannah and Martin: Which Way to Go (Andree Sophia Blumstein), 45 Tenn. B.J. 23 (2009).

Celotex, Summary Judgment and the Tennessee Supreme Court: Waiting for the Other Shoe to Drop (Buckner Wellford), 28 Tenn. B.J. 22 (1992).

Civil Procedure — Tennessee Rule of Civil Procedure 56 — Clarified Procedure for Summary Judgment, Byrd v. Hall, 847 S.W.2d 208, 1993 Tenn. LEXIS 21 (Tenn. 1993) (James H. Nixon III) 61 Tenn. L. Rev. 375 (1993).

New Rules! (Donald F. Paine), 35 Tenn. B.J. 32 (1999).

Products Liability—Lessors as Warrantors of Fitness in Tennessee, 16 Mem. St. U.L. Rev. 303 (1986).

Prove It: Finding the Middle Ground in Tennessee's Evolving Summary Judgment Standard (Amy M. Pepke), 43 Tenn. B.J. 12 (2007).

The Legacy of Byrd v. Hall: Gossiping About Summary Judgment in Tennessee, 69 Tenn. L. Rev. 175 (2001).

Trick or Treat? Summary Judgment in Tennessee after Hannan v. Alltel Publishing Co. (Judy M. Cornett), 77 Tenn. L. Rev. 305 (2010).

You Play the Ball Where It Lies: Rule 56 Motions After Reeves (Williams D. Evans Jr.), 38 Tenn. B.J. 24 (2002).

10 Significant Differences Between State and Federal Civil Procedure (Donald F. Paine), 38 Tenn. B.J. 27 (2002).

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1. In General.

The summary judgment procedure is not to be regarded as a substitute for trial of disputed factual issues. Taylor v. Nashville Banner Publishing Co., 573 S.W.2d 476, 1978 Tenn. App. LEXIS 313 (Tenn. Ct. App. 1978), cert. denied, 441 U.S. 923, 99 S. Ct. 2032, 60 L. Ed. 2d 396, 1979 U.S. LEXIS 1645 (1979); Gonzales v. Alman Constr. Co., 857 S.W.2d 42, 1993 Tenn. App. LEXIS 96 (Tenn. Ct. App. 1993).

A motion for summary judgment goes to the merits of the litigation and one faced with such

a motion may neither ignore it nor treat it lightly. Ferguson v. Tomerlin, 656 S.W.2d 378, 1983 Tenn. App. LEXIS 601 (Tenn. Ct. App. 1983).

In the absence of a contrary statute or court rule, Tenn. R. Civ. P. 1 makes it clear that summary judgments are available in all civil cases filed in the circuit or chancery courts. Owen v. Stanley, 739 S.W.2d 782, 1987 Tenn. App. LEXIS 3211 (Tenn. Ct. App. 1987), overruled, Matlock v. Simpson, 902 S.W.2d 384, 1995 Tenn. LEXIS 44 (Tenn. 1995).

Implicit in the summary judgment rubric is the idea that it should only be granted after adequate time for discovery. Messer Griesheim Indus. v. Cryotech of Kingsport, Inc., 45 S.W.3d 588, 2001 Tenn. App. LEXIS 26 (Tenn. Ct. App. 2001), review or rehearing denied, Messer Griesheim Indus., Inc. v. Cryotech of Kingsport, Inc., — S.W.3d —, 2001 Tenn. LEXIS 421 (Tenn. May 14, 2001).

Mere conclusory generalizations will not create a material factual dispute sufficient to prevent the trial court from granting a summary judgment. Davis v. Campbell, 48 S.W.3d 741, 2001 Tenn. App. LEXIS 67 (Tenn. Ct. App. 2001).

Service of an affidavit on the opposing party alone is not sufficient; Tenn. R. Civ. P. 56.04 also requires that the affidavit be filed with the trial court. Kenyon v. Handal, 122 S.W.3d 743, 2003 Tenn. App. LEXIS 196 (Tenn. Ct. App. 2003), appeal denied, Kenyon v. Handal, M.D., — S.W.3d —, 2003 Tenn. LEXIS 906 (Tenn. 2003).

Although the trial court and the child care centers' counsel had every reason to be frustrated with the failure of the AG's trial counsel to comply with the requirements in Tenn. R. Civ. P. 56.03, the facts of this case were insufficient to sustain a sanction in the form of attorney fees for such noncompliance in the absence of a showing of bad faith or willful disobedience of the court or the rules. Cooper v. Creative Learning Child Care Ctr., 240 S.W.3d 230, 2007 Tenn. App. LEXIS 421 (Tenn. Ct. App. June 27, 2007).

2. Purpose.

Summary judgment is designed to provide a quick, inexpensive means of concluding cases on issues as to which there is no dispute regarding material facts. Ferguson v. Tomerlin, 656 S.W.2d 378, 1983 Tenn. App. LEXIS 601 (Tenn. Ct. App. 1983); Byrd v. Hall, 847 S.W.2d 208, 1993 Tenn. LEXIS 21 (Tenn. 1993).

3. Standard for Decision on Motion.

As on a motion for a directed verdict, the court deciding a motion for summary judgment must view the pleadings and evidence before it in the light most favorable to the opponent of the motion, on an issue-by-issue basis. Wyatt v. Winnebago Industries, Inc., 566 S.W.2d 276, 1977 Tenn. App. LEXIS 281 (Tenn. Ct. App. 1977).

Summary judgment is to be rendered by a trial court only when it is shown that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Taylor v. Nashville Banner Publishing Co., 573 S.W.2d 476, 1978 Tenn. App. LEXIS 313 (Tenn. Ct. App. 1978), cert. denied, 441 U.S. 923, 99 S. Ct. 2032, 60 L. Ed. 2d 396, 1979 U.S. LEXIS 1645 (1979); Blazer Fin. Servs., Inc. v. Diddle, 648 S.W.2d 257, 1983 Tenn. App. LEXIS 551 (Tenn. Ct. App. 1983); Daniels v. White Consol. Indus., Inc., 692 S.W.2d 422, 1985 Tenn. App. LEXIS 2764 (Tenn. Ct. App. 1985).

The party who moves for summary judgment has the burden of showing that no genuine issue of material fact exists, and in ruling on the motion the court must view the record in the light most favorable to the motion's opponent. Taylor v. Nashville Banner Publishing Co., 573 S.W.2d 476, 1978 Tenn. App. LEXIS 313 (Tenn. Ct. App. 1978), cert. denied, 441 U.S. 923, 99 S. Ct. 2032, 60 L. Ed. 2d 396, 1979 U.S. LEXIS 1645 (1979).

On motion for a summary judgment, disputes as to material facts must be evidenced by affidavits or other sworn evidence of facts, and not merely by unsworn generalized assertions in pleadings. Wachovia Bank & Trust Co., N. A. v. Glass, 575 S.W.2d 950, 1978 Tenn. App. LEXIS 322 (Tenn. Ct. App. 1978).

In ruling on motions for summary judgment both the trial court and the supreme court must consider the matter in the same manner as a motion for a directed verdict made at the close of plaintiff's proof; i.e., it must view all affidavits in the light most favorable to the opponent of the motion and draw all legitimate conclusions of fact therefrom in that favor. If after so doing a disputed issue of material fact is made out, the motion must be denied. Berry v. Whitworth, 576 S.W.2d 351, 1978 Tenn. App. LEXIS 324 (Tenn. Ct. App. 1978); Dickerson v. Sanders Mfg. Co., 658 S.W.2d 535, 1983 Tenn. App. LEXIS 566 (Tenn. Ct. App. 1983), overruled, Business Brokerage Centre v. Dixon, 874 S.W.2d 1, 1994 Tenn. LEXIS 95 (Tenn. 1994); National Mortg. Co. v. Washington, 744 S.W.2d 574, 1987 Tenn. App. LEXIS 3188 (Tenn. Ct. App. 1987); Keene v. Cracker Barrel Old Country Store, Inc., 853 S.W.2d 501, 1992 Tenn. App. LEXIS 1042 (Tenn. Ct. App. 1992).

A defendant is not entitled to summary judgment merely because plaintiff failed to support every element of his case with evidence, but because plaintiff failed to contradict evidence which, if uncontradicted, entitles defendant to judgment as a matter of law. Armes v. Hulett, 843 S.W.2d 427, 1992 Tenn. App. LEXIS 659 (Tenn. Ct. App. 1992).

No presumption of correctness attaches to decisions granting summary judgment because they involve only questions of law. Roberts v.

Roberts, 845 S.W.2d 225, 1992 Tenn. App. LEXIS 1052 (Tenn. Ct. App. 1992).

A party moving for summary judgment may demonstrate an entitlement to a judgment as a matter of law in several ways. First, it may affirmatively negate an essential element of the non-moving party's claim. Second, it may conclusively establish an affirmative defense that defeats the non-moving party's claim. The moving party may also demonstrate that it is entitled to a judgment as a matter of law by showing that the non-moving party cannot establish an essential element of its case. Brown v. J.C. Penney Life Ins. Co., 861 S.W.2d 834, 1992 Tenn. App. LEXIS 485 (Tenn. Ct. App. 1992), rehearing denied, Brown v. J. C. Penney Life Ins. Co., — S.W.2d —, 1992 Tenn. App. LEXIS 622 (Tenn. Ct. App. 1992); Masters v. Rishton, 863 S.W.2d 702, 1992 Tenn. App. LEXIS 576 (Tenn. Ct. App. 1992); Caledonia Leasing & Equip. Co. v. Armstrong, Allen, Braden, Goodman, McBride & Prewitt, 865 S.W.2d 10, 1992 Tenn. App. LEXIS 926 (Tenn. Ct. App. 1992).

The issues that lie at the heart of evaluating a summary judgment motion are: (1) Whether a factual dispute exists; (2) Whether the disputed fact creates a genuine issue for trial. Byrd v. Hall, 847 S.W.2d 208, 1993 Tenn. LEXIS 21 (Tenn. 1993).

The party seeking summary judgment must carry the burden of persuading the court that no genuine and material factual issues exist and that it is, therefore, entitled to judgment as a matter of law. Byrd v. Hall, 847 S.W.2d 208, 1993 Tenn. LEXIS 21 (Tenn. 1993); Braswell v. Carothers, 863 S.W.2d 722, 1993 Tenn. App. LEXIS 294 (Tenn. Ct. App. 1993).

This rule contains only two prerequisites for granting a summary judgment. First, there must be no genuine issue as to any fact necessary to resolve the substantive claim or defense embodied in the summary judgment motion. Second, the moving party must be entitled to a judgment as a matter of law. Mansfield v. Colonial Freight Sys., 862 S.W.2d 527, 1993 Tenn. App. LEXIS 345 (Tenn. Ct. App. 1993), rehearing denied, 862 S.W.2d 527, 1993 Tenn. App. LEXIS 392 (Tenn. Ct. App. 1993).

In ruling on a motion for a summary judgment, the trial court and court of appeals must consider the matter in the same manner as a motion for a directed verdict made at the close of plaintiff's proof, i.e., all the evidence must be viewed in the light most favorable to the opponent of the motion and all legitimate conclusions of fact must be drawn in favor of the opponent. Gray v. Amos, 869 S.W.2d 925, 1993 Tenn. App. LEXIS 475 (Tenn. Ct. App. 1993), rehearing denied, — S.W.2d —, 1993 Tenn. App. LEXIS 493 (Tenn. Ct. App. 1993).

Courts should grant summary judgment only when both facts and conclusions drawn from facts permit reasonable person to reach only one conclusion. Roberts v. Blount Mem. Hosp., 963 S.W.2d 744, 1997 Tenn. App. LEXIS 66 (Tenn. Ct. App. 1997), appeal denied, 963 S.W.2d 744, 1997 Tenn. LEXIS 484 (Tenn. 1997), overruled in part, Limbaugh v. Coffee Med. Ctr., 59 S.W.3d 73, 2001 Tenn. LEXIS 756 (Tenn. 2001).

To properly support its motion, the moving party must either affirmatively negate an essential element of the non-moving party's claim or conclusively establish an affirmative defense. If the moving party fails to negate a claimed basis for the suit, the non-moving party's burden to produce evidence establishing the existence of a genuine issue for trial is not triggered and the motion for summary judgment must fail. Staples v. CBL & Assocs., 15 S.W.3d 83, 2000 Tenn. LEXIS 132 (Tenn. 2000), rehearing denied, Staples v. Cbl & Assocs., Inc., — S.W.3d —, 2000 Tenn. LEXIS 334 (Tenn. 2000).

Summary judgments enjoy no presumption of correctness on appeal; accordingly, reviewing courts must make a fresh determination concerning whether the requirements for summary judgment have been satisfied. Cherry v. Williams, 36 S.W.3d 78, 2000 Tenn. App. LEXIS 244 (Tenn. Ct. App. 2000).

4. Affirmative Defenses.

When party attempts to demonstrate an entitlement to summary judgment relying on an affirmative defense that defeats the non-moving party's claim, this affirmative showing is not met when the moving party simply points to evidence in support of its position, but which standing alone would not entitle it to judgment as a matter of law. Brown v. J.C. Penney Life Ins. Co., 861 S.W.2d 834, 1992 Tenn. App. LEXIS 485 (Tenn. Ct. App. 1992), rehearing denied, Brown v. J. C. Penney Life Ins. Co., — S.W.2d —, 1992 Tenn. App. LEXIS 622 (Tenn. Ct. App. 1992).

A motion for summary judgment is a proper pleading to establish the affirmative defense that the claim is barred by the statute of limitations. Creed v. Valentine, 967 S.W.2d 325, 1997 Tenn. App. LEXIS 568 (Tenn. Ct. App. 1997).

In an unsafe roads case, a court properly denied the state's motion for summary judgment, asserted on the basis that it was entitled to discretionary function immunity; discretionary function immunity is a qualified immunity and not an absolute immunity. Lucas v. State, 141 S.W.3d 121, 2004 Tenn. App. LEXIS 83 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 583 (Tenn. June 21, 2004).

5. Time Restrictions.

The failure to wait the required 30 days before considering a motion for judgment on the pleadings was not a reason to disturb the judgment. Teachers Ins. & Annuity Asso. v.

Harris, 709 S.W.2d 592, 1985 Tenn. App. LEXIS 3258 (Tenn. Ct. App. 1985).

Trial court did not err in holding that the affidavit of plaintiff patient's medical expert had not been timely filed and had failed to state licensing information about when he was licensed and the basis for the expert's knowledge of the standard of care that defendant obstetrician had allegedly violated. Kenyon v. Handal, 122 S.W.3d 743, 2003 Tenn. App. LEXIS 196 (Tenn. Ct. App. 2003), appeal denied, Kenyon v. Handal, M.D., — S.W.3d —, 2003 Tenn. LEXIS 906 (Tenn. 2003).

Both the Tennessee Rules of Civil Procedure and the Local Rules of the Eighteenth Judicial Circuit contain deadlines for filing affidavits opposing a motion for summary judgment. Tenn. R. Civ. P. 56.04 requires these affidavits, and presumably a response to a motion, to be filed no later than five days before the hearing; however, 18th Jud. Cir. R. 9.02 requires written responses to motions, including counter-affidavits and briefs, to be filed and served on the parties no later than 72 hours in advance of the hearing. The 5-day deadline in Tenn. R. Civ. P. 56.04 is an exception to Tenn. R. Civ. P. 6.04(2) that otherwise permits opposing affidavits to be served no later than 1 day before the hearing. Kenyon v. Handal, 122 S.W.3d 743, 2003 Tenn. App. LEXIS 196 (Tenn. Ct. App. 2003), appeal denied, Kenyon v. Handal, M.D., — S.W.3d —, 2003 Tenn. LEXIS 906 (Tenn. 2003).

For purposes of assessing the statute of limitations, the determination of when a reasonable person should know that his injury was caused by some wrongful or negligent act is generally a question for the trier of fact. McIntosh v. Blanton, 164 S.W.3d 584, 2004 Tenn. App. LEXIS 531 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2005 Tenn. LEXIS 74 (Tenn. Jan. 24, 2005).

6. Pleading.

It is essential to consideration of a motion for summary judgment that such motion recite that there is no genuine issue of fact. Belsky v. Payne, 560 S.W.2d 78, 1977 Tenn. App. LEXIS 299 (Tenn. Ct. App. 1977); Read v. Thomas, 679 S.W.2d 467, 1984 Tenn. App. LEXIS 3114 (Tenn. Ct. App. 1984).

Persons seeking a summary judgment need not support their motion with any evidentiary materials outside the pleadings. Biogen Distributors, Inc. v. Tanner, 842 S.W.2d 253, 1992 Tenn. App. LEXIS 751 (Tenn. Ct. App. 1992).

Having contradicted or avoided the evidence offered by defendant in summary judgment motion, plaintiff was not obligated to offer evidence of other elements of his case as to which defendant has offered no evidence. Armes v. Hulett, 843 S.W.2d 427, 1992 Tenn. App. LEXIS 659 (Tenn. Ct. App. 1992).

7. Matters of Law.

The content meaning and application of statutes and regulations are not a matter of fact to be proven by the affidavit of an expert witness, but are a matter of law to be presented by brief and argument of counsel supported by citations and authorities. Dempsey v. Correct Mfg. Corp., 755 S.W.2d 798, 1988 Tenn. App. LEXIS 245 (Tenn. Ct. App. 1988).

The affidavit of an engineer is not competent for consideration on a point of law, including interpretation of statutes and regulations, and his conclusory statement as to "failure to fulfill a duty" under the circumstances does not comply with the requirement of Tenn. R. Civ. P. 56.05. Dempsey v. Correct Mfg. Corp., 755 S.W.2d 798, 1988 Tenn. App. LEXIS 245 (Tenn. Ct. App. 1988).

Summary judgment may be granted where the only issues involved in the case are purely legal, but may not be used to resolve factual disputes. Watts v. Robertson County, 849 S.W.2d 798, 1992 Tenn. App. LEXIS 893 (Tenn. Ct. App. 1992).

No presumption of correctness attaches to decisions granting summary judgment because they involve only questions of law; thus, on appeal the reviewing court must make a fresh determination concerning whether the requirements of this rule have been met. Gonzales v. Alman Constr. Co., 857 S.W.2d 42, 1993 Tenn. App. LEXIS 96 (Tenn. Ct. App. 1993).

8. Proximate Cause.

The issue of proximate cause, like any other, may be determined on summary judgment so long as the test of Tenn. R. Civ. P. 56 is met. Wyatt v. Winnebago Industries, Inc., 566 S.W.2d 276, 1977 Tenn. App. LEXIS 281 (Tenn. Ct. App. 1977).

Summary judgment evidence showing that an injured party's temporomandibular joint syndrome (TMJ) was not likely caused by the party's chewing on a gumball was not adequate, under Tenn. R. Civ. P. 56.04, to support dismissal of the party's claim for injuries because it did not negate the gumball's causation of the TMJ symptoms. Hankins v. Chevco, Inc., 90 S.W.3d 254, 2002 Tenn. App. LEXIS 167 (Tenn. Ct. App. 2002).

In a mother's negligence suit against a hotel's owners, summary judgment in the owners' favor was improper as the owners failed to show that the child's injuries were not a foreseeable consequence of a poorly ventilated indoor pool, and did not proffer any evidence demonstrating that an indoor pool in which the ventilation system was not functioning properly could not cause injuries of the type suffered by the child. Lawson v. Edgewater Hotels, Inc., 167 S.W.3d 816, 2004 Tenn. App. LEXIS 814 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2005 Tenn. LEXIS 397 (Tenn. May 2, 2005).

9. Effect of Denial.

A denial of summary judgment indicates that the moving party has failed to establish that there is no genuine issue as to any material fact

and that he is entitled to a judgment as a matter of law; a trial therefore is necessary. Williamson County Broadcasting Co. v. Williamson County Board of Education, 549 S.W.2d 371, 1977 Tenn. LEXIS 596 (Tenn. 1977).

10. Failure to Prosecute After Denial of Motion.

When a plaintiff stands on his unsuccessful motion for summary judgment, the proper procedure is for the trial judge to dismiss for want of prosecution. Williamson County Broadcasting Co. v. Williamson County Board of Education, 549 S.W.2d 371, 1977 Tenn. LEXIS 596 (Tenn. 1977).

11. Appeals.

On motion for summary judgment, trial judge's determination of whether there is a genuine issue as to any material fact, when done so upon the record as a whole containing evidentiary matters such as depositions, affidavits or exhibits, is a review or determination of facts and an appeal from a judgment so entered is properly in the court of appeals. Allstate Ins. Co. v. Hartford Acci. & Indem. Co., 483 S.W.2d 719, 1972 Tenn. LEXIS 370 (Tenn. 1972).

A worker's compensation appeal from a summary judgment is not controlled by the material evidence rule, but rather is governed by Tenn. R. Civ. P. 56. Blocker v. Regional Medical Center, 722 S.W.2d 660, 1987 Tenn. LEXIS 815 (Tenn. 1987).

A worker's compensation appeal from a summary judgment order is not controlled by the de novo standard of review provided by the Workers' Compensation Act, in T.C.A. § 50-6-225(e) [version applicable to injuries occurring prior to July 1, 2014]; rather, it is governed by Tenn. R. Civ. P. 56. Downen v. Allstate Ins. Co., 811 S.W.2d 523, 1991 Tenn. LEXIS 196 (Tenn. 1991).

12. Interlocutory Appeal.

Generally speaking the action of a trial judge in overruling a motion for summary judgment is interlocutory in character and is not appealable. Williamson County Broadcasting Co. v. Williamson County Board of Education, 549 S.W.2d 371, 1977 Tenn. LEXIS 596 (Tenn. 1977).

Where a defendant is unsuccessful in his motion for a summary judgment, and where its correct resolution would terminate the controversy or substantially narrow the issues or materially advance the ultimate termination of the litigation, an interlocutory appeal on the basis of a trial judge's certification would be proper. Williamson County Broadcasting Co. v. Williamson County Board of Education, 549 S.W.2d 371, 1977 Tenn. LEXIS 596 (Tenn. 1977).

13. Motion to Dismiss.

A motion to dismiss a wrongful death action on the ground that plaintiff had executed a release could not be considered a motion for summary judgment under this rule since the form of a motion for summary judgment requires that it be made in writing, captioned, signed and state the ground therefor, in accordance with the usual rules governing motions. Hixson v. Stickley, 493 S.W.2d 471, 1973 Tenn. LEXIS 507 (Tenn. 1973).

It was error for the trial courts to treat defendant's motion to dismiss for lack of in personam jurisdiction under Tenn. R. Civil P. 12.02(2) as a motion for summary judgment. Nicholstone Book Bindery, Inc. v. Chelsea House Publishers, 621 S.W.2d 560, 1981 Tenn. LEXIS 487 (Tenn. 1981), cert. denied, Chelsea House Publishers, etc. v. Nicholstone Book Bindery, Inc., 455 U.S. 994, 102 S. Ct. 1623, 71 L. Ed. 2d 856, 1982 U.S. LEXIS 1195 (1982).

Where movant combined a motion for summary judgment with a motion to dismiss, the appellate court treated the motion as a motion for summary judgment to the extent the motion relied upon the grounds in the accompanying affidavit, and as a motion to dismiss to the extent that the motion asserted grounds for dismissal that did not rely on an accompanying affidavit. Pendleton v. Mills, 73 S.W.3d 115, 2001 Tenn. App. LEXIS 689 (Tenn. Ct. App. 2001).

Policy of insurance, not having been exhibited to the complaint itself, did not become a part of the complaint pursuant to Tenn. R. Civ. P. 10.03; thus, since the policy of insurance at issue first appeared in the case as an exhibit to the motion to dismiss, the provisions of Tenn. R. Civ. P. 12.02(6) converted the motion to dismiss at that time to a motion for summary judgment under Tenn. R. Civ. P. 56. Brick Church Transmission, Inc. v. S. Pilot Ins. Co., 140 S.W.3d 324, 2003 Tenn. App. LEXIS 829 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 392 (Tenn. May 10, 2004).

Conversion of employer's motion to dismiss to one for summary judgment in an apartment manager's action against the employer and its insurer after the apartment manager was refused reimbursement for losses she incurred as the result of a fire was appropriate, because the employer filed an affidavit of one of its regional managers and the affidavit and the lease agreement were considered by the trial court in making its determination. Ferguson v. Nationwide Prop. & Cas. Ins. Co., 218 S.W.3d 42, 2006 Tenn. App. LEXIS 793 (Tenn. Ct. App. 2006).

14. Notice.

Where in a suit to collect delinquent alimony under a California divorce decree established as a foreign judgment the defendant admitted the amount of the delinquency the court was authorized to enter summary judgment without regard to the provision of Tenn. R. Civ. P. 56 requiring 30 days notice before the time fixed for hearing, since there was no genuine issue as

to any material fact and the moving party was entitled to a judgment as a matter of law. Schmidt v. Schmidt, 493 S.W.2d 720, 1973 Tenn. LEXIS 509 (Tenn. 1973).

In prescribing the 30 day notice the rule uses the word "shall" and thus it is mandatory and not discretionary. Craven v. Lawson, 534 S.W.2d 653, 1976 Tenn. LEXIS 600 (Tenn. 1976).

Where there is the slightest possibility that the party opposing the motion for summary judgment has been denied the opportunity to file affidavits, take discovery depositions or amend, by the disposition of a motion for summary judgment without a 30 day interval following the filing of motion, it will be necessary to remand the case to cure such error. Craven v. Lawson, 534 S.W.2d 653, 1976 Tenn. LEXIS 600 (Tenn. 1976).

15. Evidence.

In malpractice action for negligently performed bilateral tubal ligation, defendant physician's affidavit denying negligence and stating that he was aware of instances where pregnancies occurred even after properly performed ligations did not comply with the requirements of this rule, since he had no personal knowledge of a second operation which revealed his alleged negligence, and his awareness of other unexpected pregnancies would be inadmissible as evidence. Teeters v. Currey, 518 S.W.2d 512, 1974 Tenn. LEXIS 438, 93 A.L.R.3d 207 (Tenn. 1974).

In those medical malpractice cases where the acts complained of are within the ken of the common layman, the affidavits of medical experts may be considered along with all other proof, but are not conclusive, and a summary judgment based on expert testimony alone would be improper. Bowman v. Henard, 547 S.W.2d 527, 1977 Tenn. LEXIS 556 (Tenn. 1977).

A petitioner's own belief does not constitute "such facts as would be admissible in evidence" as required by this Tenn. R. Civ. P. 56. Fowler v. Happy Goodman Family, 575 S.W.2d 496, 1978 Tenn. LEXIS 692 (Tenn. 1978).

Whether or not the trial court weighed evidence or gauged credibility in considering a motion for summary judgment was irrelevant where the most favorable view to the nonmoving party that could be taken was to disregard the testimony altogether. Taylor v. Nashville Banner Publishing Co., 573 S.W.2d 476, 1978 Tenn. App. LEXIS 313 (Tenn. Ct. App. 1978), cert. denied, 441 U.S. 923, 99 S. Ct. 2032, 60 L. Ed. 2d 396, 1979 U.S. LEXIS 1645 (1979).

For the purpose of eliciting from counterclaimant the details of his claim, the affidavit of one of plaintiff bank's senior officers in support of plaintiff's motion for summary judgment, which stated, "As a senior officer of plaintiff, so far as I know, there is no basis for the allegations of the counterclaim," was competent even though it might have been partly hearsay. Wachovia Bank & Trust Co., N. A. v. Glass, 575 S.W.2d 950, 1978 Tenn. App. LEXIS 322 (Tenn. Ct. App. 1978).

Under Tenn. R. Civ. P. 56, evidence offered in support of or opposition to a motion is subject to objection on grounds of hearsay. However, such objection must be presented with the same specificity as any other objection to evidence. Wachovia Bank & Trust Co., N. A. v. Glass, 575 S.W.2d 950, 1978 Tenn. App. LEXIS 322 (Tenn. Ct. App. 1978).

Response to motion for summary judgment was struck where attorney stated he "verily believed" certain information to be true, which was held not the same thing as knowledge, and where statements by attorney based on personal knowledge were inadmissible because attorney was not competent to testify. Keystone Ins. Co. v. Griffith, 659 S.W.2d 364, 1983 Tenn. App. LEXIS 706 (Tenn. Ct. App. 1983).

It is the burden of the party seeking a summary judgment to show to the court that under uncontradicted facts the moving party is entitled to judgment as a matter of law. In order to satisfy this requirement, the moving party must present or point out admissions of adversary or evidence of the facts relied upon and satisfy the court that such evidence is not contradicted. If the evidence presented by the moving party is not contradicted by the opposing party by sworn evidence or record admissions of adversary, and if the uncontradicted evidence relied upon by the moving party is sufficient to entitle the moving party to judgment as a matter of law, then summary judgment for the moving party is in order. Read v. Thomas, 679 S.W.2d 467, 1984 Tenn. App. LEXIS 3114 (Tenn. Ct. App. 1984).

The burden of showing that there is no genuine issue of material fact falls on the party moving for summary judgment. Tucker v. Metropolitan Government of Nashville & Davidson County, 686 S.W.2d 87, 1984 Tenn. App. LEXIS 3282 (Tenn. Ct. App. 1984).

Summary judgment may properly be granted in reliance solely on the pleadings, depositions, answer to interrogatories, and admissions on file. American Network Group, Inc. v. Kostyk, 834 S.W.2d 296, 1991 Tenn. App. LEXIS 925 (Tenn. Ct. App. 1991).

Where party relied on *Reed v. Firestone*, 1991 WL 46678 (Tenn. App. at Nashville, filed April 8, 1991), permission to appeal denied June 24, 1991, for his argument that the motion for summary judgment may not be supported by depositions alone, the supreme court was of the opinion that such a holding directly conflicted with the express wording of Tenn. R. Civ. P. 56 and that the conflict between *Reed* and the Tennessee Rules of Civil Procedure must be resolved in favor of the Tennessee Rules of Civil Procedure. American Network Group, Inc. v.

Kostyk, 834 S.W.2d 296, 1991 Tenn. App. LEXIS 925 (Tenn. Ct. App. 1991).

Trial court erred in failing to grant defendant insurance company's motion for summary judgment, where the presumption, established by decedent's blood and urine alcohol content, that he was intoxicated at the time of his death was not rebutted by plaintiff, and where decedent's intoxication was an absolute bar to benefits. Brown v. J.C. Penney Life Ins. Co., 861 S.W.2d 834, 1992 Tenn. App. LEXIS 485 (Tenn. Ct. App. 1992), rehearing denied, Brown v. J. C. Penney Life Ins. Co., — S.W.2d —, 1992 Tenn. App. LEXIS 622 (Tenn. Ct. App. 1992).

When the moving party has made a properly supported motion for summary judgment, the burden of production of evidence shifts to the nonmoving party to produce evidence which would establish a genuine factual dispute. Masters v. Rishton, 863 S.W.2d 702, 1992 Tenn. App. LEXIS 576 (Tenn. Ct. App. 1992).

Once the moving party has shown that there is no genuine issue of material fact, it is for the nonmoving party to then demonstrate, by affidavits or discovery materials, that there is a genuine, material fact dispute warranting a trial. Braswell v. Carothers, 863 S.W.2d 722, 1993 Tenn. App. LEXIS 294 (Tenn. Ct. App. 1993).

Where party seeking summary judgment successfully negates claimed basis for suit, nonmoving party must establish existence of essential elements of claim by pointing to evidence establishing material factual dispute overlooked or ignored by movant, rehabilitating impeached evidence, producing additional evidence establishing genuine issue for trial, or submitting affidavit explaining necessity for further discovery. McCarley v. West Quality Food Serv., 960 S.W.2d 585, 1998 Tenn. LEXIS 1 (Tenn. 1998).

Tenn. R. Civ. P. 56 does not preclude the filing of excerpts of a deposition nor require that an affidavit be attached to deposition excerpts. Seffernick v. St. Thomas Hosp., 969 S.W.2d 391, 1998 Tenn. LEXIS 281 (Tenn. 1998).

On summary judgment motion, inferences from the evidence address themselves to the trier of fact, not the trier of law. Buddy Lee Attractions, Inc. v. William Morris Agency, Inc., 13 S.W.3d 343, 1999 Tenn. App. LEXIS 638 (Tenn. Ct. App. 1999).

Tennessee follows the rule that contradictory statements by the same witness regarding a single fact cancel each other out; when the so-called cancellation rule is invoked at the summary judgment stage to challenge evidence opposing the motion, the courts must view the challenged evidence in the light most favorable to the opponent of the motion. Church v. Perales, 39 S.W.3d 149, 2000 Tenn. App. LEXIS 567 (Tenn. Ct. App. 2000).

Doctor's deposition taken pursuant to Tenn. R. Civ. P. 26.02(4) could not be used except for impeachment purposes at trial pursuant to Tenn. R. Civ. P. 32.01 and, thus, could not be used by a patient to oppose a motion for summary judgment; the evidence supporting or opposing summary judgment must be such facts as would be admissible in evidence. Roberts v. Bicknell, 73 S.W.3d 106, 2001 Tenn. App. LEXIS 605 (Tenn. Ct. App. 2001).

Patients faced with their physician's summary judgment motion cannot rest on the allegations in their complaint. They must demonstrate the existence of triable factual disputes either by: (1) Pointing to evidence ignored or overlooked by the physician; (2) Rehabilitating evidence attacked by the physician; or (3) Producing additional evidence establishing the existence of a genuine factual issue. Because the practitioners most often file their summary judgment motions before much discovery has occurred, the only practical alternative available to most patients is to file an expert affidavit contradicting their physician's affidavit. Kenyon v. Handal, 122 S.W.3d 743, 2003 Tenn. App. LEXIS 196 (Tenn. Ct. App. 2003), appeal denied, Kenyon v. Handal, M.D., — S.W.3d —, 2003 Tenn. LEXIS 906 (Tenn. 2003).

Substance of the evidence offered by a patient to oppose a physician's summary judgment motion must be admissible at trial but need not be in admissible form, the affidavit must contain sufficient information to demonstrate that the affiant is qualified to render an expert opinion, Tenn. R. Evid. 104(a), and that the affiant's opinion will substantially assist the trier of fact, Tenn. R. Evid. 702; it must also comply with the requirements of Tenn. R. Civ. P. 56.06 and T.C.A. § 29-26-115. Kenyon v. Handal, 122 S.W.3d 743, 2003 Tenn. App. LEXIS 196 (Tenn. Ct. App. 2003), appeal denied, Kenyon v. Handal, M.D., — S.W.3d —, 2003 Tenn. LEXIS 906 (Tenn. 2003).

In addition to the four specific factors identified in *Harris v. Chern*, there should be consideration of "any other relevant factor;" whether a new or supplemental affidavit effectively rebuts the defendant's affidavit is clearly a relevant consideration. Kenyon v. Handal, 122 S.W.3d 743, 2003 Tenn. App. LEXIS 196 (Tenn. Ct. App. 2003), appeal denied, Kenyon v. Handal, M.D., — S.W.3d —, 2003 Tenn. LEXIS 906 (Tenn. 2003).

Trial court erred in excluding the deposition of plaintiffs' expert witness in plaintiffs' response to defendants' summary judgment motion. An expert deposition taken in accordance with Tenn. R. Civ. P. 26 could be offered by a party to oppose summary judgment to the same extent that an affidavit may be so used. Dial v. Harrington, 138 S.W.3d 895, 2003 Tenn. App. LEXIS 761 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 275 (Tenn. Mar. 22, 2004).

County was properly granted summary judgment in deceased's widow's wrongful death

action because correctional professionals disagreed with widow's contention that it was a well established fact that an intoxicated person was at increased risk of suicide and widow offered no expert testimony to support her contention; affidavits submitted by the county established deceased's suicide was not foreseeable by the jailers because he was specifically questioned and denied that he was having suicidal thoughts or had a history of suicide attempts, deceased was frequently observed by jailers, was quiet and respectful during his interactions with a deputy, and was resting quietly when two deputies observed him shortly before he was found dead with the telephone cord around his neck. Linkous v. Lane, 276 S.W.3d 917, 2008 Tenn. App. LEXIS 285 (Tenn. Ct. App. May 14, 2008), appeal denied, Linkous v. Hawkins County, — S.W.3d —, 2008 Tenn. LEXIS 917 (Tenn. Dec. 8, 2008).

16. Specific Types of Cases.

In an indemnification dispute, a court properly granted summary judgment to a sub-contractor because the sub-contractor was entitled to indemnification from a contractor for the collapse of a bridge caused by a third party where the sub-contractor had no control of the third-party and the sub-contractor sustained a loss from that negligence. Trinity Indus. v. McKinnon Bridge Co., 147 S.W.3d 225, 2003 Tenn. App. LEXIS 684 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 264 (Tenn. Mar. 22, 2004).

Trial court did not err by granting the non-profit organization's motion for summary judgment on the grounds that it was immune from prosecution under T.C.A. § 40-38-108; T.C.A. § 40-38-108 provides immunity for failure to comply with any provision of the Victims' Bill of Rights, which would include a victim's right to be fully informed, and under T.C.A. § 40-38-108, the non-profit was immune from prosecution for any failure to properly inform the citizen of his rights. Hawkins v. Case Mgmt., Inc., 165 S.W.3d 296, 2004 Tenn. App. LEXIS 593 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2005 Tenn. LEXIS 78 (Tenn. Jan. 24, 2005).

Where the inmate asserted that a doctor and a facility administrator were negligent with respect to his treatment for hepatitis, the record showed that none of the medical aid rendered at the private for-profit correctional facility was administered by an employee of the state, and rather, each of the individuals was an employee of an independent contractor; summary judgment for the state was proper as it enjoyed sovereign immunity and the proper defendant for the inmate's negligence claims would have been the private contractor or its employees. Younger v. State, 205 S.W.3d 494, 2006 Tenn. App. LEXIS 54 (Tenn. Ct. App. 2006), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 628 (Tenn. 2006).

17. —Contracts.

There was a genuine issue of material fact as to whether there was adequate consideration flowing between father and daughter to constitute an enforceable contract for father to pay for daughter's college tuition. Calabro v. Calabro, 15 S.W.3d 873, 1999 Tenn. App. LEXIS 732 (Tenn. Ct. App. 1999).

Summary judgment was properly granted in favor of the bank on its claim against the owners for an unpaid note, where the loan documents clearly stated that they constituted the entire agreement between the parties, and the owners' affidavit was extraneous evidence introduced in an attempt to alter a loan agreement so as to change the meaning of the unambiguous loan contract; the owners failed to establish the existence of disputed material facts. First Tenn. Bank Nat'l Ass'n v. Bad Toys, Inc., 159 S.W.3d 557, 2004 Tenn. App. LEXIS 596 (Tenn. Ct. App. 2004), appeal denied, First Tenn. Bank Natl Ass'n v. Bad Toys, Inc., — S.W.3d —, 2005 Tenn. LEXIS 167 (Tenn. Feb. 28, 2005).

18. —Insurance Actions.

The issues relating to the scope of coverage and an insurer's duty to defend present questions of law which can be resolved using a summary judgment when the relevant facts are not in dispute. Allstate Ins. Co. v. Jordan, 16 S.W.3d 777, 1999 Tenn. App. LEXIS 733 (Tenn. Ct. App. 1999).

Judgment of the trial court granting summary judgment in favor of the beneficiary was vacated and summary judgment was granted to the insurer. There was nothing in the record to indicate that there was any intent on the part of the parties to change the due date of the premium set out in the policy and there was no misrepresentation by the insurer that the grace period would extend for 31 days past the 15th of the month, when the arrangement for the payment of the premiums on the 15th of the month by bank withdrawal was brought about by the insured's request and the insured knew or at least was charged with knowledge that the premium due date was the 4th of the month, but made no effort to have that time changed. Buchholz v. Tenn. Farmers Life Reassurance Co., 145 S.W.3d 80, 2003 Tenn. App. LEXIS 719 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 204 (Tenn. Mar. 8, 2004).

Trial court properly granted summary judgment for insured where the insurer claimed that, because the bank never sued the corporation, it was not liable for the corporation's legal fees and settlement costs; however, the insurer waived the lawsuit requirement through the words, action, and non-action, of its agent. The insurer was liable to the corporation for its settlement costs, as well as its legal fees and expenses, because the damages claimed by the bank constituted covered "property damage"

under the policy. Marlin Fin. & Leasing Corp. v. Nationwide Mut. Ins. Co., 157 S.W.3d 796, 2004 Tenn. App. LEXIS 485 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2005 Tenn. LEXIS 173 (Tenn. Feb. 28, 2005).

19. — ERISA Action.

Trial court erred in granting summary judgment in an employee's action against an employer and a plan supervisor to recover unpaid medical expenses stemming from an alcohol-related car accident; the action was dismissed without prejudice on appeal because the employee failed to exhaust his administrative remedies, as required by the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq. Cantrell v. Walker Die Casting, Inc., 121 S.W.3d 391, 2003 Tenn. App. LEXIS 103 (Tenn. Ct. App. 2003), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 542 (Tenn. June 2, 2003).

20. — Actions Involving Real Property.

Questions regarding dominant and servient easements, including parties' reliance and intentions, involved factual determinations that could not be determined on summary judgment. Minton v. Long, 19 S.W.3d 231, 1999 Tenn. App. LEXIS 830 (Tenn. Ct. App. 1999).

Tenn. R. Civ. P. 71 does not preclude the use of summary judgment in condemnation proceedings. Metropolitan Dev. & Hous. Agency v. Trinity Marine Nashville, Inc., 40 S.W.3d 73, 2000 Tenn. App. LEXIS 473 (Tenn. Ct. App. 2000).

Because the contract for the sale of real property was unambiguous, the court could not consider evidence indicating that the seller signed the agreement under the belief that the language would later be changed; because such extraneous evidence could not be considered, it could not be considered a disputed material fact which would then render summary judgment inappropriate. Hillard v. Franklin, 41 S.W.3d 106, 2000 Tenn. App. LEXIS 654 (Tenn. Ct. App. 2000), review or rehearing denied, — S.W.3d —, 2001 Tenn. LEXIS 242 (Tenn. Mar. 12, 2001).

There was no genuine issue of material fact relating to whether purchasers where in possession of the real property after execution of the contract. Hillard v. Franklin, 41 S.W.3d 106, 2000 Tenn. App. LEXIS 654 (Tenn. Ct. App. 2000), review or rehearing denied, — S.W.3d —, 2001 Tenn. LEXIS 242 (Tenn. Mar. 12, 2001).

Summary judgment was appropriate in action by a real estate broker to collect compensation where there was no evidence to demonstrate that the broker was the procuring cause of the successful transaction between country club buyer and club's sellers. Burke v. KRA Holdings, 42 S.W.3d 868, 2000 Tenn. App. LEXIS 298 (Tenn. Ct. App. 2000).

Summary judgment was proper in an action for unpaid rents under a lease; the undisputed material facts showed the purchaser of the lease at a bankruptcy auction was liable for rent as an assignee under the terms of the original lease. Cherry v. First State Bank, 112 S.W.3d 129, 2003 Tenn. App. LEXIS 119 (Tenn. Ct. App. 2003), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 646 (Tenn. July 7, 2003).

In a suit regarding the sale of a condominium unit, the sellers affirmatively negated an essential element of the buyers' Tennessee Residential Property Disclosures Act, T.C.A. § 66-5-201 et seq., claim, specifically, that the alleged material defects were known to the owner. Additionally, the buyers failed to carry their burden to set forth specific facts establishing the existence of disputed, material facts that had to be resolved by the trier of fact; thus, there were no genuine issues with regard to the material facts and the sellers were entitled to summary judgment on that claim. Robinson v. Currey, 153 S.W.3d 32, 2004 Tenn. App. LEXIS 411 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 1104 (Tenn. Dec. 6, 2004).

Trial court properly awarded summary judgment for plaintiff realtors in their lawsuit over the commission owed them for leasing property; the rights and obligations of the parties were governed by the terms of the written contract, which stated the amount of commission owed the realtors. Realty Store, Inc. v. Tarl P'ship, L.P., 153 S.W.3d 366, 2004 Tenn. App. LEXIS 455 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 1146 (Tenn. Dec. 20, 2004).

Trial court properly concluded that plaintiff's duty to provide lateral support did not extend to adjoining land that had been altered or improved. Therefore, as both plaintiff's and defendant's property in question had been altered from its natural state, plaintiff had no duty to replace the lateral support of the improved portion of the defendant's property when plaintiff made excavations, and summary judgment for plaintiff was proper. XI Props. v. RaceTrac Petroleum, Inc., 151 S.W.3d 443, 2004 Tenn. LEXIS 1110 (Tenn. 2004).

21. —Fraud.

Where a claim of fraud is presented, ordinarily only upon a full trial of the action can the issue properly be developed. As a general rule, summary judgment is not an appropriate procedure for the disposition of such an issue. Nevertheless, it is incumbent upon the party asserting fraud, when confronted by a motion for summary judgment, to produce some competent and material evidence legally sufficient to support his claim or defense. Fowler v. Happy Goodman Family, 575 S.W.2d 496, 1978 Tenn. LEXIS 692 (Tenn. 1978).

Defendants were not entitled to summary judgment on plaintiff's fraud and conspiracy to

defraud claims; this holding was not altered by the defendants' invocation of the testimonial privilege because plaintiff's claims fit within the "larger conspiracy" exception to that privilege. Brown v. Birman Managed Care, Inc., 42 S.W.3d 62, 2001 Tenn. LEXIS 358 (Tenn. 2001).

22. —Malpractice Actions.

In those malpractice actions where expert medical testimony is required to establish negligence and proximate cause, affidavits by medical doctors, which clearly and completely refute plaintiff's contention, afford a proper basis for dismissal of the action on summary judgment, in the absence of proper responsive proof by affidavit or otherwise. Bowman v. Henard, 547 S.W.2d 527, 1977 Tenn. LEXIS 556 (Tenn. 1977).

As a general rule summary judgments are particularly inappropriate in malpractice actions against professionals, since there is a natural tendency to support a fellow professional. Bowman v. Henard, 547 S.W.2d 527, 1977 Tenn. LEXIS 556 (Tenn. 1977).

In malpractice actions wherein expert medical testimony is required to establish negligence and proximate cause, affidavits by medical doctors which clearly and completely refute plaintiff's contention afford a proper basis for dismissal of the action on summary judgment, in the absence of proper responsive proof by affidavit or otherwise; whereas in those cases wherein the acts complained of are within the ken of the common layman, the affidavit of medical experts may be considered along with all other proof, but is not conclusive. Moncrief v. Fuqua, 610 S.W.2d 720, 1979 Tenn. App. LEXIS 402 (Tenn. Ct. App. 1979).

While motions for summary judgment are generally inappropriate in professional malpractice cases, if the only issue is one which requires expert testimony and there is no expert response to an affidavit by an expert, then summary judgment is proper. Ayers v. Rutherford Hospital, Inc., 689 S.W.2d 155, 1984 Tenn. App. LEXIS 3391 (Tenn. Ct. App. 1984); Gambill v. Middle Tennessee Medical Center, Inc., 751 S.W.2d 145, 1988 Tenn. App. LEXIS 72 (Tenn. Ct. App. 1988).

Cause of action for legal malpractice arising out of attorneys' alleged negligence in failing to secure deeds of trust for a loan made by plaintiff leasing company was improperly dismissed, as the record established that whether plaintiff should have known of any injuries stemming from attorneys' alleged negligence was a genuine issue of material fact. Caledonia Leasing & Equip. Co. v. Armstrong, Allen, Braden, Goodman, McBride & Prewitt, 865 S.W.2d 10, 1992 Tenn. App. LEXIS 926 (Tenn. Ct. App. 1992).

In a malpractice action against an oral surgeon, the unverified letter of a dentist attached to plaintiffs' attorney's affidavit did not meet the requirements of Tenn. R. Civ. P. 56.05. Keith v. Witt, 919 S.W.2d 613, 1995 Tenn. App. LEXIS 771 (Tenn. Ct. App. 1995).

Summary judgment was properly awarded to defendants in medical malpractice action arising out of an abortion, where plaintiffs failed to rebut presumption that patient was a mature minor with the capacity to consent to the procedure, and failed to meet their burden of proof by furnishing testimony that as a proximate result of defendant's alleged negligent act or omission, the patient suffered injuries which would not have otherwise occurred. Roddy v. Volunteer Medical Clinic, 926 S.W.2d 572, 1996 Tenn. App. LEXIS 110 (Tenn. Ct. App. 1996), appeal denied, Tenn. Roddy v. Volunteer Medical Clinic, 1996 LEXIS 457 (Tenn. July 1, 1996).

The plaintiff facing a summary judgment in a medical malpractice case must demonstrate only that the plaintiff has been injured; the question of how much the plaintiff has been injured should be left to the trier of fact. Church v. Perales, 39 S.W.3d 149, 2000 Tenn. App. LEXIS 567 (Tenn. Ct. App. 2000).

The trial court should not have granted summary judgment to dispose of plaintiff's malpractice claims against doctors based on their alleged delay in diagnosing and treating plaintiff's perforated bowel and the intra-abdominal process it caused. Church v. Perales, 39 S.W.3d 149, 2000 Tenn. App. LEXIS 567 (Tenn. Ct. App. 2000).

Summary judgment in a medical malpractice case may be appropriate where the defendant produces expert proof that completely refutes the plaintiff's allegations of negligence and the plaintiff does not produce rebuttal proof by expert testimony. Dunham v. Stones River Hosp., Inc., 40 S.W.3d 47, 2000 Tenn. App. LEXIS 285 (Tenn. Ct. App. 2000).

Since the record before the court at the summary judgment stage of legal malpractice proceedings did not establish, as a matter of law, what the actual participation of the plaintiff, a public defender, was in the underlying tort case, the record simply provided no adequate basis for the court to grant summary judgment on the issue to either party. Walker v. Sidney Gilreath & Assocs., 40 S.W.3d 66, 2000 Tenn. App. LEXIS 475 (Tenn. Ct. App. 2000), review or rehearing denied, — S.W.3d —, 2001 Tenn. LEXIS 237 (Tenn. 2001).

Summary judgment, in favor of the doctors on the patient's medical malpractice case was affirmed when there was no evidence to conclude that the patient was unable to manage her personal affairs or to understand her legal rights and liabilities, extending the statute of limitations under T.C.A. § 28-1-106. Crawford v. Beatty, 108 S.W.3d 877, 2003 Tenn. App. LEXIS 19 (Tenn. Ct. App. 2003), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 543 (Tenn. June 2, 2003).

Patients who are unable to produce an expert affidavit of their own face almost certain dis-

missal of their complaint because the physician has effectively negated an essential element of their case; without an opposing expert affidavit, patients cannot demonstrate the existence of a genuine factual dispute regarding whether the physician breached the standard of professional practice in the community. Kenyon v. Handal, 122 S.W.3d 743, 2003 Tenn. App. LEXIS 196 (Tenn. Ct. App. 2003), appeal denied, Kenyon v. Handal, M.D., — S.W.3d —, 2003 Tenn. LEXIS 906 (Tenn. 2003).

Implicit in the *Harris v. Chern* opinion is the Tennessee supreme court's recognition that relief under Tenn. R. Civ. P. 59.04 is available only when the supplemental affidavit effectively remedies the defects or shortcomings in the earlier affidavit opposing the physician's summary judgment motion; trial courts are not required to grant relief from an order granting a summary judgment if the patient remains unable to demonstrate the existence of a material factual dispute requiring a trial. Kenyon v. Handal, 122 S.W.3d 743, 2003 Tenn. App. LEXIS 196 (Tenn. Ct. App. 2003), appeal denied, Kenyon v. Handal, M.D., — S.W.3d —, 2003 Tenn. LEXIS 906 (Tenn. 2003).

In a medical malpractice action, fact issues existed as to whether a consulting cardiologist had a physician-patient relationship with a decedent who he never saw; that relationship could be implied if a doctor affirmatively participated in diagnosis or treatment. Summary judgment in favor of the doctor and his employer was reversed. Kelley v. Middle Tenn. Emergency Physicians, P.C., 133 S.W.3d 587, 2004 Tenn. LEXIS 333 (Tenn. 2004).

Trial court erred in granting the attorneys' summary judgment motion on the client's legal malpractice claim; whether the client would have received a higher settlement but for the attorneys' negligence was a question of fact that precluded summary judgment. Parnell v. Ivy, 158 S.W.3d 924, 2004 Tenn. App. LEXIS 361 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 1055 (Tenn. Nov. 29, 2004).

Appellate court erred by granting hospital summary judgment in patient's husband's medical malpractice action because genuine issues of material fact existed concerning whether hospital could be held vicariously liable under an apparent agency theory, and in particular whether hospital provided patient with adequate notice that emergency room physicians were independent contractors rather than employees; hospital held itself out as providing emergency care to the public, and husband testified that he and the patient relied on the hospital to supply emergency medical care and that they did not have the option to choose patient's emergency room physician. Boren ex rel. Boren v. Weeks, 251 S.W.3d 426, 2008 Tenn. LEXIS 317 (Tenn. May 6, 2008).

23. —Will Contests.

A will contest proceeding can be disposed of by a summary judgment. Owen v. Stanley, 739 S.W.2d 782, 1987 Tenn. App. LEXIS 3211 (Tenn. Ct. App. 1987), overruled, Matlock v. Simpson, 902 S.W.2d 384, 1995 Tenn. LEXIS 44 (Tenn. 1995).

Court erred in granting summary judgment to plaintiff in a will contest, where the conditions of the gift, and the obligation to satisfy them, would only come into play if the decedent left the hospital; since he never did, the conditions could not have been satisfied, and, hence, were not satisfied per the terms of the will. Albright v. Button, 155 S.W.3d 110, 2004 Tenn. App. LEXIS 477 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 1132 (2004).

Trial court erred by interpreting the court's earlier opinion as conclusively deciding that the testator's third codicil had not been revoked, had been lost or destroyed, and that the contents were the same as the contents of the purported copy, and therefore the trial court erred by granting the widow summary judgment under the law of the case doctrine; rather, the court's prior opinion stated that nothing in its opinion prevented the testator's daughters from also contesting the will and all three codicils if that was their desire, and on remand the trial court was to require the daughters to state whether they were contesting the testator's will or any of the codicils, and if so, the basis for their contest. In re Estate of Boote, 265 S.W.3d 402, 2007 Tenn. App. LEXIS 818 (Tenn. Ct. App. Dec. 27, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 384 (Tenn. May 27, 2008).

24. —Default Judgments.

The fact that the plaintiff had a statutory basis under former T.C.A. § 36-2-106(b) upon which to pursue summary judgment did not preclude the plaintiff from seeking a default judgment where the requisite elements for such relief were also present. Walker v. Baker, 738 S.W.2d 194, 1987 Tenn. App. LEXIS 2736 (Tenn. Ct. App. 1987).

25. —Negligence Actions.

As a general rule summary judgments are not appropriate in negligence cases. Bowman v. Henard, 547 S.W.2d 527, 1977 Tenn. LEXIS 556 (Tenn. 1977); Wolfe v. Hart, 679 S.W.2d 455, 1984 Tenn. App. LEXIS 3062 (Tenn. Ct. App. 1984); Gonzales v. Alman Constr. Co., 857 S.W.2d 42, 1993 Tenn. App. LEXIS 96 (Tenn. Ct. App. 1993).

Where decedents were found to have committed contributory negligence and were barred from recovery as a matter of law, summary judgment was appropriate. Rollins v. Dixie, 780 S.W.2d 765, 1989 Tenn. App. LEXIS 635 (Tenn. Ct. App. 1989).

Summary judgments are generally not appropriate in negligence actions and should only be granted when the inferences that may be drawn from uncontroverted facts are so certain that all reasonable persons must agree with them. Dudley v. Unisys Corp., 852 S.W.2d 435, 1992 Tenn. App. LEXIS 1048 (Tenn. Ct. App. 1992).

As a general rule, negligence cases are not amenable to disposition under summary judgment proceedings unless, from all of the facts together with the inferences to be drawn from the facts, the facts and inferences are so certain and uncontroverted that reasonable minds must agree. Keene v. Cracker Barrel Old Country Store, Inc., 853 S.W.2d 501, 1992 Tenn. App. LEXIS 1042 (Tenn. Ct. App. 1992).

Summary judgments are not disfavored procedural devices and they may be used to conclude any case, including negligence cases, that can and should be resolved on legal issues alone. Mansfield v. Colonial Freight Sys., 862 S.W.2d 527, 1993 Tenn. App. LEXIS 345 (Tenn. Ct. App. 1993), rehearing denied, 862 S.W.2d 527, 1993 Tenn. App. LEXIS 392 (Tenn. Ct. App. 1993); Peete v. Shelby County Health Care Corp., 938 S.W.2d 693, 1996 Tenn. App. LEXIS 497 (Tenn. Ct. App. 1996).

Although the trial court erred that unretracted sprinkler system head was not a dangerous condition, defendants were entitled to summary judgment because there was no evidence that the dangerous condition lasted long enough that the defendants would have discovered and corrected it had they used due care; there can be no liability in this type of negligence case without this proof. Basily v. Rain, Inc., 29 S.W.3d 879, 2000 Tenn. App. LEXIS 213 (Tenn. Ct. App. 2000).

Where the defendant was not aware of the slippery condition in the defendant's store before the plaintiff fell and no creation of a dangerous condition was shown by the defendant's method of operation, the plaintiff failed to prove a necessary element of the case, i.e., notice of a dangerous condition on the part of the defendant. Trebing v. Fleming Cos., 40 S.W.3d 42, 2000 Tenn. App. LEXIS 266 (Tenn. Ct. App. 2000), overruled, Tubb v. Wal-Mart Stores East, L.P., — F. Supp. 2d —, 2010 U.S. Dist. LEXIS 62421 (E.D. Tenn. June 21, 2010).

In an accounting negligence suit brought by companies and their officers against accountants and their firms, summary judgment in the accountants' favor on res judicata grounds was improper; a prior settlement agreement from an adversary proceeding filed in bankruptcy court was not a bar to the officers' individual claims, where genuine issues of material fact existed as to whether the officers engaged the accountants for services separate and distinct from those to be rendered pursuant to the engagement by one of the companies, as to the nature of the separate engagement, as to whether the accountants were negligent or grossly negligent in performing under the separate engagement, and as to the nature and extent of the damages suffered by each of the officers as a result of the negligence, if any, of the accountants. Hart v. Joseph Decosimo and Co., LLP, 145 S.W.3d 67, 2004 Tenn. App. LEXIS 73 (Tenn. Ct. App. 2004), appeal denied, Hart v. Joseph Decosimo & Co., — S.W.3d —, 2004 Tenn. LEXIS 1234 (Tenn. Oct. 4, 2004).

In a premises liability case, summary judgment was properly granted to an employer where there was no allegation or proof of any defect or obstruction existing on the stairway, there was no foreign substance of any type on the stairway, there was no proof of any substance or condition of the surface or subsurface of the basement floor beneath the last step of the stairway that could have combined with the newspaper lying on the floor surface to create a slippery condition, and the housekeeper did not catch her heel in the newspapers; she asserted only that she "slipped and fell" as she stepped on the newspaper. Friedenstab v. Short, 174 S.W.3d 217, 2004 Tenn. App. LEXIS 346 (Tenn. Ct. App. 2004), review or rehearing denied, — S.W.3d —, 2004 Tenn. LEXIS 1074 (Tenn. 2004).

Court properly granted summary judgment to a school board where the board's policy regarding the sign out of children from the school could not form the basis of a negligence per se claim. The policy was neither a statute nor an ordinance; rather, it was a rule adopted by the board intended to regulate the conduct of school employees when releasing students during school hours, and the applicable standard of care owed by the board and the school was established by law, not the policy. Haney v. Bradley County Bd. of Educ., 160 S.W.3d 886, 2004 Tenn. App. LEXIS 607 (Tenn. Ct. App. 2004), review or rehearing denied, — S.W.3d —, 2005 Tenn. LEXIS 299 (Tenn. 2005).

Court properly granted summary judgment to a school board on a mother's claim that the school was negligent in allowing her child's stepfather to sign the child out, where the child was born during the mother's and the husband's marriage, and there was no court order restricting the husband's access to the child; therefore, the school was not negligent in continuing to treat the husband as the child's father based on the conduct of the mother and stepfather. Haney v. Bradley County Bd. of Educ., 160 S.W.3d 886, 2004 Tenn. App. LEXIS 607 (Tenn. Ct. App. 2004), review or rehearing denied, — S.W.3d —, 2005 Tenn. LEXIS 299 (Tenn. 2005).

Court properly granted summary judgment to a school board on a mother's claim that the school was negligent in allowing her child's stepfather to sign the child out, because certain school employees had knowledge of the stepfather's violent propensities, where the mother's

testimony as to events occurring prior to the fateful day and who at the school knew what, was insufficient to create a factual issue on whether the school was negligent in releasing the children to the stepfather. Haney v. Bradley County Bd. of Educ., 160 S.W.3d 886, 2004 Tenn. App. LEXIS 607 (Tenn. Ct. App. 2004), review or rehearing denied, — S.W.3d —, 2005 Tenn. LEXIS 299 (Tenn. 2005).

Court erred in granting summary judgment to a school board on a mother's claim that the school was negligent in allowing her child's stepfather to sign the child out, where the inaction of school employees in not reading the reasons the stepfather gave for signing out the children was not a planning decision reflecting a course of conduct by those in charge of formulating the policy; rather, it was a failure in the implementation of the policy, and therefore, the discretionary function exception to the removal of immunity did not apply to shield the actions of the school. Haney v. Bradley County Bd. of Educ., 160 S.W.3d 886, 2004 Tenn. App. LEXIS 607 (Tenn. Ct. App. 2004), review or rehearing denied, — S.W.3d —, 2005 Tenn. LEXIS 299 (Tenn. 2005).

26. —Products Liability Actions.

Defendant in products liability action was entitled to summary judgment where plaintiffs were unable to establish negligence or defeat, essential elements of their claims. Masters v. Rishton, 863 S.W.2d 702, 1992 Tenn. App. LEXIS 576 (Tenn. Ct. App. 1992).

Defendants were entitled to summary judgment after plaintiffs failed to establish the existence of any genuine issues of material fact as to whether the defendants' spinal system devices were unreasonably dangerous pursuant to T.C.A. § 29-28-102(8); furthermore, summary judgment could not be defeated by doctor's reasoning that placing a screw in a pedicle is unsafe because it had not been proven to the doctor to be safe. King v. Danek Med., 37 S.W.3d 429, 2000 Tenn. App. LEXIS 182 (Tenn. Ct. App. 2000).

27. —Workers' Compensation.

Grant of summary judgment in favor of the alleged employer was proper pursuant to T.C.A. § 50-6-106(1)(A) where it was not, as a matter of law, the alleged employees' employer so as to subject it to liability under the Workers' Compensation Law; in a service agreement executed by the alleged employer and company, the company agreed to provide drivers to the alleged employer and the agreement stated that the personnel supplied to the alleged employer would be employees of the company only. Honsa v. Tombigbee Transp. Corp., 141 S.W.3d 540, 2004 Tenn. LEXIS 632 (Tenn. 2004), rehearing denied, — S.W.3d —, 2004 Tenn. LEXIS 826 (Tenn. Aug. 18, 2004).

28. Employment Discrimination Cases.

In employment discrimination cases, the summary judgment analysis must be applied at each stage of the McDonnell Douglas inquiry. Versa v. Policy Studies, Inc., 45 S.W.3d 575, 2000 Tenn. App. LEXIS 580 (Tenn. Ct. App. 2000).

Summary judgment, Tenn. R. Civ. P. 56, in favor of the employer was affirmed when assuming the employee had established a prima facie case of age discrimination, T.C.A. § 4-21-101 et seq., the record established that the employer terminated the employee for legitimate, non-pretextual reasons. Fox v. Baptist Mem. Hosp. Tipton, 148 S.W.3d 903, 2002 Tenn. App. LEXIS 875 (Tenn. Ct. App. 2002), appeal denied, Fox v. Baptist Mem. Hosp. - Tipton, — S.W.3d —, 2004 Tenn. LEXIS 631 (Tenn. July 6, 2004).

Trial court reasoned that the employer did not replace the female employee, but rather that the employer eliminated the employee's job as part of a general reorganization of the company to save money, however, the employee assigned all of the employee's duties to a man at lower pay, and changed the title of the job from floor supervisor to director of operations. The employee raised genuine issues of material fact as to all four required elements of a cause of action under the Tennessee Human Rights Act, T.C.A. § 4-21-101, established a prima facie case, and summary judgment for the employer was improper. Dennis v. White Way Cleaners, L.P., 119 S.W.3d 688, 2003 Tenn. App. LEXIS 188 (Tenn. Ct. App. 2003), rehearing denied, 119 S.W.3d 688, 2003 Tenn. App. LEXIS 270 (Tenn. Ct. App. 2003), appeal denied, Dennis v. White Way Cleaners, — S.W.3d —, 2003 Tenn. LEXIS 896 (Tenn. Oct. 6, 2003).

Trial court properly granted the employer summary judgment on the employee's retaliation claim under T.C.A. § 4-21-301(1) because even though the employee presented sufficient evidence for a prima facie case of retaliation, the employer articulated a legitimate, nondiscriminatory reason for the employee's transfer, which the employee failed to show was pretextual; the employer contended that it transferred the employee to protect her from further harassment by her supervisor, which was one of the central purposes of T.C.A. § 4-21-101(a)(1)-(4). Allen v. McPhee, 240 S.W.3d 803, 2007 Tenn. LEXIS 1073 (Tenn. Dec. 4, 2007).

Even though the *Faragher/Ellerth* affirmative defense was not affected by the supervisor's status as a proxy or alter ego of the employer, genuine issues of material fact existed regarding whether the employer established that defense, and therefore the trial court erred by granting the employer summary judgment on that ground on the employee's discrimination claim; because the supervisor was the final arbiter regarding sexual harassment complaints and the employer's policy failed to provide a method of removing him from the decision-making process in which he

was the alleged harasser, a reasonable jury could conclude the complaint procedures were unreasonable as applied to the employee. Allen v. McPhee, 240 S.W.3d 803, 2007 Tenn. LEXIS 1073 (Tenn. Dec. 4, 2007).

Trial court properly granted the supervisor summary judgment on the employee's retaliation claim under T.C.A. § 4-21-301(1) because the employee failed to present evidence satisfying the third prong of the retaliation test with regard to the email, press releases, and the supervisors statements to the employer's investigator; the main text of the email merely affirmed that the sexual harassment complaint would not impact the day-to-day operations of the university, the press release did not disclose the employee's identity or any information from which others could easily identify her and did not make any affirmative allegations against the employee, and the supervisor's allegations of inappropriate conduct by the employee were not materially adverse to her. Allen v. McPhee, 240 S.W.3d 803, 2007 Tenn. LEXIS 1073 (Tenn. Dec. 4, 2007).

Trial court properly granted the employee's supervisor summary judgment on her discrimination claim under T.C.A. § 4-21-301(2) because even though the supervisor denied most of the employee's allegations, he did not try to inhibit or impair the investigation and did not discourage or prevent the employer from taking remedial measures, as he accepted the sanctions that were imposed on him; the court declined to extend individual liability to supervisors who participated in the behavior creating the hostile work environment absent a showing that the supervisor's conduct encouraged the employer to engage in employment-related discrimination or prevented the employer from taking corrective action. Allen v. McPhee, 240 S.W.3d 803, 2007 Tenn. LEXIS 1073 (Tenn. Dec. 4, 2007).

Employer was properly granted summary judgment in employee's age and sex discrimination action filed under the Tennessee Human Rights Act, T.C.A. § 4-21-101 et seq., because the employee submitted insufficient evidence to establish the fourth element of his prima facie case, that he was either replaced by an employee outside the protected class or that he was treated less favorably than a similarly situated employee outside the protected class; the only evidence in the record indicating that a younger female employee replaced the employee was a record showing that her first loan was processed one month after the employee was terminated. Bundy v. First Tenn. Bank Nat'l Ass'n, 266 S.W.3d 410, 2007 Tenn. App. LEXIS 762 (Tenn. Ct. App. Dec. 13, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 471 (Tenn. June 2, 2008).

29. Genuine Issue for Trial.

The term "genuine issue for trial" referred to in Tenn. R. Civ. P. 56.05 connotes genuine factual issues. It does not include issues involving legal conclusions to be drawn from the facts. Price v. Mercury Supply Co., 682 S.W.2d 924, 1984 Tenn. App. LEXIS 3422 (Tenn. Ct. App. 1984).

The phrase "genuine issue" contained in this rule refers to genuine factual issues and does not include issues involving legal conclusions to be drawn from the facts. Byrd v. Hall, 847 S.W.2d 208, 1993 Tenn. LEXIS 21 (Tenn. 1993); Louis Dreyfus Corp. v. Austin Co., 868 S.W.2d 649, 1993 Tenn. App. LEXIS 488 (Tenn. Ct. App. 1993), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 430 (Tenn. 1993); Winfree v. Educators Credit Union, 900 S.W.2d 285, 1995 Tenn. App. LEXIS 5 (Tenn. Ct. App. 1995), rehearing denied, — S.W.2d —, 1995 Tenn. App. LEXIS 59 (Tenn. Ct. App. Feb. 1, 1995).

In a case where the sellers sold their termite-infested home to the buyers, some of the summary judgments in favor of the sellers and a termite inspection company were reversed as there were genuine issues of fact as to whether the sellers fraudulently concealed information regarding the termite infestation of their home and whether the termite inspection company negligently misrepresented that no termites existed. Patel v. Bayliff, 121 S.W.3d 347, 2003 Tenn. App. LEXIS 207 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 921 (Tenn. 2003).

30. Summary Judgment Appropriate.

Summary judgment was held appropriate under the facts in the following cases. Fowler v. Happy Goodman Family, 575 S.W.2d 496, 1978 Tenn. LEXIS 692 (Tenn. 1978); Taylor v. Nashville Banner Publishing Co., 573 S.W.2d 476, 1978 Tenn. App. LEXIS 313 (Tenn. Ct. App. 1978), cert. denied, 441 U.S. 923, 99 S. Ct. 2032, 60 L. Ed. 2d 396, 1979 U.S. LEXIS 1645 (1979); Wachovia Bank & Trust Co., N. A. v. Glass, 575 S.W.2d 950, 1978 Tenn. App. LEXIS 322 (Tenn. Ct. App. 1978); Berry v. Whitworth, 576 S.W.2d 351, 1978 Tenn. App. LEXIS 324 (Tenn. Ct. App. 1978); Creative Displays, Inc. v. Pigeon Forge, 576 S.W.2d 356, 1978 Tenn. App. LEXIS 326 (Tenn. Ct. App. 1978); Union Planters Nat'l Bank v. Inman, 588 S.W.2d 757, 1979 Tenn. App. LEXIS 351 (Tenn. Ct. App. 1979); Fly v. Cannon, 813 S.W.2d 458, 1991 Tenn. App. LEXIS 84 (Tenn. Ct. App. 1991); Armes v. Hulett, 843 S.W.2d 427, 1992 Tenn. App. LEXIS 659 (Tenn. Ct. App. 1992); Roberts v. Roberts, 845 S.W.2d 225, 1992 Tenn. App. LEXIS 1052 (Tenn. Ct. App. 1992); Basily v. Rain, Inc., 29 S.W.3d 879, 2000 Tenn. App. LEXIS 213 (Tenn. Ct. App. 2000).

Allegation of retaliatory discharge of employee was not recognized as a cause of action in either contract or tort, and failing to set forth a genuine issue for trial, summary judgment was proper. Davenport v. Montgomery Ward, 664 S.W.2d 74, 1983 Tenn. App. LEXIS 651 (Tenn. Ct. App. 1983).

Judgment debtor's contention that summary judgment was improper because the judgment creditor did not file certified copies of all the papers filed in the Florida courts was meritless, as T.C.A. § 26-6-104(a) only requires that an authenticated copy of foreign judgment itself be filed. Biogen Distributors, Inc. v. Tanner, 842 S.W.2d 253, 1992 Tenn. App. LEXIS 751 (Tenn. Ct. App. 1992).

Affidavit that consisted mainly of presumptions and conclusions did not meet the criteria of Tenn. R. Civ. P. 56.05, and therefore did not serve to create a disputed issue of material fact sufficient to withstand defendant's motion for summary judgment. Yater v. Wachovia Bank, 861 S.W.2d 369, 1993 Tenn. App. LEXIS 359 (Tenn. Ct. App. 1993); Masters v. Rishton, 863 S.W.2d 702, 1992 Tenn. App. LEXIS 576 (Tenn. Ct. App. 1992).

Nonmoving party failed to raise genuine issue of material fact in their action for conspiracy, by presenting no countervailing evidence that defendant incorrectly or falsely determined the cause of death. Braswell v. Carothers, 863 S.W.2d 722, 1993 Tenn. App. LEXIS 294 (Tenn. Ct. App. 1993).

County's motion for summary judgment was appropriately granted against wrongful discharge claim based upon the Tennessee Human Rights Act, the Civil Rights Act of 1964, and the Family and Medical Leave Act. Austin v. Shelby County Gov't, 3 S.W.3d 474, 1999 Tenn. App. LEXIS 128 (Tenn. Ct. App. 1999).

Where plaintiff was injured upon exiting elevator and sued on grounds company was negligent by not properly inspecting and repairing the elevator, the trial court erred in granting company summary judgment because plaintiff failed to present expert testimony as to company's negligence because summary judgment at that stage was premature. Fleck v. Cooper Realty Mgmt. Co., 84 S.W.3d 600, 2002 Tenn. App. LEXIS 121 (Tenn. Ct. App. 2002).

Grant of summary judgment in favor of the limited partners was proper; the limited partners were not precluded from asserting "advice of counsel" defense to the individual's malicious prosecution claim as there was no evidence they had sued individual in bad faith or that their attorney's advice was not a basis for suing her. Abernethy v. Brandt, 120 S.W.3d 310, 2002 Tenn. App. LEXIS 862 (Tenn. Ct. App. 2002), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 372 (Tenn. 2003).

Neither the college handbook nor the acceptance letter to medical school was a contract between the college and the medical student because: (1) The state did not intend to be contractually bound by the contents of the handbook; and (2) If the acceptance letter was a contract, its terms had been completed long before the current action; therefore, the Tennessee claims commission's decision granting summary judgment to the state and dismissing the student's claim for damages against the college for the student's removal from a clerkship and the creation of requirements the student had to complete in order to be allowed to resume medical school classes for lack of subject matter jurisdiction was proper. Ku v. State, 104 S.W.3d 870, 2002 Tenn. App. LEXIS 888 (Tenn. Ct. App. 2002), review or rehearing denied, — S.W.3d—, 2003 Tenn. LEXIS 396 (Tenn. 2003).

Trial court properly granted the cardiology company summary judgment pursuant to Tenn. R. Civ. P. 56.04 because there was no genuine issue of material fact, as the cardiology company was added to the suit long after the statute of limitations had run. McCullough v. Johnson City Emergency Physicians, P.C., 106 S.W.3d 36, 2002 Tenn. App. LEXIS 896 (Tenn. Ct. App. 2002), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 529 (Tenn. 2003).

Where sewage had backed up into homes, there had been no inverse taking by a publicly-owned, governmental utility district, as it had not performed any purposeful or intentional act that had resulted in the damage, and the court of appeals had erred when it vacated the trial court's grant of summary judgment to the utility company. Edwards v. Hallsdale-Powell Util. Dist., 115 S.W.3d 461, 2003 Tenn. LEXIS 723 (Tenn. 2003).

Trial court's grant of summary judgment in favor of defendants concluding that the son's claims were barred by the statutes of limitation, T.C.A §§ 28-1-105 and 30-2-310, was affirmed when the son never set forth any proof establishing the existence of a material fact with regard to when the statute of limitation began to run. Vandergriff v. Vandergriff, 106 S.W.3d 682, 2003 Tenn. App. LEXIS 35 (Tenn. Ct. App. 2003), appeal denied, Vandegriff v. Vandegriff, — S.W.3d —, 2003 Tenn. LEXIS 476 (Tenn. May 19, 2003).

Summary judgment court dismissed a medical malpractice claim filed by a state prisoner. He failed to produce affidavits by competent medical experts contradicting the assertions in defendants' affidavits as required by Tenn. R. Civ. P. 56.06. Hessmer v. Miranda, 138 S.W.3d 241, 2003 Tenn. App. LEXIS 347 (Tenn. Ct. App. 2003).

In a dispute arising from a promissory note between the parties, summary judgment in favor of the payee was proper; a company's president was personally liable to the payee for repayment, interest, and attorney's fees, as the note contained no ambiguities and did not indicate the president was signing in a representative capacity on behalf of his company. Campora v. Ford, 124 S.W.3d 624, 2003 Tenn. App. LEXIS 247 (Tenn. Ct. App. 2003), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 767 (Tenn. 2003).

Verbal offers of multi-year employment contracts made by the developer of a new country

music record label to five music industry executives could not be enforced in the absence of a signed writing to satisfy the Statute of Frauds. Breach of contract action based on the verbal offers was dismissed upon summary judgment. Shedd v. Gaylord Entm't Co., 118 S.W.3d 695, 2003 Tenn. App. LEXIS 271 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 899 (Tenn. Oct. 6, 2003).

Summary judgment court dismissed a medical malpractice claim filed by a state prisoner. He failed to produce affidavits by competent medical experts contradicting the assertions in defendants' affidavits as required by Tenn. R. Civ. P. 56.06. Hessmer v. Miranda, 138 S.W.3d 241, 2003 Tenn. App. LEXIS 347 (Tenn. Ct. App. 2003).

Wife was granted partial summary judgment, pursuant to Tenn. R. Civ. P. 56.04, in a divorce action wherein it was determined that her husband had no interest in the marital residence and had not contributed to its acquisition, preservation, or enhancement, where the marriage was of very short duration and the wife had used her separate property for the down payment and had made all payments as to mortgage and utilities pursuant to T.C.A. § 36-4-121(c)(1), the issue was not one of classification of property as marital or separate, but rather, the equitable distribution thereof, and the court properly considered each spouse's contributions to the accumulation of the residence. Cronin-Wright v. Wright, 121 S.W.3d 673, 2003 Tenn. App. LEXIS 404 (Tenn. Ct. App. 2003), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 1145 (Tenn. 2003).

Summary judgment in favor of the physicians was affirmed because the presumption against any genuine issue of material fact remained, when the affidavits submitted by the physicians in support of their motion for summary judgment created a presumption that no genuine issue of material fact existed. The burden then fell to appellants to rebut that presumption, through expert opinion that established each element of a malpractice claim enumerated in T.C.A. § 29-26-115, and the expert affidavits proffered by appellants failed to satisfy that burden. Fitts v. Arms, 133 S.W.3d 187, 2003 Tenn. App. LEXIS 666 (Tenn. Ct. App. 2003).

Trial court did not err in granting a city's motion for summary judgment where Tennessee's mandatory retirement statute, T.C.A. § 8-36-205, permits it to adopt a mandatory retirement age of 62 without proving that age is a bona fide occupational qualification (BFOQ) for firefighters; although no such reference was made to the prohibition against age discrimination in the Tennessee Human Rights Act, T.C.A. § 4-21-401, clearly, the legislature intended to create an express exception to the Tennessee statute prohibiting age discrimination. Goodman v. City of Savannah, 148 S.W.3d 88, 2003 Tenn. App. LEXIS 788 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 444 (Tenn. May 10, 2004).

Sworn proof of loss was filed and the insurer neither paid the loss nor denied liability under the policy within the 30 day loss payment period, so the two-year limitations period in the insurance policy commenced to run when the loss payment period ended, and expired prior to the filing of the insured's suit; additionally, the record did not support the insured's assertions of estoppel on the statute of limitations period. Therefore, summary judgment was properly granted to the insurer on the insured's suit under a policy of commercial insurance alleging a loss by theft. Brick Church Transmission, Inc. v. S. Pilot Ins. Co., 140 S.W.3d 324, 2003 Tenn. App. LEXIS 829 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 392 (Tenn. May 10, 2004).

Where radiologists applied for a certificate of need to perform outpatient diagnostic imaging services in competition with hospital, and the hospital authority's board of trustees opposed the certificate of need application and filed an action for declaratory judgment seeking a declaration of the right of the hospital to close the staff of its imaging department by means of an exclusive provider contract, the trial court properly granted the hospital authority's motion for summary judgment, determining that the hospital authority had the right to close the staff of the hospital's imaging department because: (1) T.C.A. §§ 7-57-502(c) and 7-57-603 and the medical staff bylaws permitted the hospital authority to close the staff of the hospital's imaging department by means of an exclusive provider contract; and (2) Radiologists were not legally or constitutionally entitled to a hearing if their clinical privileges were terminated upon the execution of such a contract. City of Cookeville v. Humphrey, 126 S.W.3d 897, 2004 Tenn. LEXIS 130 (Tenn. 2004).

Grant of summary judgment in favor of the credit life insurance company was proper where the policy exclusion for diseases within six months of the date of coverage applied and the company was not estopped from relying on that exclusion since the elements required for the application of equitable estoppel were simply not present in the case, T.C.A. § 56-7-907(c). Osborne v. Mt. Life Ins. Co., 130 S.W.3d 769, 2004 Tenn. LEXIS 242 (Tenn. 2004).

Insurance company was properly granted summary judgment in the wife's action to recover her husband's life insurance benefits following his death because the wife failed to establish a genuine issue of material fact regarding whether her husband answered certain questions accurately to the best of his knowledge and belief. Lane v. Am. Gen. Life & Accident Ins. Co., 252 S.W.3d 289, 2007 Tenn. App.

LEXIS 689 (Tenn. Ct. App. Nov. 14, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 246 (Tenn. Apr. 7, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 261 (Tenn. Apr. 7, 2008).

Because the decedent's wife had the right to control disposition of the decedent's body, she alone had the right to bring the various tort claims against defendants, the crematorium and its operator, and the decedent's sister's tort claims against defendants were properly dismissed on summary judgment for lack of standing. Crawford v. J. Avery Bryan Funeral Home, Inc., 253 S.W.3d 149, 2007 Tenn. App. LEXIS 718 (Tenn. Ct. App. Nov. 21, 2007).

Trial court properly granted the city summary judgment on the citizen's Open Meetings Act claim because even if the city violated the act by some of its officials meeting with the investors' representative in private, the violations were cured under T.C.A. § 8-44-105 by the city's substantial consideration of the sale during five subsequent public meetings; during all five meetings, citizens were permitted to express their opinions regarding disposition of the building and it was only after the public meetings that the decision to sell the property was made. Dossett v. City of Kingsport, 258 S.W.3d 139, 2007 Tenn. App. LEXIS 729 (Tenn. Ct. App. Nov. 28, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 464 (Tenn. June 2, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 430 (Tenn. June 16, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 423 (Tenn. June 16, 2008).

31. Summary Judgment Inappropriate.

Summary judgment was held inappropriate under the facts in the following cases. Long v. State Farm Fire & Casualty Co., 510 S.W.2d 517, 1974 Tenn. App. LEXIS 139 (Tenn. Ct. App. 1974); Hunter v. Sequatchie County, 534 S.W.2d 118, 1975 Tenn. App. LEXIS 188 (Tenn. Ct. App. 1975); Belsky v. Payne, 560 S.W.2d 78, 1977 Tenn. App. LEXIS 299 (Tenn. Ct. App. 1977); Osborne Enterprises, Inc. v. Chattanooga, 561 S.W.2d 160, 1977 Tenn. App. LEXIS 262 (Tenn. Ct. App. 1977); Kelly v. Cherokee Ins. Co., 574 S.W.2d 735, 1978 Tenn. LEXIS 684 (Tenn. 1978); Keystone Ins. Co. v. Griffith, 659 S.W.2d 364, 1983 Tenn. App. LEXIS 706 (Tenn. Ct. App. 1983); Poore v. Magnavox Co., 666 S.W.2d 48, 1984 Tenn. LEXIS 741 (Tenn. 1984); Wolff & Munier, Inc. v. Price-Waterhouse, 811 S.W.2d 532, 1991 Tenn. App. LEXIS 11 (Tenn. Ct. App. 1991); White v. Methodist Hosp. S., 844 S.W.2d 642, 1992 Tenn. App. LEXIS 709 (Tenn. Ct. App. 1992); Byrd v. Hall, 847 S.W.2d 208, 1993 Tenn. LEXIS 21 (Tenn. 1993).

In a wrongful death action predicated upon a common law dram shop cause of action, it will rarely be appropriate for the trial court to grant a summary judgment for the defendant owner of the establishment selling alcoholic beverages by-the-drink where the person causing the fatal accident has been served alcoholic beverages immediately prior to the accident. Knapp v. Holiday Inns, Inc., 682 S.W.2d 936, 1984 Tenn. App. LEXIS 3430 (Tenn. Ct. App. 1984); National Mortg. Co. v. Washington, 744 S.W.2d 574, 1987 Tenn. App. LEXIS 3188 (Tenn. Ct. App. 1987).

Summary judgment is almost never an option in workers' compensation cases. Hilliard v. Tennessee State Home Health Servs., 950 S.W.2d 344, 1997 Tenn. LEXIS 287 (Tenn. Special Workers' Comp. App. Panel 1997).

The court erred in granting full summary judgment where there was a genuine issue of material fact regarding whether there was proper service of process as to the underlying judgment which was renewed in a California proceeding, the proceeding upon which the plaintiff seeking summary judgment was relying. A judgment that is void because it was obtained without in personam jurisdiction over the defendant is void for all purposes, including renewal. Hart v. Tourte, 10 S.W.3d 263, 1999 Tenn. App. LEXIS 502 (Tenn. Ct. App. 1999), review or rehearing denied, — S.W. 3d —, 1999 Tenn. LEXIS 667 (Tenn. 1999).

Partial summary judgment was inappropriate where the evidence was sufficient to present a genuine issue of material fact as to whether or not a 1991 agreement entered into by competing "booking agencies" representing various performing artists in the music industry superseded a 1987 agreement, thus freeing the defendants from the non-compete provisions of the 1987 agreement. Buddy Lee Attractions, Inc. v. William Morris Agency, Inc., 13 S.W.3d 343, 1999 Tenn. App. LEXIS 638 (Tenn. Ct. App. 1999).

In an appeal from a prison disciplinary proceeding, the prisoner did not waive the prisoner's right to 24 hours notice of larceny disciplinary charges and the Tennessee department of correction acted illegally by preventing the prisoner from presenting exculpatory evidence, which violated the prisoner's rights to due process under U.S. Const. amend. XIV, § 1; thus, the restitution order and the order sentencing the prisoner to punitive segregation were improper and the department's motion for summary judgment was improperly granted. Jeffries v. Tenn. Dep't of Corr., 108 S.W.3d 862, 2002 Tenn. App. LEXIS 930 (Tenn. Ct. App. 2002), rehearing denied, — S.W.3d —, 2003 Tenn. App. LEXIS 27 (Tenn. Ct. App. Jan. 14, 2003), appeal denied, Jeffries v. Tenn. Dept. of Corr., — S.W.3d —, 2003 Tenn. LEXIS 418 (Tenn. May 12, 2003).

Taxpayer was entitled to a credit for sales tax paid on photocompositions in Alabama, which were used for the production of telephone directories distributed in Tennessee, because the overall tax paid exceeded the six percent tax set out in T.C.A. § 67-6-203(a); therefore, sum-

mary judgment was improperly granted in favor of the Tennessee department of revenue in a refund action brought by the taxpayer. Bellsouth Adver. & Publ. Co. v. Johnson, 100 S.W.3d 202, 2003 Tenn. LEXIS 213 (Tenn. 2003).

In a wrongful death action by the wife of the deceased, who was an inmate in a county jail, because the healthcare providers provided crisis response services under a grant of the Tennessee department of mental health and mental retardation to determine who may be suicidal and to determine the form of treatment that would be most effective, the healthcare providers were community-based screening agencies that functioned under T.C.A. §§ 33-2-601 to 33-2-604, and because healthcare providers who screened incarcerated individuals were not precluded from state employee status under T.C.A. § 8-42-101(3)(D), the employee was an immune state employee pursuant to T.C.A. § 9-8-307 and was not liable to the wife in her wrongful death claim; however, the employee's personal immunity did not prevent the healthcare providers from being held vicariously liable for the employee's negligence under the doctrine of respondeat superior and the trial court improperly granted the healthcare providers' motion for summary judgment under Tenn. R. Civ. P. 56.04. Shelburne v. Frontier Health, 126 S.W.3d 838, 2003 Tenn. LEXIS 367 (Tenn. 2003).

The physician owed a duty to an injured car passenger and her deceased husband to have warned his patient of the risks of driving while under the influence of the two prescribed drugs, a muscle relaxant and a barbiturate, where the patient's medical chart strikingly answered the question of whether there was a foreseeable probability of harm; but, the supreme court held that the physician did not owe a duty to the couple deciding whether or not to have prescribed the medications to his patient in the first place. Burroughs v. Magee, 118 S.W.3d 323, 2003 Tenn. LEXIS 853 (Tenn. 2003), rehearing denied, 118 S.W.3d 323, 2003 Tenn. LEXIS 1015 (Tenn. 2003).

Summary judgment court erred by dismissing a consumer's civil conspiracy claim against an automobile finance company. The court improperly weighed the expert testimony when granting summary judgment. Beaudreau v. GMAC, 118 S.W.3d 700, 2003 Tenn. App. LEXIS 315 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 893 (Tenn. Oct. 6, 2003).

In a wrongful death action by the father who survived the deceased mother, and the mother's unborn child, it was clear that a viable fetus "resided wherever its mother resided," and therefore, the family exclusion provision in the policy was applicable, the insurer was not required to provide coverage for bodily injury to fetus, and the trial court's grant of partial summary judgment, on the father's request for a declaratory judgment, was reversed. Hollis v. Doerflinger, 137 S.W.3d 625, 2003 Tenn. App. LEXIS 416 (Tenn. Ct. App. 2003).

Telecommunications company's rights-of-way for its telephone lines through defendant city's property was granted by state law; although pursuant to its police power, the city could charge a fee reasonably related to the cost to the city for the use and maintenance of the rights-of-way, the city could not tax the telecommunications company for the use of the rights-of-way. However, the record indicated that the revenue derived from the alleged fee was allocated to different city functions and apparently bore no relation to the cost to the city in supervising and regulating the use of the rights-of-way, so the appellate court found that the ordinance enacted was invalid as contrary to the state statutes and reversed the chancery court's contrary decision. Bellsouth Telcoms., Inc. v. City of Memphis, 160 S.W.3d 901, 2004 Tenn. App. LEXIS 442 (Tenn. Ct. App. 2004), appeal denied, Bellsouth Telecomms., Inc. v. City of Memphis, — S.W.3d —, 2005 Tenn. LEXIS 3 (Tenn. Jan. 4, 2005).

Trial court erred in granting summary judgment for defendant doctors in a wrongful death case, where plaintiff nephew voluntarily dismissed the claim but refiled the action within one year of nonsuiting but beyond the expiration of the original statute of limitations, adding the decedent's husband as a plaintiff; in light of the Tennessee supreme court's avowed liberality in permitting the substitution of a proper party plaintiff for an improper party plaintiff, even after the statute of limitations had passed, it was error for the trial court to find that the original lawsuit was a nullity. The claim was not void but, rather, merely voidable because the savings statute applied. Foster v. St. Joseph Hosp., 158 S.W.3d 418, 2004 Tenn. App. LEXIS 491 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2005 Tenn. LEXIS 82 (Tenn. Jan. 31, 2005).

Evidence from the employee and from his supervisor's own deposition testimony indicated that the employee's decision to honor subpoena, which decision necessitated his absence from work, was a substantial factor in his termination; a claim for retaliatory discharge in violation of public policy lies in cases where a substantial factor in the employer's decision to terminate the employee is the fact that the employee honors a lawful subpoena. Thus, the trial court erred when it granted the employer's motion for summary judgment dismissing the employee's retaliatory discharge claim. Willard v. Golden Gallon-TN, LLC, 154 S.W.3d 571, 2004 Tenn. App. LEXIS 510 (Tenn. Ct. App. 2004).

There were attestations in the employee's affidavit to the effect that he left work several times due to his son's medical condition and that he brought doctor's excuses to his supervi-

sor in that regard, that he was absent from work on multiple occasions to receive medical treatment for his knee injury, and that he apprised his supervisor that was the reason for his absence on each of those occasions; thus, the trier of fact could reasonably conclude that the employee provided the employer with sufficient notice that he was requesting leave for a serious health condition covered under the Family and Medical Leave Act (FMLA), 29 U.S.C. § 2601 et seq.; therefore, the trial court erred in granting the employer's motion for summary judgment on the employee's FMLA claim. Willard v. Golden Gallon-TN, LLC, 154 S.W.3d 571, 2004 Tenn. App. LEXIS 510 (Tenn. Ct. App. 2004).

Trial court erred in dismissing a medical malpractice action based on the statute of limitations; a genuine issue of material fact existed regarding when the patient was reasonably put on notice that the injuries to her hand were caused by the doctor's negligent conduct during surgery, rather than the carpal tunnel for which she was treated. McIntosh v. Blanton, 164 S.W.3d 584, 2004 Tenn. App. LEXIS 531 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2005 Tenn. LEXIS 74 (Tenn. Jan. 24, 2005).

Trial court improperly granted summary judgment under Tenn. R. Civ. P. 56.04 to plaintiff in a suit in which it sought a declaratory judgment establishing the priority of its judgment lien because defendant had mistakenly released a prior deed of trust on the property in question and restoring the deed of trust to its priority position would not prejudice plaintiff's rights; although plaintiff's judgment lien was properly recorded under T.C.A. § 25-5-101 and became effective against later acquired interests under § 25-5-101 and T.C.A. § 66-24-119, and notwithstanding the fact that the mistaken release resulted in an equitable lien subject to the recording and notice provisions under T.C.A. § 66-26-101 and T.C.A. § 66-26-103, plaintiff was still entitled to seek the equitable remedy of cancellation of the release. Holiday Hospitality Franchising, Inc. v. States Res., Inc., 232 S.W.3d 41, 2006 Tenn. App. LEXIS 787 (Tenn. Ct. App. Dec. 14, 2006), appeal denied, Holiday Hospitality Franchising v. States Res., Inc., — S.W.3d —, 2007 Tenn. LEXIS 445 (Tenn. Apr. 30, 2007).

Coach was not entitled to any coaching supplement for 2002-2003 on motion for summary judgment because factual disagreements existed concerning whether the director considered the same issues that resulted in the coach's dismissal in 2001-2002, and whether the director considered the coach the incumbent in making the assignments for the following year. Lawrence County Educ. Ass'n v. Lawrence County Bd. of Educ., 244 S.W.3d 302, 2007 Tenn. LEXIS 1084 (Tenn. Dec. 20, 2007), rehearing denied, — S.W.3d —, 2008 Tenn. LEXIS 30 (Tenn. Jan. 30, 2008).

32. Genuine Issue as to Material Fact.

In determining whether or not a genuine issue of fact exists in a summary judgment case, the trial court, and the court of appeals, must look to all the evidence, take the strongest legitimate view of it in favor of the opponent of the motion and, allowing all reasonable inferences from it in his favor, discard all countervailing evidence. If, then, there is any dispute as to any material determinative evidence or any doubt as to the conclusion to be drawn from the whole evidence, the motion must be denied. Dooley v. Everett, 805 S.W.2d 380, 1990 Tenn. App. LEXIS 856 (Tenn. Ct. App. 1990).

Where a dispute exists as to any material fact or where there is merely uncertainty as to whether there may be a dispute, it is the duty of the court to overrule a motion for summary judgment. Dooley v. Everett, 805 S.W.2d 380, 1990 Tenn. App. LEXIS 856 (Tenn. Ct. App. 1990).

Where expert testified he could not rule out a relationship between decedent's death and the physical demands of his employment, there was a genuine issue as to a material fact. Downen v. Allstate Ins. Co., 811 S.W.2d 523, 1991 Tenn. LEXIS 196 (Tenn. 1991).

If the court entertains any doubt as to whether a genuine issue of material fact exists, it is its duty to overrule the motion. Smith v. Bridgestone/Firestone, Inc., 2 S.W.3d 197, 1999 Tenn. App. LEXIS 110 (Tenn. Ct. App. 1999).

The court is not to "weigh" the evidence when evaluating a motion for summary judgment. Smith v. Bridgestone/Firestone, Inc., 2 S.W.3d 197, 1999 Tenn. App. LEXIS 110 (Tenn. Ct. App. 1999).

Summary judgment was improper to hold an employer vicariously liable for an employee's negligence where a reasonable fact-finder could determine that the employee was the borrowed servant of another employer. Armoneit v. Elliott Crane Serv., 65 S.W.3d 623, 2001 Tenn. App. LEXIS 506 (Tenn. Ct. App. 2001).

In a dispute over whether fees charged to waste disposal companies for garbage disposal constituted double taxation, or were a violation of the trash haulers' constitutional rights, the appellate court, in its de novo review, concluded that there were no genuine issues of material fact, only legal issues, and the trial court properly granted the city's motion for summary judgment. Gray's Disposal Co. v. Metro. Gov't of Nashville, 122 S.W.3d 148, 2002 Tenn. App. LEXIS 927 (Tenn. Ct. App. 2002), rehearing denied, Gray's Disposal Co. v. Metro. Gov't of Nashville County, — S.W.3d —, 2003 Tenn. App. LEXIS 71 (Tenn. Ct. App. Jan. 28, 2003), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 656 (Tenn. 2003).

In a medical battery case, summary judgment was improperly granted to the anesthesiologist, because a question of material fact existed as to whether the patient authorized

the use of oral intubation for her surgery. Although it was true that, when confronted with the anesthesiologist's statement that he would decide what type of intubation would be used in the patient's hysterectomy, while lying on the gurney in a hospital gown being prepared for surgery, the patient did not stop the procedure, against the background of patient's persistent statements to all of the medical personnel involved in her surgery, it was not dispositive. Hensley v. Scokin, 148 S.W.3d 352, 2003 Tenn. App. LEXIS 659 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 158 (Tenn. Mar. 1, 2004).

In a defamation suit, a court did not err by vacating its grant of summary judgment to defendant where there was a genuine issue of material fact as to whether a letter he had written regarding plaintiff was defamatory. McWhorter v. Barre, 132 S.W.3d 354, 2003 Tenn. App. LEXIS 672 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 228 (Tenn. Mar. 8, 2004).

Supreme court of Tennessee emphasizes the importance of attorneys using Tenn. R. Civ. P. 56.03 statements of material facts to their fullest; a trial court should not need to sift through lengthy deposition testimony to find any information that is essential to its summary judgment decision, and nor should an appellate court be required to do likewise when reviewing decisions to grant or deny summary judgment. Bennett v. Trevecca Nazarene Univ., 216 S.W.3d 293, 2007 Tenn. LEXIS 272 (Tenn. 2007).

Trial court did not make a finding that the AG was in contempt of court, and the record failed to support a finding that the AG was in willful disobedience or resistance of any order or rule of court, particularly Tenn. R. Civ. P. 56.03, which was the rule at issue; the mere fact the AG failed to comply with the requirements of Tenn. R. Civ. P. 56.03 was wholly insufficient to conclude the AG was in willful disobedience of the rule, and accordingly T.C.A. § 29-9-102(3) was inapplicable to the matters at issue. Cooper v. Creative Learning Child Care Ctr., 240 S.W.3d 230, 2007 Tenn. App. LEXIS 421 (Tenn. Ct. App. June 27, 2007).

33. Review of Summary Judgment.

No presumption of correctness attaches to decisions granting summary judgments, because they involve only questions of law. Hembree v. State, 925 S.W.2d 513, 1996 Tenn. LEXIS 434 (Tenn. 1996).

Unlike other dispositions by a trial court without a jury, summary judgments do not enjoy a presumption of correctness on appeal; accordingly, reviewing courts must decide anew whether the requirements of Tenn. R. Civ. P. 56 have been satisfied. Basily v. Rain, Inc., 29 S.W.3d 879, 2000 Tenn. App. LEXIS 213 (Tenn. Ct. App. 2000).

As movants had the responsibility to ensure that oral testimony relied on by the trial court in granting their motion for summary judgment was "on file," and such testimony was not contained in the record on appeal, the summary judgment was vacated. Svacha v. Waldens Creek Saddle Club, 60 S.W.3d 851, 2001 Tenn. App. LEXIS 582 (Tenn. Ct. App. 2001).

In a dispute over whether fees charged to waste disposal companies for garbage disposal constituted double taxation, or were a violation of the trash haulers' constitutional rights, the appellate court, in its de novo review, concluded that there were no genuine issues of material fact, only legal issues, and the trial court properly granted the city's motion for summary judgment. Gray's Disposal Co. v. Metro. Gov't of Nashville, 122 S.W.3d 148, 2002 Tenn. App. LEXIS 927 (Tenn. Ct. App. 2002), rehearing denied, Gray's Disposal Co. v. Metro. Gov't of Nashville County, — S.W.3d —, 2003 Tenn. App. LEXIS 71 (Tenn. Ct. App. Jan. 28, 2003), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 656 (Tenn. 2003).

On appeal, the father asserted that the special master failed to file a transcript with his report and that the special master's conclusions as to the respective amounts of child support owed by the parties were not supported by material evidence due to his failure to file a transcript. However, the father could not represent to the trial court his agreement to abide by the special master's determination, solemnized in the trial court's prior order, and then take a contrary position on appeal; thus, summary judgment upon the mother's proposed consent order was proper. Johnston v. Houston, 170 S.W.3d 573, 2004 Tenn. App. LEXIS 887 (Tenn. Ct. App. 2004).

Appellate court could not consider, on the instant summary judgment analysis, a patient's affidavit with respect to her assertions regarding the effects of the medications she was taking or her belief that the taking of the medications caused confusion during her deposition regarding the dates and substance of conversations because the patient, as a lay person, was not competent to opine as to the effects of the medications. Sampson v. Wellmont Health Sys., 228 S.W.3d 124, 2007 Tenn. App. LEXIS 62 (Tenn. Ct. App. Jan. 31, 2007), appeal denied, Sampson v. Wellmont Health Ctr., — S.W.3d —, 2007 Tenn. LEXIS 547 (Tenn. June 18, 2007).

34. — Premises Liability Actions.

Defendants could not have reasonably foreseen plaintiff's choice to proceed through a plate glass vestibule without being able to perceive a clear exit from the building; rather, the proximate cause of plaintiff's injury while he was temporarily blinded by the sun's glare was plaintiff's own inattention. Madison v. Pickett County Bank & Trust Co., 33 S.W.3d

815, 2000 Tenn. App. LEXIS 340 (Tenn. Ct. App. 2000).

Where a tenant tripped over a metal edging separating the gravel walkway and the grass, the trial court did not err in granting summary judgment in favor of the landlord and the landscape company in her negligence action, as it was not foreseeable that the long-term tenant would have tripped over a known obstacle, she admitted she could have used the walkway but chose to cut across the grass to reach the subject trash receptacle, and there was no indication that the metal landscape edging was inherently dangerous. Wilson v. Gables-Tennessee Props., LLC, 168 S.W.3d 154, 2004 Tenn. App. LEXIS 829 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2005 Tenn. LEXIS 535 (Tenn. May 23, 2005).

35. — Defenses Based on Statute of Limitations.

Defenses based on a statute of limitations are particularly amenable to summary judgment motions because most often the facts material to a statute of limitations defense are not in dispute and the courts themselves can bring to bear the applicable legal principles to determine whether the moving party is entitled to a judgment as a matter of law. Cherry v. Williams, 36 S.W.3d 78, 2000 Tenn. App. LEXIS 244 (Tenn. Ct. App. 2000).

Trial court did not err in granting summary judgment to a doctor who had been charged with comparative fault by defendant hospital in a medical malpractice suit, where the patient's representative's amended complaint naming the doctor was filed beyond the one-year statute of limitation and she failed to file her amended complaint and to cause process to be issued within 90 days as required by T.C.A. § 20-1-119; the motion to amend her complaint simply failed to fulfill the unambiguous requirements of T.C.A.§ 20-1-119. Ward v. AMI SUB (SFH), Inc., 149 S.W.3d 35, 2004 Tenn. App. LEXIS 117 (Tenn. Ct. App. 2004), appeal denied, Ward v. AMI SUB, Inc., — S.W.3d —, 2004 Tenn. LEXIS 760 (Tenn. Sept. 7, 2004).

36. Motion Properly Granted.

Client's legal malpractice claim was barred by the one-year statute of limitations of T.C.A. § 28-3-104(a)(2), and therefore the attorneys were properly granted summary judgment, because the client knew or should have known that it had suffered a legally cognizable injury no later than March 3, 1994, the date it was served with a creditor's complaint to revoke the order confirming the reorganization plan, and the client did not sue the attorneys until February 2001. A tolling agreement entered into between the parties that deemed the client's complaint to have been filed on August 3, 1995, five months after the statute of limitations, did not preclude the attorneys from asserting the statute of limitations offense. Tenn-Fla Partners v. Shelton, 233 S.W.3d 825, 2007 Tenn. App. LEXIS 101 (Tenn. Ct. App. Feb. 26, 2007), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 703 (Tenn. Aug. 13, 2007).

Attorneys were properly granted summary judgment in a client's legal malpractice action because the client failed to establish any grounds upon which the trier of fact could find the loss alleged by the client was caused by any negligent act or omission of the attorneys; in the absence of the attorneys' alleged negligence in handling the client's bankruptcy, the client would have had to disclose the prospective purchasers' interest in its property, the bankruptcy court would not have approved the client's proposed plan of reorganization, and the client would not have been allowed to repurchase the property and bonds for $9,885,000. The client was not damaged by having the order approving its reorganization plan revoked because, absent the alleged negligence, the plan would not have been approved in the first place; the client was prevented from purchasing the property and thus reaping a windfall, not because of the attorneys' alleged negligence, but because the property was actually worth more than $9,885,000 on the open market; this loss would have occurred with or without the attorneys' alleged negligence. Tenn-Fla Partners v. Shelton, 233 S.W.3d 825, 2007 Tenn. App. LEXIS 101 (Tenn. Ct. App. Feb. 26, 2007), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 703 (Tenn. Aug. 13, 2007).

RULE 57

DECLARATORY JUDGMENTS

The procedure for obtaining a declaratory judgment pursuant to Tenn. Code Ann. § 29-14-101 et seq., shall be in accordance with these rules, and the right to trial by jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not necessarily preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar.

Advisory Commission Comments. This Rule retains the substance of Tenn. Code Ann. § 29-14-101 et seq., but makes the procedure consistent with that provided for other actions under the Rules. It specifically provides for trial by jury of disputed issues of fact in the same forum. The discretionary provision for a speedy hearing is designated to avoid delay in the trial of pending suits. The right of trial by jury is not intended to restrict the discretion of the trial court in entertaining the action, but to provide a vehicle to decide disputed factual issues if the action is entertained.

Law Reviews. Constitutional Law — Bemis Pentecostal Church v. State: The Validity of Tennessee's Campaign Disclosure Act, 18 Mem. St. U.L. Rev. 324 (1989).

Death and Dying in T J. McKenney, Jr.), 7 Mem. St. U.L. Rev. 503.

Judgments and Appeal, 4 Mem. St. U.L. Rev. 373.

Methods of Judicial Review over Administrative Actions in Tennessee, 13 Mem. St. U.L. Rev. 657 (1984).

NOTES TO DECISIONS

ANALYSIS

1. Disputed Issues of Fact.
2. Incorrectly Designated Complaint.
3. Alternative Remedy.
4. Right to Jury Trial.

1. Disputed Issues of Fact.

Ideally and ordinarily, a declaratory judgment suit does not invoke disputed issues of fact. Goodwin v. Metropolitan Bd. of Health, 656 S.W.2d 383, 1983 Tenn. App. LEXIS 710 (Tenn. Ct. App. 1983).

2. Incorrectly Designated Complaint.

Although the complaint was incorrectly designated as a suit for declaratory judgment, the court could treat the complaint as a petition for a common law writ of certiorari. McCallen v. Memphis, 786 S.W.2d 633, 1990 Tenn. LEXIS 103 (Tenn. 1990).

3. Alternative Remedy.

Opponents to a landfill were permitted under T.C.A. § 68-211-704(c) to challenge the commission's decision either by a petition for a statutory writ of certiorari, or by a complaint for declaratory judgment. Brundage v. Cumberland County, 357 S.W.3d 361, 2011 Tenn. LEXIS 1153 (Tenn. Dec. 19, 2011).

4. Right to Jury Trial.

Property owners who challenged the validity of a municipal annexation ordinance in a declaratory judgment action were entitled to a jury trial. State ex rel. Allen v. City of Newport, 422 S.W.3d 567, 2013 Tenn. App. LEXIS 393 (Tenn. Ct. App. June 18, 2013), appeal denied, — S.W.3d —, 2013 Tenn. LEXIS 968 (Tenn. Nov. 13, 2013).

RULE 58

ENTRY OF JUDGMENT

Entry of a judgment or an order of final disposition is effective when a judgment containing one of the following is marked on the face by the clerk as filed for entry:

(1) the signatures of the judge and all parties or counsel, or

(2) the signatures of the judge and one party or counsel with a certificate of counsel that a copy of the proposed order has been served on all other parties or counsel, or

(3) the signature of the judge and a certificate of the clerk that a copy has been served on all other parties or counsel.

Following entry of judgment the clerk shall make appropriate docket notations and shall copy the judgment on the minutes, but failure to do so will not affect validity of the entry of judgment. When requested by counsel or pro se parties, the clerk shall forthwith mail or deliver a copy of the entered judgment to all parties or counsel. If the clerk fails to forthwith mail or deliver, a party prejudiced by that failure may seek relief under Rule 60. [As amended effective July 1, 1980; by order entered January 31, 1984, effective August 20, 1984; by order entered March 10, 1993, effective July 1, 1993; and by order effective

July 1, 1997; and by order entered January 6, 2005, effective July 1, 2005.]

Advisory Commission Comments. This Rule is designed to make uniform across the State the procedure for the entry of judgment and to make certain the effective date of a judgment. Under this Rule, unless otherwise ordered by the court, the effective date of a judgment is the date of its filing with the clerk after being signed by the judge, even though it may not be copied or entered on the minute book until a later date.

Advisory Commission Comments [1980]. This [1980] amendment adds the requirement that a judgment or other action of the court cannot be filed until it bears not only signature of the judge [which in 1980 was required under then-numbered Rule 58.02], but also (1) the signatures of all parties or their counsel or (2) a certificate of counsel or the clerk that copies of the judgment or action of the court have been served on all parties or counsel of record. The purpose of this amendment is to provide notice to all parties or their counsel before judgment becomes final to allow either party to file a timely appeal. [1980.]

Advisory Commission Comments [1984]. This rule [then-numbered Rule 58.03] introduces the concept of notice of entry of judgment. Occasionally, it is foreseeable that a judgment, order or decree will not be entered promptly upon submission to the judge although a party contemplates filing an appeal, motion for a new trial or similar post trial motion. When a party anticipates such a judgment, decree or order will not be promptly entered, the party may be assured of notice of entry by employing this Rule 58.03. [1984.]

T.R.C.P. 5.02 requires service on counsel when a party is represented. [1984.]

Advisory Commission Comments [1993]. The amended rule changes the holding of *Yearout v. Trusty*, 684 S.W.2d 612 (Tenn. 1984), which required a copy of the judgment signed by only one lawyer to be mailed to opposing counsel bearing the "date of entry." That was an impossible requirement, as the judgment could not be entered – and could not have an entry date – until a copy had been mailed to opposing counsel.

The rule is also abbreviated and carries a new title.

Advisory Commission Comments [1997]. The second sentence is amended to make the right to notice of the judgment entry date meaningful. A lawyer or party who requests a copy of the judgment stamped with the entry date should not be prejudiced by a clerk's failure to comply with the request.

Advisory Commission Comments [2005]. The rule is amended to allay concerns raised in *Binkley v. Medling*, 117 S.W.3d 252 (Tenn. 2003). Upon request the clerk is to mail "forthwith" (immediately, without delay) a copy of the judgment to all concerned. The request and mailing, or failure to mail, do not affect the time for filing a post-trial motion authorized by these rules (e.g., motion to alter or amend, or motion for a new trial) or a notice of appeal. Parties prejudiced by clerical negligence may pursue relief by a Rule 60 motion.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 6, 2005, was ratified and approved by 2005 House Resolution 12 and Senate Resolution 7. The order promulgating the amendment of this rule provided that it take effect July 1, 2005.

Cross-References. Divorce and annulment, T.C.A. title 36, ch. 4.

Nonjury cases, time for decision, T.C.A. § 20-9-506.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), § 231.

Tennessee Forms (Robinson, Ramsey and Harwell.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, § 23; 16 Tenn. Juris., Judgments and Decrees, '§ 25, 82.

Law Reviews. The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure, II. Initiation of An Appeal (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 4.

NOTES TO DECISIONS

Analysis

1. Construction.
2. Purpose of Rule.
3. Notice of Entry.
4. What Constitutes Entry.
5. Effective Prior to Entry.
6. Insufficient Service.
7. Divorce Actions.
8. Judgment Not Effective Upon Filing.
9. Final Judgment.
10. Failure to Comply.

1. Construction.

While the text of Tenn. R. Civ. P. 58 regarding the filing of a post-trial motion or notice of appeal is clear, that language is rendered less clear when it is read in conjunction with the second paragraph of the 1984 Advisory Comm'n Cmts. to the rule. Binkley v. Medling, 117 S.W.3d 252, 2003 Tenn. LEXIS 850 (Tenn. 2003), rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 1262 (Tenn. 2003).

Neither the rule, the advisory comments to the rule, nor the cases interpreting that rule, allow for substantial compliance to satisfy the

strictures of the rule; on the contrary, compliance with the strictures of the rule is "mandatory." Wallace v. City of Lewisburg, — S.W.3d —, 2019 Tenn. App. LEXIS 249 (Tenn. Ct. App. May 21, 2019).

2. Purpose of Rule.

The purpose of Tenn. R. Civ. P. 58 is to insure that a party is aware of the existence of a final, appealable judgment in a lawsuit in which he is involved. Masters v. Rishton, 863 S.W.2d 702, 1992 Tenn. App. LEXIS 576 (Tenn. Ct. App. 1992).

Because the unfavorable rulings by the trial court did not become appealable for an employee until the trial court entered its order confirming that all claims of all parties had been adjudicated, for purposes of filing an appeal under T.R.A.P. 3, 4(a), the 30-day appeal period commenced on the date that the trial court entered its order, not on the date that the employer and related individual filed a notice of voluntary dismissal of its counterclaim pursuant to Tenn. R. Civ. P. 41.01; the court noted that under the plain language of Tenn. R. Civ. P. 58, the signature of the judge was mandatory to effectuate a judgment. Green v. Moore, 101 S.W.3d 415, 2003 Tenn. LEXIS 324 (Tenn. 2003).

Under the plain language of Tenn. R. Civ. P. 58, the signature of the judge is mandatory to effectuate a judgment or order of final disposition. Green v. Moore, 101 S.W.3d 415, 2003 Tenn. LEXIS 324 (Tenn. 2003).

Language in Tenn. R. Civ. P. 58 stating that "notwithstanding any rule of civil or appellate procedure to the contrary, time periods for post-trial motions or a notice of appeal shall not begin to run until the date of such requested mailing or delivery," was added to Rule 58 by a 1997 amendment; according to the 1997 Advisory Comm'n Cmt., the purpose of that language is to make the right to notice of the judgment entry date meaningful. A lawyer or party who requests a copy of the judgment stamped with the entry date should not be prejudiced by a clerk's failure to comply with the request. Binkley v. Medling, 117 S.W.3d 252, 2003 Tenn. LEXIS 850 (Tenn. 2003), rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 1262 (Tenn. 2003).

3. Notice of Entry.

Where, 33 days after entry of the trial court's judgment, appellant contemnor filed a motion to alter or amend, that motion was untimely under Tenn. R. Civ. P. 58 and was therefore insufficient to toll commencement of the 30-day period for filing a notice of appeal, because Tenn. R. Civ. P. 6.05 did not apply to the mailing of a copy of entry of judgment requested pursuant to Tenn. R. Civ. P. 58; consequently, the "three-day rule" contained in Tenn. R. Civ. P. 6.05, and relied upon by the contemnor, did not apply because the contemnor failed to carry his burden of proving his compliance with Tenn. R. Civ. P. 58, i.e. he failed to prove the date on which the clerk mailed the notice of entry of the judgment. Binkley v. Medling, 117 S.W.3d 252, 2003 Tenn. LEXIS 850 (Tenn. 2003), rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 1262 (Tenn. 2003).

The word "delivery" is merely used as an alternate to the word "mailing," signifying that the trial court clerk may either mail the copy of the judgment or use some other form of delivery (e.g., personal delivery or commercial delivery service). In other words, "delivery" simply means a non-mail method of sending the notice of entry of judgment to the parties; the word "delivery" does not mean the date on which a mailed copy of the judgment is actually delivered to a party by the postal service. Binkley v. Medling, 117 S.W.3d 252, 2003 Tenn. LEXIS 850 (Tenn. 2003), rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 1262 (Tenn. 2003).

Because the time for filing a motion to alter or amend is not based upon the date of "service of a notice or other paper," Tenn. R. Civ. P. 6.05 does not apply to the filing of a Tenn. R. Civ. P. 59 motion. If that were not the case, a literal reading of Tenn. R. Civ. P. 6.05 and 58 would result in two separate periods being added to the normal 30-day period for filing a Tenn. R. Civ. P. 59 motion or a notice of appeal, Tenn. R. Civ. P. 58 would grant up to an additional five days and Tenn. R. Civ. P. 6.05 would grant an additional three days (in cases in which the clerk mailed the requested copy of the judgment), for a total of up to eight additional days. This result never was intended by the rules commission, and it certainly was not intended by the supreme court in its adoption of the amendments to Tenn. R. Civ. P. 58. Binkley v. Medling, 117 S.W.3d 252, 2003 Tenn. LEXIS 850 (Tenn. 2003), rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 1262 (Tenn. 2003).

Because the 1984 version of Tenn. R. Civ. P. 58 measured the "time for all proceedings on a judgment" from the date of service of the notice of entry of judgment (or 90 days after the date of entry of the judgment), Tenn. R. Civ. P. 6.05 applied to that version of the rule. However, Tenn. R. Civ. P. 58 was substantially rewritten in 1993, and a portion of the 1984 version of the rule was deleted. Consequently, the second paragraph of the 1984 Advisory Comm'n Cmts. to Rule 58 became obsolete and should have been deleted from the comments to Tenn. R. Civ. P. 58. Binkley v. Medling, 117 S.W.3d 252, 2003 Tenn. LEXIS 850 (Tenn. 2003), rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 1262 (Tenn. 2003).

State court's order dismissing a wrongful death suit for failure to prosecute was final and appealable even though the order did not contain a certificate of service indicating that a copy had been served upon all parties or their attorneys. The order contained the notation

"cc" which was understood to mean that a copy of the document had been provided to the persons identified; plaintiff's attorney of record had actual notice of the order. DeLong v. Vanderbilt Univ., 186 S.W.3d 506, 2005 Tenn. App. LEXIS 497 (Tenn. Ct. App. 2005), appeal denied, Delong v. Vanderbilt Univ., — S.W.3d —, 2005 Tenn. LEXIS 1189 (Tenn. Dec. 19, 2005).

4. What Constitutes Entry.

Tenn. R. Civ. P. 58 clearly provides that all judgments shall be effective upon entry of same, unless the court orders otherwise, and it is the filing of that signed judgment with the clerk of the court which constitutes the entry. Christopher v. Spooner, 640 S.W.2d 833, 1982 Tenn. App. LEXIS 418 (Tenn. Ct. App. 1982).

Tenn. R. Civ. P. 58 reflects the principle that a court speaks only through its written judgments, duly entered upon its minutes; therefore, no oral pronouncement is of any effect unless and until made a part of a written judgment duly entered. Environmental Abatement, Inc. v. Astrum R. E. Corp., 27 S.W.3d 530, 2000 Tenn. App. LEXIS 126 (Tenn. Ct. App. 2000).

Tenn. R. Civ. P. 58 clearly provides that the time for filing a post-trial motion or a notice of appeal begins to run on the day the trial court clerk fulfils his or her duty to mail or deliver the requested copy; thus, Rule 58 extends the period for filing a post-trial motion by an additional one to five days, depending upon the "date of such requested mailing or delivery." Binkley v. Medling, 117 S.W.3d 252, 2003 Tenn. LEXIS 850 (Tenn. 2003), rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 1262 (Tenn. 2003).

5. Effective Prior to Entry.

Where in a divorce case the trial judge entered an order in the record clearly indicating he intended the divorce decree and property settlement to be effective as of the date it was pronounced and believed he had done everything necessary to make the decree effective on that date by entering a notation on the file of the case that the divorce was granted and the property awarded on that date, the court held that the decree became effective on that date, although the judgment was not actually entered by filing with the clerk until some time later. Vessels v. Vessels, 530 S.W.2d 71, 1975 Tenn. LEXIS 558 (Tenn. 1975).

6. Insufficient Service.

The mailing of a proposed judgment to opposing counsel prior to actual entry of judgment was insufficient service for Tenn. R. Civ. P. 58.02(2) purposes which requires that if a judgment does not bear the signature of all parties or their counsel, that copies of the judgment bearing the date of entry and signature of the judge be served on all parties or counsel of record. Yearout v. Trusty, 684 S.W.2d 612, 1984 Tenn. LEXIS 878 (Tenn. 1984), superseded by statute as stated in, Dulin v. Dulin, — S.W.3d —, 2003 Tenn. App. LEXIS 628 (Tenn. Ct. App. Sept. 3, 2003).

Under the rationale for Tenn. R. Civ. P. 58, a judgment which is not actually served on a party within a reasonable time after it has been filed, even though it contains a certificate of service, is not a final appealable judgment. Masters v. Rishton, 863 S.W.2d 702, 1992 Tenn. App. LEXIS 576 (Tenn. Ct. App. 1992).

7. Divorce Actions.

Where spouse in divorce action died subsequent to announcement of judicial decision by letter, but prior to entry of the judgment with the clerk, and evidence showed that the judge knew his decision needed to be formalized by entry of judgment on the minutes of the court, there was no judgment entered prior to the death of the spouse as required by Tenn. R. Civ. P. 58.02, and the action abated with his death. Steele v. Steele, 757 S.W.2d 340, 1988 Tenn. App. LEXIS 373 (Tenn. Ct. App. 1988).

A cause of action for divorce is purely personal, and it has been held that such a cause of action terminates on the death of either spouse; and if an action for a divorce is commenced, and one of the parties dies thereafter, but before the entry of the final decree, the action abates. The judicial power is ended when a party dies before the entry of a decree; if the court thereafter grants a divorce in ignorance of the death of a party, the decree is void; and the decree does not estop the survivor from asserting in another proceeding that the decedent was dead when the decree was entered. If, on the other hand, the court has entered a decree, or if the judicial function has terminated without formal entry of a decree, the death of the spouse does not affect the matter. Steele v. Steele, 757 S.W.2d 340, 1988 Tenn. App. LEXIS 373 (Tenn. Ct. App. 1988).

8. Judgment Not Effective Upon Filing.

The effective date of the judgment could not be the date of filing where judgment neither contained the signatures of all parties or their counsel nor a certificate of counsel or the clerk that copies of the judgment or action of the court had been served on all parties or counsel of record. Grantham v. Tennessee State Bd. of Equalization, 794 S.W.2d 751, 1990 Tenn. App. LEXIS 429 (Tenn. Ct. App. 1990).

Although not notified of the exact filing date, all parties received a copy of the proposed order for summary judgment, but rather than setting the Tenn. R. Civ. P. 60 motion to be heard in a timely fashion, the client's attorney waited until December of 2002, nearly 19 months after the entry of the motion for summary judgment to schedule the matter for hearing; thus, the trial court did not abuse its discretion in denying the client's Rule 60 motion because the client's attorney was derelict, and because the

unwarranted delay could have prejudiced the other party's case. Thompson v. Chafetz, 164 S.W.3d 571, 2004 Tenn. App. LEXIS 152 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 813 (Tenn. Sept. 13, 2004).

9. Final Judgment.

Order approving a parenting plan did not comply with Tenn. R. Civ. P. 58, and therefore, had no effective date, where although the mother apparently signed the agreed permanent parenting plan, she had not signed the agreed order that adopted the plan, the order did not include a certificate of service to her, she had signed the permanent parenting plan six days prior to entry of the agreed order, and there was no evidence that the mother ever received a copy of the agreed order or that she was present during the hearing when the agreed order was entered. In re Omari T., — S.W.3d —, 2019 Tenn. App. LEXIS 502 (Tenn. Ct. App. Oct. 10, 2019).

Juvenile court order suspending child support was not a final order because the order itself did not indicate that it was sent to the parent, but, rather, the certificate of service reflected that a copy of the order was sent to the parent's former counsel who had withdrawn from the case. Morel v. Nochera, — S.W.3d —, 2020 Tenn. App. LEXIS 171 (Tenn. Ct. App. Apr. 17, 2020).

10. Failure to Comply.

Order dismissing the case did not comply with the rule and was not a final order because it did not contain the signature of a party, counsel, or clerk; without at least one of those signatures, the order was not effective within the meaning of the rule and was not final. Wallace v. City of Lewisburg, — S.W.3d —, 2019 Tenn. App. LEXIS 249 (Tenn. Ct. App. May 21, 2019).

Juvenile court order suspending child support was not a final order because the order itself did not indicate that it was sent to the parent, but, rather, the certificate of service reflected that a copy of the order was sent to the parent's former counsel who had withdrawn from the case. Morel v. Nochera, — S.W.3d —, 2020 Tenn. App. LEXIS 171 (Tenn. Ct. App. Apr. 17, 2020).

RULE 59

NEW TRIALS AND ALTERATION OR AMENDMENT OF JUDGMENTS

59.01. Motions Included. Motions to which this rule is applicable are: (1) under Rule 50.02 for judgment in accordance with a motion for a directed verdict; (2) under Rule 52.02 to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59.07 for a new trial; or (4) under Rule 59.04 to alter or amend the judgment. These motions are the only motions contemplated in these rules for extending the time for taking steps in the regular appellate process. Motions to reconsider any of these motions are not authorized and will not operate to extend the time for appellate proceedings. [As amended by order entered January 31, 1984, effective August 20, 1984; by order entered January 23, 1986, effective August 1, 1986; by order entered January 28, 1993, effective July 1, 1993; and by order entered December 14, 2009, effective July 1, 2010.]

Advisory Commission Comments [2010]. The amendment merely corrects an erroneous cross-reference contained in Tenn. R. Civ. P. 59.01.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated December 14, 2009, was ratified and approved by 2010 Senate Resolution 180 and 2010 House Resolution 239. The order promulgating the amendment of this rule provided that it take effect July 1, 2010.

NOTES TO DECISIONS

Analysis

1. Timeliness of Appeal.
2. Applicability.
3. Jurisdiction.

1. Timeliness of Appeal.

Appellate court lacked jurisdiction to consider a husband's appeal of a suit for divorce because the notice of appeal was not timely filed as the time period for filing the notice of

appeal commenced to run when the trial court entered its order addressing the parties' first motions to alter or amend. The time period did not commence following the court's order pertaining to the wife's second motion to alter or amend because that motion constituted the filing of serial motions to alter or amend, which which was not permitted. Grissette v. Grissette, — S.W.3d —, 2021 Tenn. App. LEXIS 92 (Tenn. Ct. App. Mar. 9, 2021).

2. Applicability.

Tenn. R. Civ. P. 59 and 60 are applicable to de novo appeals from general sessions court to circuit court under Tenn. R. Civ. P. 1(2); as in any other circuit court case, Rules 59 and 60 reflect the circuit courts' jurisdiction to correct earlier orders, even after an erroneous remand to general sessions court, within the parameters set out in those rules. Ken Smith Auto Parts v. Thomas, — S.W.3d —, 2020 Tenn. App. LEXIS 172 (Tenn. Apr. 17, 2020).

3. Jurisdiction.

Circuit court erred in vacating its order granting a corporate president's motion to set aside an order because it had jurisdiction to set aside its order dismissing the president's appeal from the general sessions court, pursuant to the rule; the decision to grant or deny the president's motion to set aside was within the circuit court's discretion Ken Smith Auto Parts v. Thomas, — S.W.3d —, 2020 Tenn. App. LEXIS 172 (Tenn. Apr. 17, 2020).

59.02. Time for Motions. A motion for new trial and all other motions permitted under this rule shall be filed and served within thirty (30) days after judgment has been entered in accordance with Rule 58. [As amended by order entered January 31, 1984, effective August 20, 1984, and by order entered January 23, 1986, effective August 1, 1986.]

59.03. Time for Serving Affidavits. Where a motion for a new trial is based upon affidavits, they shall be filed and served with the motion unless otherwise authorized by the court. The opposing party shall have 10 days after such service within which to file and serve opposing affidavits, which period may be extended for an additional period not exceeding 20 days by the court for good cause shown or by stipulation of the parties in writing. The court may permit reply affidavits. [As amended by order entered January 31, 1984, effective August 20, 1984, and by order entered January 23, 1986, effective August 1, 1986.]

59.04. Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment shall be filed and served within thirty (30) days after the entry of the judgment. [As added by order entered January 23, 1986, effective August 1, 1986.]

NOTES TO DECISIONS

Analysis

1. Motion to Alter or Amend Judgment.
2. Motion to Set Aside Default Judgment.
3. Relief from Sanctions.
4. Appeal.
5. Jurisdiction of Circuit Courts.

1. Motion to Alter or Amend Judgment.

Trial court did not abuse its discretion by denying widow's motion to alter or amend under Tenn. R. Civ. P. 59.04 because the proffered testimony of a fellow inmate did not establish whether county employees' negligence contributed to the deceased's death; inmate's affidavit merely provided that deceased was housed for a time with the general population of the jail and two deputies forcibly removed him from the cell. Linkous v. Lane, 276 S.W.3d 917, 2008 Tenn. App. LEXIS 285 (Tenn. Ct. App. May 14, 2008), appeal denied, Linkous v. Hawkins County, — S.W.3d —, 2008 Tenn. LEXIS 917 (Tenn. Dec. 8, 2008).

Trial court erred in evaluating a wife's motion to set aside an award of attorney fees entered in favor of a husband as a motion made pursuant to Tenn. R. Civ. P. 59 because when the is matter came before the trial court on the wife's motion to set aside, there was no final judgment in the case since the wife's motion to reconsider remained pending and not addressed; Rule 59 does not come into play until a trial court has entered a final judgment. Byrnes v. Byrnes, 390 S.W.3d 269, 2012 Tenn. App. LEXIS 306 (Tenn. Ct. App. May 14, 2012),

appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 908 (Tenn. Dec. 11, 2012).

Trial court did not err by denying the patient's motion to alter or amend based on the submission of new evidence because the health care liability action had been pending for eight months before the hearing, the action was filed after the patient's voluntary nonsuit of the original action in which extensive discovery was completed, the patient was well-aware of the need for an expert affidavit to respond to the motions but chose to wait until the last minute to procure one, and the non-moving party would suffer unfair prejudice by allowing the case to continue further, considering the overall age of the case. Stubblefield v. Morristown-Hamblen Hosp. Ass'n, — S.W.3d —, 2019 Tenn. App. LEXIS 294 (Tenn. Ct. App. June 11, 2019).

Trial court did not abuse its discretion by denying plaintiff's motion to alter or amend the judgment because he did not dispute that he had the newly discovered evidence within his knowledge and possession prior to the motion for summary judgment and he offered no explanation for why the evidence was not offered in response to the motion. Fuller v. Allianz Life Ins. Co. of N. Am., — S.W.3d —, 2020 Tenn. App. LEXIS 69 (Tenn. Ct. App. Feb. 19, 2020).

Trial court did not err by denying the father's motion to alter or amend the judgment terminating his parental rights because the evidence he presented was not new, as he stated in his appellate brief that he gave this "new" evidence to his attorney prior to trial. In re Zaylee W., — S.W.3d —, 2020 Tenn. App. LEXIS 145 (Tenn. Ct. App. Apr. 9, 2020), overruled, In re Neveah M., — S.W.3d —, 2020 Tenn. LEXIS 591 (Tenn. Dec. 10, 2020).

Appellant's notice of appeal was timely filed because appellant's motion to alter or amend tolled the time period for filing a notice of appeal. Appellate court considered appellant's motion to be a motion to alter or amend because appellant arguably moved the trial court to address what appellant considered to be a clear error of law and/or injustice, thereby providing the trial court with an opportunity to correct any errors before its judgment became final and avoiding an unnecessary appeal. In re March 9, 2012 Order, — S.W.3d —, 2020 Tenn. App. LEXIS 586 (Tenn. Ct. App. Dec. 22, 2020).

2. Motion to Set Aside Default Judgment.

Interest in finality is heightened once a final judgment has been entered, and while the same factors must guide the inquiry, relief from a partial default judgment may be granted more liberally under Tenn. R. Civ. P. 54.02 than relief from final default judgments under Tenn. R. Civ. P. 59.04 or Tenn. R. Civ. P. 60.02. Discover Bank v. Morgan, 363 S.W.3d 479, 2012 Tenn. LEXIS 215 (Tenn. Mar. 27, 2012).

When a party seeks relief from a default judgment due to "excusable neglect," whether pursuant to Tenn. R. Civ. P. 54.02 (for interlocutory judgments), Tenn. R. Civ. P. 59.04 (for final judgments within thirty days of entry), or Tenn. R. Civ. P. 60.02 (for final judgments more than thirty days after entry), a reviewing court must first determine whether the conduct precipitating the default was willful; if the court finds that the defaulting party has acted willfully, the judgment cannot be set aside on "excusable neglect" grounds, and the court need not consider the other factors. If the conduct was not willful, however, then the court must consider whether the defaulting party has a meritorious defense and whether the non-defaulting party would be prejudiced by the granting of relief; the court may also consider any other factor that it deems relevant. Discover Bank v. Morgan, 363 S.W.3d 479, 2012 Tenn. LEXIS 215 (Tenn. Mar. 27, 2012).

3. Relief from Sanctions.

Where city employees filed a class action lawsuit seeking step raise promotions based upon merit, the city failed to answer discovery requests; the trial court's decision to impose sanctions against the city under Tenn. R. Civ. P. 37 did not constitute an abuse of discretion. Considering the harsh result that would ensue from not allowing the city to make affirmative defenses, the court did not err in relieving the city of this portion of the sanctions under Tenn. R. Civ. P. 59. Ussery v. City of Columbia, 316 S.W.3d 570, 2009 Tenn. App. LEXIS 363 (Tenn. Ct. App. June 1, 2009), rehearing denied, 316 S.W.3d 570, 2009 Tenn. App. LEXIS 490 (Tenn. Ct. App. June 30, 2009), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 246 (Tenn. Mar. 15, 2010).

4. Appeal.

Because an appellant raised the issue of whether the trial court erred in granting appellees' motion for summary judgment—when the motion lacked any recitation that there was no genuine issue of material fact—for the first time in appellant's motion to alter or amend, the issue was, therefore, waived as a motion to alter or amend was not be used to raise or present new, previously untried or unasserted theories or legal arguments. Holt v. Whedbee, — S.W.3d —, 2019 Tenn. App. LEXIS 178 (Tenn. Ct. App. Apr. 12, 2019).

Trial court did not abuse its discretion in denying a party's motion to reopen proof in a divorce case to introduce allegedly newly discovered evidence concerning the premarital value of a retirement account because there was no error in the court's application of an incorrect legal standard as the court did not err in applying the balancing factors outlined in the case law. Westbrooks v. Westbrooks, — S.W.3d —, 2019 Tenn. App. LEXIS 520 (Tenn. Ct. App. Oct. 29, 2019).

5. Jurisdiction of Circuit Courts.

Tenn. R. Civ. P. 59, 60 are applicable to de novo appeals from general sessions court to

circuit court; as in any other circuit court case, these rules reflect the circuit courts' jurisdiction to correct earlier orders, even after an erroneous remand to general sessions court, within the parameters set out in those rules. Ken Smith Auto Parts v. Thomas, 599 S.W.3d 555, 2020 Tenn. LEXIS 147 (Tenn. Apr. 17, 2020).

Appellant did not raise constitutional arguments concerning Tennessee legislative procedural rules until appellant filed a motion to alter or amend the trial court's final order denying appellant's amended petition. Accordingly, the trial court acted properly in declining to address appellant's constitutional challenge. Gentry v. Casada, — S.W.3d —, 2020 Tenn. App. LEXIS 416 (Tenn. Ct. App. Sept. 17, 2020).

59.05. On Initiative of Court. Within thirty (30) days after entry of judgment the court on its own initiative may alter or amend the judgment, or the court may order a new trial for any reason for which it might have granted a new trial on motion of a party where no such motion has been filed. After giving the parties notice and opportunity to be heard, the court may grant a motion for a new trial, timely filed and served, for reasons not stated in the motion. In either case, the court shall specify in its order the grounds for its action. [As redesignated by order entered January 23, 1986, effective August 1, 1986.]

NOTES TO DECISIONS

1. Misunderstanding of Evidence.

Trial court properly granted a new trial on its own initiative, pursuant to Tenn. R. Civ. P. 59.05, in a boundary line dispute because the trial court stated it misunderstood the evidence regarding a particular survey and the fact the surveyor set the pins, and the trial court explained it was unable to properly see the witnesses and exhibits during trial, resulting in a misapprehension of the testimony. Martin v. Copeland, 372 S.W.3d 591, 2012 Tenn. App. LEXIS 56 (Tenn. Ct. App. Jan. 30, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 392 (Tenn. May 23, 2012).

59.06. New Trial Where Verdict Is Against the Weight of the Evidence. If the trial court grants a new trial because the verdict is contrary to the weight of the evidence, upon the request of either party the new trial shall be conducted by a different circuit judge or chancellor.

NOTES TO DECISIONS

Analysis

1. In General.
2. New Trial Inappropriate.
3. Recusal of Judge.

1. In General.

Motions filed pursuant to Tenn. R. Civ. P. 59 do not affect the jurisdiction of the court of criminal appeals in actions for habeas corpus relief. Davis v. State, 261 S.W.3d 16, 2008 Tenn. Crim. App. LEXIS 161 (Tenn. Crim. App. Jan. 31, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 467 (Tenn. June 30, 2008).

2. New Trial Inappropriate.

Trial court did not err in denying the claimant's motion for new trial because the claimant did not show that the evidence was newly-discovered because the claimant knew the witness was a fact witness, knew generally where he was living and someone who could contact him but made no effort to get in touch with him nor to secure his presence at the trial, and the testimony did not aid the claimant's case, as other witnesses testified they believed it took the ambulance at least 30 minutes to arrive after the seizure, which did not change the fact that the claimant failed to prove that the ambulance could have arrived in time to save the deceased's life. Marsee v. CSX Transp., Inc., 269 S.W.3d 570, 2008 Tenn. App. LEXIS 124 (Tenn. Ct. App. Mar. 4, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 740 (Tenn. Sept. 29, 2008).

Railroad company contended that, contrary to the bar on punitive damages in the Federal Employees Liability Act, 45 U.S.C. §§ 51-60, the employee tacitly encouraged the jury to punish the railroad rather than merely compensating the employee, by making an impermissible closing argument that was unduly prejudicial and inflammatory; however, the railroad was taking individual quotes out of

context and was painting the argument as far more inflammatory than it really was, while the employee's argument was focused on establishing the elements of his claim, and any rhetorical flourishes were within the boundaries of permissible argumentation, and thus the railroad company's invitation to order a new trial on that basis was denied. Hensley v. CSX Transp., Inc., 278 S.W.3d 282, 2008 Tenn. App. LEXIS 147 (Tenn. Ct. App. Mar. 14, 2008), rehearing denied, 278 S.W.3d 282, 2008 Tenn. App. LEXIS 204 (Tenn. Ct. App. Apr. 3, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 867 (Tenn. Nov. 17, 2008), rev'd, 173 L. Ed. 2d 1184, 129 S. Ct. 2139, 556 U.S. 838, 2009 U.S. LEXIS 3974 (U.S. 2009).

Trial court did not err by denying defendant's motion for a new trial because the verdict was not against the weight of the evidence as it showed that for years defendant made unfounded reports about plaintiffs, he tried to have plaintiff fired, he used his truck and gun to frighten and intimidate plaintiffs, and plaintiffs suffered severe emotional distress as a result of his behavior. Holt v. Kirk, — S.W.3d —, 2019 Tenn. App. LEXIS 205 (Tenn. Ct. App. Apr. 30, 2019).

3. Recusal of Judge.

Recusal was appropriate when a trial court stated, for the first time, in response to a motion for recusal, its reasons for granting a motion for a new trial several months earlier. By granting the motion for a new trial without explanation, the trial court was presumed to have weighed the evidence and found the jury's verdict to be against the weight of the evidence so that the judge's failing to disqualify the judge constituted grounds for recusal as a reasonable basis for questioning the judge's impartiality was created. Buckley v. Elephant Sanctuary Tenn. Inc., — S.W.3d —, 2020 Tenn. App. LEXIS 315 (Tenn. Ct. App. July 14, 2020).

59.07 Motion for New Trial — Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues in an action in which there has been a trial by jury for any of the reasons for which new trials have heretofore been granted. [As added by order entered January 25, 1991, effective July 1, 1991; as amended by order entered January 8, 2008, effective July 1, 2008.]

Advisory Commission Comments. The provisions of this Rule are generally consistent with the procedure followed prior to the adoption of the Rules of Civil Procedure. The time for filing affidavits has been made more specific. The provisions of Rule 59.04 require specific statement of reasons by the trial judge when taking action thereunder.

Advisory Commission Comments [1984]. 59.01, 59.02: Motion for new trial, motions to alter or amend a judgment, motions to amend or add findings under Rule 52.02, and post-trial motions for directed verdict (for judgment notwithstanding the verdict) under Rule 50.02 all must be made within 30 days after judgment entry. Filing and serving motions in serial fashion will not extend the time for filing a notice of appeal with the trial court clerk. *See Gassaway v. Patty*, 604 S.W.2d 60 (Tenn. Ct. App. 1980). In particular, motions to reconsider rulings on any of the listed motions will not extend the time for filing a notice of appeal. [1984.]

Advisory Commission Comments [1986]. Multiple orders conceivably may be entered on different dates even though various post trial motions are simultaneously filed on time. Careful litigators should file a notice of appeal within thirty days after entry of the order appealed from, although in many instances the time would not expire until thirty days from entry of the last order entered. [1986.]

Advisory Commission Comments [1991]. The amendment applies to only one of the many grounds for which a new trial may be granted. This is the familiar "thirteenth juror" rule, requiring the court to order a new trial where the jury verdict is contrary to the weight of the evidence. While Tenn. Code Ann. § 27-2-101, as construed in opinions such as *Trott v. West, Moss & Co.*, 18 Tenn. 499 (1837), limits the number of new trials on this ground alone to two, the Commission believes that public confidence in the justness of civil procedure would be enhanced by providing upon request a different circuit judge or chancellor for the retrial.

Advisory Commission Comments [1993]. The amendment to Rule 59.01 deletes the motion for discretionary costs from the list. Discretionary costs are requested by a motion described in amended Rule 54.04(2).

Advisory Commission Comments [2008]. Motion for new trial grounds have been governed by case law. A helpful list can be found in Professor Larry A. Pivnick's treatise, *Tennessee Circuit Court Practice* § 28:1 (Thomson West).

Compiler's Notes. The adoption of § 59.07 of this rule, as promulgated and adopted by the Supreme Court in its order dated January 8, 2008, was ratified and approved by 2008 House Resolution 232 and Senate Resolution 220. The order promulgating the amendment of this rule provided that it take effect July 1, 2008.

Cross-References. For criminal procedure, see Tenn. R. Crim. P. 33.

New trial after death or insanity of judge, T.C.A. §§ 17-1-305, 17-1-306.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 97, 239, 346, 659.

Pritchard on Wills and Administration of Estates (4th ed., Phillips and Robinson), § 378.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-50.02-1, 1-52.02-1, 1-59.02-1, 1-59.02-2, 1-59.04-1, 1-59.04-2, 1-62.02-1.

Tennessee Jurisprudence. 1 Tenn. Juris., Actions, § 30; 1 Tenn. Juris., Amendments, § 7; 2 Tenn. Juris., Appeal and Error, §§ 53, 137; 11 Tenn. Juris., Equity, § 76; 16 Tenn. Juris., Judgments and Decrees, § 48; 12 Tenn. Juris., Executions, § 4; 16 Tenn. Juris., Judgments and Decrees, § 45, 46, 48; 19 Tenn. Juris., Municipal Corporations, § 18; 20 Tenn. Juris., New Trials, §§ 28, 31.

Law Reviews. New Evidence and New Trials (Gary C. Shockley), 19 No. 3 Tenn. B.J. 23 (1983).

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1. In General.

Where the chancellor stated that by striking the first Tenn. R. Civ. P. 59 motion from the docket he took no action other than to decline to rule on the motion or to re-set it for argument, striking of the first motion was not a denial of the motion, and the chancery court retained jurisdiction to alter its earlier orders. Trundle v. Park, 210 S.W.3d 575, 2006 Tenn. App. LEXIS 474 (Tenn. Ct. App. 2006), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 1172 (Tenn. 2006).

2. Purpose.

The purpose of Tenn. R. Civ. P. 59 is to bring finality to proceedings in the trial court when the trial judge has ruled upon any of the motions listed in the rule. Daugherty v. Lumbermen's Underwriting Alliance, 798 S.W.2d 754, 1990 Tenn. LEXIS 411 (Tenn. 1990).

3. Motion for New Trial.

In a civil action there is no right to oral argument on a motion for a new trial. Jerkins v. McKinney, 533 S.W.2d 275, 1976 Tenn. LEXIS 499 (Tenn. 1976).

Where a motion entitled "Motion to Set Aside Decree and Restore Cause to Docket" was filed within 30 days after judgment, it was considered as a motion for new trial. Bemis Co. v. Hines, 585 S.W.2d 574, 1979 Tenn. LEXIS 477 (Tenn. 1979).

Plaintiff's second motion for relief from judgment pursuant to Tenn. R. Civ. P. 60 was, in substance, nothing more than a motion to reconsider a prior motion for a new trial, which had been denied, because it was brought on the identical single ground alleged in both motions, and thus was prohibited under Tenn. R. Civ. P. 59 and was a nullity. Daugherty v. Lumbermen's Underwriting Alliance, 798 S.W.2d 754, 1990 Tenn. LEXIS 411 (Tenn. 1990).

4. —Not Timely.

Where plaintiff filed only two motions within 30 days of the entry of the judgment on the jury verdict, one for reinstatement and one for attorney's fees and costs, the trial judge overruled both motions on October 15, and it was not until October 25 that the plaintiff moved for a new trial on the issue of front pay and for an increase in the judgment for back pay, both of which issues had been decided by the jury and a judgment entered on the verdict on June 19, the motions came too late and the plaintiff was precluded from raising those issues on appeal. Flynn v. Shoney's, Inc., 850 S.W.2d 458, 1992 Tenn. App. LEXIS 883 (Tenn. Ct. App. 1992), rehearing denied, — S.W.2d —, 1992 Tenn. App. LEXIS 960 (Tenn. Ct. App. Dec. 2, 1992).

Pursuant to T.C.A. § 13-20-105, individual development by the landowners would frustrate the objection of the metropolitan development and housing agency's (MDHA) urban renewal plan, and the landowners could not bring themselves within the exception to eminent domain; thus, the trial court did not err in granting possession to MDHA, and since the Tenn. R. Civ. P. 59 motion filed four years subsequent to the June 25, 2001, order of possession simply sought to relitigate matters that had already been adjudicated, the trial court did not abuse its discretion in overruling the motion. Metro. Dev. & Hous. Agency v. Eaton, 216 S.W.3d 327, 2006 Tenn. App. LEXIS 670 (Tenn. Ct. App. 2006), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 169 (Tenn. Feb. 26, 2007).

5. Motion to Alter or Amend Judgment.

Where the motion to set aside the order of dismissal was filed within 30 days after entry of the order, the court could act upon the motion after the expiration of the 30 days. Newport Housing Authority, Inc. v. Hartsell, 533 S.W.2d 317, 1975 Tenn. App. LEXIS 165 (Tenn. Ct. App. 1975).

A trial court may modify a judgment when the damages awarded by the jury conflict with the undisputed facts concerning damages. Spence v. Allstate Ins. Co., 883 S.W.2d 586, 1994 Tenn. LEXIS 251 (Tenn. 1994).

A motion to alter or amend under Tenn. R. Civ. P. 59.04, filed before the entry of final judgment, was timely and extended the 30-day time limit for filing notice of appeal. Hawkins v. Hawkins, 883 S.W.2d 622, 1994 Tenn. App. LEXIS 160 (Tenn. Ct. App. 1994), appeal denied, — S.W.2d —, 1994 Tenn. LEXIS 215 (Tenn. June 27, 1994); Donnelly v. Walter, 959 S.W.2d 166, 1997 Tenn. App. LEXIS 393 (Tenn. Ct. App. 1997).

The Tennessee Rules of Civil Procedure do not authorize "motions to reconsider," and therefore such a motion is construed to be a motion to alter or amend pursuant to Tenn. R. Civ. P. 59.04. McCracken v. Brentwood United Methodist Church, 958 S.W.2d 792, 1997 Tenn. App. LEXIS 483 (Tenn. Ct. App. 1997).

A motion filed by the plaintiff requesting that the trial court alter or amend its judgment to find in her favor, which was entitled "Motion to Reconsider," was in substance a motion under Tenn. R. Civ. P. 59 to alter or amend judgment; since this motion was filed within the time permitted, the chancellor retained jurisdiction and the time period for filing a notice of appeal did not commence until the trial court ruled on the motion. Tennessee Farmers Mut. Ins. Co. v. Farmer, 970 S.W.2d 453, 1998 Tenn. LEXIS 367 (Tenn. 1998).

The trial court did not abuse its discretion when it denied a post-judgment motion to amend a summary judgment where the motion sought to introduce a new legal defense that was not presented to the trial court before it granted summary judgment, and sought to present evidence not introduced prior to the original summary judgment hearing. Bradley v. McLeod, 984 S.W.2d 929, 1998 Tenn. App. LEXIS 547 (Tenn. Ct. App. 1998), overruled in part, Harris v. Chern, 33 S.W.3d 741, 2000 Tenn. LEXIS 687 (Tenn. 2000). But see, Harris v. Chern, 33 S.W.3d 741, 2000 Tenn. LEXIS 687 (Tenn. 2000).

Because motions are construed based on their substance and not their title, an attorney's motion for permission to withdraw from the case and to assert an attorney's lien on the settlement proceeds was construed as a motion under Tenn. R. Civ. P. 59 to alter or amend the judgment to include a notation of the attorney's lien in the judgment itself. Starks v. Browning, 20 S.W.3d 645, 1999 Tenn. App. LEXIS 528 (Tenn. Ct. App. 1999).

Many of the same considerations applicable when a litigant submits additional evidence to revise a grant of summary judgment pursuant to Tenn. R. Civ. P. 54.02 are applicable in ruling on a Tenn. R. Civ. P. 59.04 motion to alter or amend. Harris v. Chern, 33 S.W.3d 741, 2000 Tenn. LEXIS 687 (Tenn. 2000).

Because the time for filing a motion to alter or amend is not based upon the date of "service of a notice or other paper," Tenn. R. Civ. P. 6.05 does not apply to the filing of a Tenn. R. Civ. P. 59 motion. If that were not the case, a literal reading of Tenn. R. Civ. P. 6.05 and 58 would result in two separate periods being added to the normal 30-day period for filing a Tenn. R. Civ. P. 59 motion or a notice of appeal; Tenn. R. Civ. P. 58 would grant up to an additional five days and Tenn. R. Civ. P. 6.05 would grant an additional three days (in cases in which the clerk mailed the requested copy of the judgment), for a total of up to eight additional days. This result never was intended by the rules commission, and it certainly was not intended by the supreme court in its adoption of the amendments to Tenn. R. Civ. P. 58. Binkley v. Medling, 117 S.W.3d 252, 2003 Tenn. LEXIS 850 (Tenn. 2003), rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 1262 (Tenn. 2003).

Where, 33 days after entry of the trial court's judgment, appellant contemnor filed a motion to alter or amend, that motion was untimely under Tenn. R. Civ. P. 58 and was therefore insufficient to toll commencement of the 30-day period for filing a notice of appeal, because Tenn. R. Civ. P. 6.05 did not apply to the mailing of a copy of entry of judgment requested pursuant to Tenn. R. Civ. P. 58; consequently, the "three-day rule" contained in Tenn. R. Civ. P. 6.05, and relied upon by the contemnor, did not apply because the contemnor failed to carry his burden of proving his compliance with Tenn. R. Civ. P. 58, i.e. he failed to prove the date on which the clerk mailed the notice of entry of the judgment. Binkley v. Medling, 117 S.W.3d 252, 2003 Tenn. LEXIS 850 (Tenn. 2003), rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 1262 (Tenn. 2003).

In a breach of contract case, an appeal was timely filed because the 30-day time limit did not begin to run until a trial court ruled on a motion to alter or amend, which was filed after judgment was entered against a purchaser. Albert v. Frye, 145 S.W.3d 526, 2004 Tenn. LEXIS 654 (Tenn. 2004).

In a suit regarding the sale of a condominium unit, the trial court did not abuse its discretion in refusing to consider the affidavits filed with the buyers' Tenn. R. Civ. P. 59 motion to alter or amend the judgment, because they made no showing of due diligence and the affidavits they produced were deficient in several respects, including the lack of signatures as required by

Hamilton County, Tenn., Ch. & Cir. Ct. R. § 3.06, and the contradictory testimony contained in one affidavit. Thus, the trial court did not err in denying the buyers' motion to alter or amend. Robinson v. Currey, 153 S.W.3d 32, 2004 Tenn. App. LEXIS 411 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 1104 (Tenn. Dec. 6, 2004).

Trial court did not abuse its discretion when it determined that it did not have jurisdiction to consider a builder's motion styled "motion to reconsider findings of fact and conclusions of law," because that motion was filed after the builder filed a notice of appeal. Although the motion was substantively a motion to amend or make additional findings of fact made pursuant to Tenn. R. Civ. P. 52.02 and Tenn. R. Civ. P. 59.01 and 59.02, the court stated that, had it considered the motion, it would have been denied. Holladay v. Speed, 208 S.W.3d 408, 2005 Tenn. App. LEXIS 828 (Tenn. Ct. App. 2005), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 743 (Tenn. Aug. 21, 2006).

Where notice of a tax sale had not been given to the owners, the trial court did not abuse its discretion in granting summary judgment to the owners in their suit against the purchaser and in denying the purchaser's Tenn. R. Civ. P. 59.04 motion to set aside the summary judgment; the purchaser's post-judgment evidence would not have created genuine issue of material fact as to whether notice of the tax sale had been given because, the purchaser's claim that she was entitled to reimbursement that she claimed to have spent improving the property, in no way related to the motion for summary judgment filed by the owners. Whalum v. Marshall, 224 S.W.3d 169, 2006 Tenn. App. LEXIS 304 (Tenn. Ct. App. 2006), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 1131 (Tenn. 2006).

6. Premature Motion for New Trial.

Appeal was not dismissed for premature filing of motion for new trial, where the prematurity was the innocent result of difficulties encountered in conducting proceedings over a large geographical area. Grundy County v. Dyer, 546 S.W.2d 577, 1977 Tenn. LEXIS 517 (Tenn. 1977), superseded by statute as stated in, Jenkins v. Loudon County, 736 S.W.2d 603, 1987 Tenn. LEXIS 1084 (Tenn. 1987) (decided under prior law).

7. Newly Discovered Evidence.

To justify a new trial for newly discovered evidence, it must be shown that the new evidence was not known to the moving party prior to or during trial and that it could not have been known to him through exercise of reasonable diligence. Seay v. Knoxville, 654 S.W.2d 397, 1983 Tenn. App. LEXIS 548 (Tenn. Ct. App. 1983).

A new trial is not warranted on newly discovered evidence that goes to a collateral matter only. Crain v. Brown, 823 S.W.2d 187, 1991 Tenn. App. LEXIS 329 (Tenn. Ct. App. 1991), overruled, Matlock v. Simpson, 902 S.W.2d 384, 1995 Tenn. LEXIS 44 (Tenn. 1995).

8. —Affidavits.

On motion for new trial on grounds of newly discovered evidence, affidavits should be filed by both the attorney and the client, since both are under a duty to exercise due diligence in preparing the case for trial. In addition, an affidavit of the new witness setting out the substance of his or her testimony should be filed. Seay v. Knoxville, 654 S.W.2d 397, 1983 Tenn. App. LEXIS 548 (Tenn. Ct. App. 1983).

Affidavits in support of the motion should set out the facts constituting due diligence with particularity. Seay v. Knoxville, 654 S.W.2d 397, 1983 Tenn. App. LEXIS 548 (Tenn. Ct. App. 1983).

On motion for new trial on grounds of newly discovered evidence, counter-affidavits are allowed and reply affidavits may be filed. Seay v. Knoxville, 654 S.W.2d 397, 1983 Tenn. App. LEXIS 548 (Tenn. Ct. App. 1983).

In addition to the four specific factors identified in *Harris v. Chern*, the Tennessee supreme court invited the consideration of "any other relevant factor"; whether a new or supplemental affidavit effectively rebuts the defendant's affidavit is clearly a relevant consideration. Kenyon v. Handal, 122 S.W.3d 743, 2003 Tenn. App. LEXIS 196 (Tenn. Ct. App. 2003), appeal denied, Kenyon v. Handal, M.D., — S.W.3d —, 2003 Tenn. LEXIS 906 (Tenn. 2003).

Howell v. Baptist Hospital should not be read to provide lawyers in a medical malpractice action with a safe haven any time they proclaim that they believed that the affidavit they prepared was substantively adequate. Implicit in *Howell v. Baptist Hospital* is the requirement that the lawyer's belief in the adequacy of the challenged affidavit be in good faith and have some objectively reasonable basis; close calls should be decided in favor of the party seeking to use Tenn. R. Civ. P. 59.04 to file a corrected affidavit. However, protestations of belief that an affidavit is adequate may not be sufficient to obtain relief under *Harris v. Chern* if the defects and shortcomings in the original affidavit are patent to any reasonably competent lawyer. Kenyon v. Handal, 122 S.W.3d 743, 2003 Tenn. App. LEXIS 196 (Tenn. Ct. App. 2003), appeal denied, Kenyon v. Handal, M.D., — S.W.3d —, 2003 Tenn. LEXIS 906 (Tenn. 2003).

Implicit in the *Harris v. Chern* opinion is the Tennessee supreme court's recognition that relief under Tenn. R. Civ. P. 59.04 is available only when the supplemental affidavit effectively remedies the defects or shortcomings in the earlier affidavit opposing the physician's summary judgment motion; trial courts are not required to grant relief from an order granting

a summary judgment if the patient remains unable to demonstrate the existence of a material factual dispute requiring a trial. Kenyon v. Handal, 122 S.W.3d 743, 2003 Tenn. App. LEXIS 196 (Tenn. Ct. App. 2003), appeal denied, Kenyon v. Handal, M.D., — S.W.3d —, 2003 Tenn. LEXIS 906 (Tenn. 2003).

9. Communications with Jury.

A trial judge's ex parte communication with a jury in a civil case does not require reversal per se, but reversal is required where a timely complaining party shows specific prejudice or where, owing to the nature of the ex parte communication, the reviewing court is unable to determine whether the action was actually harmless. Guy v. Vieth, 754 S.W.2d 601, 1988 Tenn. LEXIS 130 (Tenn. 1988).

10. Subsequent Change in Law.

A trial judge may reconsider the evidence in the light of a change in the applicable law that occurs after the original decree, and make findings of fact in response to those changes. Saylors v. Jackson, 575 S.W.2d 264, 1978 Tenn. LEXIS 689 (Tenn. 1978).

11. New Trial Appropriate.

Where the judge said that, as a thirteenth juror, he could not say the jury's verdict was right, he should have set aside the verdict and granted a new trial. Sherlin v. Roberson, 551 S.W.2d 700, 1976 Tenn. App. LEXIS 221 (Tenn. Ct. App. 1976).

Where either mistake, inadvertence, or excusable neglect arguably was responsible for defendant's failure to appear, the judgment in favor of plaintiff should have been set aside and a new trial granted. Campbell v. Archer, 555 S.W.2d 110, 1977 Tenn. LEXIS 625 (Tenn. 1977).

Because a juror possessed first-hand knowledge of facts and issues in dispute in the trial, which information was passed on to other jurors, the affidavits of those jurors were admissible under Tenn. R. Evid. 606(b); because the information was prejudicial, a company's new trial motion should have been granted, and the court ordered a new trial. Cavalier Metal Corp. v. Johnson Metal Controls, 124 S.W.3d 122, 2003 Tenn. App. LEXIS 397 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 1186 (Tenn. Dec. 8, 2003).

Chancellor properly granted a new trial under Tenn. R. Civ. P. 59.06 in favor of plaintiffs because a trial court was not allowed to reallocate the percentages of fault determined by the jury once it disagreed with the weight of the evidence as the thirteenth juror; the only remedy was the granting of a new trial. Jones v. Idles, 114 S.W.3d 911, 2003 Tenn. LEXIS 827 (Tenn. 2003).

Trial court erred in a medical malpractice action in denying a patient's motion to set aside a summary judgment order on the ground of excusable neglect because failure of the patient's attorney to calendar the pertinent dates was due to the fact that the attorney was attending to the significant needs of the attorney's brother who was suffering from cancer. Ferguson v. Brown, 291 S.W.3d 381, 2008 Tenn. App. LEXIS 640 (Tenn. Ct. App. Oct. 21, 2008).

12. Nonjury Matters.

Errors of the trial judge, committed after trial and without participation by the jury, do not need to be brought back for further consideration by the trial court on a motion under Tenn. R. Civ. P. 59, before such issues can be considered on appeal. McCormic v. Smith, 659 S.W.2d 804, 1983 Tenn. LEXIS 735 (Tenn. 1983).

A party may request a trial judge in a nonjury matter to reconsider actions which the judge has taken, but this is not a prerequisite to appellate review of those actions. McCormic v. Smith, 659 S.W.2d 804, 1983 Tenn. LEXIS 735 (Tenn. 1983).

13. Discretion of Trial Judge.

The granting or refusal of a new trial rests largely in the discretion of the trial judge. Esstman v. Boyd, 605 S.W.2d 237, 1979 Tenn. App. LEXIS 400 (Tenn. Ct. App. 1980); Seay v. Knoxville, 654 S.W.2d 397, 1983 Tenn. App. LEXIS 548 (Tenn. Ct. App. 1983).

As long as its judgment has not become final, the trial court, sitting without a jury, may change its mind after reconsidering the proof and applicable law. Waste Mgmt. v. South Cent. Bell Tel. Co., 15 S.W.3d 425, 1997 Tenn. App. LEXIS 117 (Tenn. Ct. App. 1997).

Trial court did not abuse its discretion by dismissing pro se inmate's divorce petition for failure to prosecute the claim without having given him prior notice of the dismissal where he knew that original summons had been returned unserved and permitted case to languish for seven months without making any effort to see to it that his wife was properly served; moreover, his position on appeal was undermined by his failure to avail himself of the post-judgment remedies available to him through a Tenn. R. Civ. P. 59.04 motion to alter or amend the trial court's judgment within 30 days after entry explaining his reasons for failing to serve his wife or otherwise prosecute his case, or Tenn. R. Civ. P. 60.02, arguing mistake, inadvertence, surprise, or excusable neglect. Hessmer v. Hessmer, 138 S.W.3d 901, 2003 Tenn. App. LEXIS 346 (Tenn. Ct. App. 2003).

14. Effect of Motion on Appeal.

Where notice of appeal was filed prior to disposition of motion for a new trial, which was still pending in the trial court, the notice was of no effect, as there had been no final disposition below of the case, there was no appeal of right and the notice of appeal was of no effect. Hut-

chison v. ARO Corp., 653 S.W.2d 738, 1983 Tenn. App. LEXIS 584 (Tenn. Ct. App. 1983).

15. Number of Motions.

Tenn. R. Civ. P. 59 does not require more than a single motion as a prerequisite to appellate review. McCormic v. Smith, 659 S.W.2d 804, 1983 Tenn. LEXIS 735 (Tenn. 1983).

16. Change Considered Alteration or Amendment.

Because a final order entered by a trial court changed an earlier order entered by the trial court, it was considered an alteration or amendment pursuant to Tenn. R. Civ. P. 59.05, and the final order superseded the earlier order; thus, the trial court properly denied a party's motion to set aside the earlier order, pursuant to Tenn. R. Civ. P. 60.02, because it was of no continuing legal effect. Edwards v. Banco Lumber Co., 101 S.W.3d 69, 2002 Tenn. App. LEXIS 779 (Tenn. Ct. App. 2002), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 195 (Tenn. Feb. 24, 2003).

17. No Basis for Reversal.

In a driver's personal injury action, a trial court did not err in denying an insurer's motion for a new trial because any error in admitting testimony about the reason stated by the driver's employer for the driver's termination was harmless, T.R.A.P. 36(b); even without the testimony regarding the employer's statements, the jury could have reasonably inferred that the driver's employment was terminated for reasons related to the injuries she sustained in the crash. Johnson v. Beverly Nunis & Farmer's Ins. Exch., 383 S.W.3d 122, 2012 Tenn. App. LEXIS 277 (Tenn. Ct. App. Apr. 27, 2012).

Construction project administrator's motion for a new trial was properly denied where a doctor's affidavit did not explain his failure to appear in court on the day of trial, and his unsworn statements as a litigant could not considered to explain his whereabouts. Ski Chalet Vill. Owners Club, Inc. v. Pate, — S.W.3d —, 2020 Tenn. App. LEXIS 283 (Tenn. Ct. App. June 19, 2020).

RULE 60

RELIEF FROM JUDGMENTS OR ORDERS

60.01. Clerical Mistakes. Clerical mistakes in judgments, orders or other parts of the record, and errors therein arising from oversight or omissions, may be corrected by the court at any time on its own initiative or on motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

NOTES TO DECISIONS

Analysis

1. Applicability.
2. Jurisdiction.

1. Applicability.

Tenn. R. Civ. P. 59 and 60 are applicable to de novo appeals from general sessions court to circuit court under Tenn. R. Civ. P. 1(2); as in any other circuit court case, Rules 59 and 60 reflect the circuit courts' jurisdiction to correct earlier orders, even after an erroneous remand to general sessions court, within the parameters set out in those rules. Ken Smith Auto Parts v. Thomas, — S.W.3d —, 2020 Tenn. App. LEXIS 172 (Tenn. Apr. 17, 2020).

2. Jurisdiction.

Plaintiff's appeal was untimely because the trial court's order granting relief from its judgment was void where the plaintiffs' notice of appeal was received and docketed by the appellate court more than 30 days after the trial court's judgment became final and the appellate court denied their motion for leave to correct the trial court record. Burke v. Huntsville NH Operations LLC, 491 S.W.3d 683, 2015 Tenn. App. LEXIS 940 (Tenn. Ct. App. Nov. 30, 2015), appeal denied, Burke v. Huntsville NH Operations LLC, — S.W.3d —, 2016 Tenn. LEXIS 321 (Tenn. May 5, 2016).

Tenn. R. Civ. P. 59, 60 are applicable to de novo appeals from general sessions court to circuit court; as in any other circuit court case, these rules reflect the circuit courts' jurisdiction to correct earlier orders, even after an erroneous remand to general sessions court, within the parameters set out in those rules. Ken Smith Auto Parts v. Thomas, 599 S.W.3d 555, 2020 Tenn. LEXIS 147 (Tenn. Apr. 17, 2020).

60.02. Mistakes — Inadvertence — Excusable Neglect — Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or the party's legal representative from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (3) the judgment is void; (4) the judgment has been satisfied, released or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that a judgment should have prospective application; or (5) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than one year after the judgment, order or proceeding was entered or taken. A motion under this Rule 60.02 does not affect the finality of a judgment or suspend its operation, but the court may enter an order suspending the operation of the judgment upon such terms as to bond and notice as to it shall seem proper pending the hearing of such motion. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to set aside a judgment for fraud upon the court. Writs of error coram nobis, bills of review and bills in the nature of a bill of review are abolished, and the procedure for obtaining relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Advisory Commission Comments. 60.01: This Rule supersedes the provisions of Tenn. Code Ann. §§ 20-1508 [repealed], 20-11-106 and 20-11-107, although it is generally consistent with the purpose of those statutes. The provisions of the Rule are somewhat more flexible than the statutory procedures.

60.02: This Rule supersedes chapter 7 of Title 27, T.C.A., dealing with the writ of error coram nobis, and Tenn. Code Ann. §§ 27-203, 27-204 [both repealed] dealing with bills of review. The Committee felt that it was better to bring together under one Rule the subject matter formerly covered by these statutes and to provide a simple remedy by motion or by separate suit to obtain relief under the circumstances set out in the Rule.

Advisory Commission Comments [2009]. A modified Rule 60 procedure to obtain relief from a general sessions court judgment is available by statute, T.C.A. § 16-15-727.

Advisory Commission Comments [2017]. 60.02. Rule 60.02 provides that a motion filed pursuant to the Rule "shall be made within a reasonable time, and for reasons (1) and (2) not more than one year after the judgment, order or proceeding was entered or taken." The Supreme Court, however, has held that "the reasonable time filing requirement of Rule 60.02 does not apply to petitions seeking relief from void judgments under Rule 60.02(3)." *Turner v. Turner*, 473 S.W.3d 257, 260 (Tenn. 2015). But the Court went on to also hold in *Turner* that relief from a void judgment should nevertheless be denied "if the following exceptional circumstances exist: '(1) [t]he party seeking relief, after having had actual notice of the judgment, manifested an intention to treat the judgment as valid; and (2) [g]ranting the relief would impair another person's substantial interest of reliance on the judgment.' Restatement (Second) of Judgments § 66 (1982)." *Id.*

Compiler's Notes. The amendment of the Advisory Commission Comments to Rule 60, which added the 2009 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated January 8, 2009, was ratified and approved by 2009 House Resolution 15 and Senate Resolution 16. The order promulgating the amendment of the Advisory Commission Comments provided that it take effect July 1, 2009.

The amendment of Rule 60 by the addition of [2017] Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 21, 2016, was ratified and approved by 2017 House Resolution 20 and Senate Resolution 13. The order promulgating the amendment of Rule 60 by adding [2017] Advisory Commission Comments, provided that it take effect July 1, 2017.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 97, 142, 144, 232, 233, 236, 237, 239, 266, 274, 288, 320, 345, 346, 659.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 2-4-1, 1-60.01-1, 1-60.01-2, 1-60.02-1, 1-60.02-2.

Tennessee Jurisprudence. 1 Tenn. Juris., Amendments, § 7; 2 Tenn. Juris., Appeal and Error, §§ 9, 10-31, 145; 5 Tenn. Juris., Bill of

Review, §§ 1, 2; 5 Tenn. Juris., Certiorari, § 2; 8 Tenn. Juris., Courts, § 11; 9 Tenn. Juris., Dismissal, Discontinuance and Nonsuit, §§ 11, 15; 9 Tenn. Juris., Divorce and Alimony, § 28; 16 Tenn. Juris., Judges, § 15; 16 Tenn. Juris., Judgments and Decrees, §§ 26, 45-52, 57, 77; 16 Tenn. Juris., Judicial Sales, §§ 5, 20; 21 Tenn. Juris., Process, § 14; 21 Tenn. Juris., Reference and Commissioners, § 6; 25 Tenn. Juris., Wills, § 51; 24 Tenn. Juris., Vendor and Purchaser, § 41; 26 Tenn. Juris., Workers' Compensation, §§ 34, 57.

Law Reviews. Adoption Proceedings — Revocation of Surrender Under Tennessee Code Annotated Section 36-1-117 (Bradley E. Trammell), 23 Mem. St. U.L. Rev. 293 (1993).

Amended Rules (Donald F. Paine), 36 No. 6 Tenn. B.J. 13 (2000).

As a Matter of Law: Summary Judgment in Medical Malpractice Litigation in Tennessee, 15 Mem. St. U. L. Rev. 55 (1984).

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1. In General.

Tenn. R. Civ. P. 60 affords relief from judgments which have actually been entered and does not provide for the entry of a judgment which was not entered. Zeitlin v. Zeitlin, 544 S.W.2d 103, 1976 Tenn. App. LEXIS 231 (Tenn. Ct. App. 1976), superseded by statute as stated in, Aubin v. Aubin, — S.W.2d —, 1989 Tenn. App. LEXIS 101 (1989), superseded by statute as stated in, State ex rel. Woody v. Morris, — S.W.2d —, 1990 Tenn. App. LEXIS 22 (1990); Fielder v. Lakesite Enters., Inc., 871 S.W.2d 157, 1993 Tenn. App. LEXIS 599 (Tenn. Ct. App. 1993).

After the appeal has been docketed in the appellate court, mistakes may be corrected by the trial court only with leave of the appellate court. Henry County v. Summers, 547 S.W.2d 247, 1976 Tenn. App. LEXIS 227 (Tenn. Ct. App. 1976), rehearing denied, 547 S.W.2d 247, 1976 Tenn. App. LEXIS 228 (Tenn. Ct. App. 1976).

Negligence on the part of the moving party is precisely the type of error a Tenn. R. Civ. P. 60 motion is designed to relieve. Tate v. County of Monroe, 578 S.W.2d 642, 1978 Tenn. App. LEXIS 328 (Tenn. Ct. App. 1978).

Tenn. R. Civ. P. 60 motions can provide relief not only for mistake, etc., of the moving party, but also from that of other parties to the action. Tate v. County of Monroe, 578 S.W.2d 642, 1978 Tenn. App. LEXIS 328 (Tenn. Ct. App. 1978).

Tenn. R. Civ. P. 60 is designed to afford relief in those cases wherein the judgment or order, either standing alone or when viewed in connection with other portions of the record, shows facially that it contains errors arising from oversight or omission. Pennington v. Pennington, 592 S.W.2d 576, 1979 Tenn. App. LEXIS 364 (Tenn. Ct. App. 1979).

Tenn. R. Civ. P. 60 is not meant to be used in every case in which the circumstances of a party change after the entry of a judgment or order. Nor is the rule a mechanism for use by a party who is merely dissatisfied with the result of a particular case. It is meant to be used only in those few cases that meet one or more of the

criteria stated in the rule. Toney v. Mueller Co., 810 S.W.2d 145, 1991 Tenn. LEXIS 179 (Tenn. 1991); NCNB Nat'l Bank v. Thrailkill, 856 S.W.2d 150, 1993 Tenn. App. LEXIS 106 (Tenn. Ct. App. 1993).

Tenn. R. Civ. P. 60 acts as an escape valve from possible inequity that might otherwise arise from the unrelenting imposition of the principle of finality imbedded in our procedural rules, and because of the importance of this "principle of finality," the "escape valve" should not be easily opened. Toney v. Mueller Co., 810 S.W.2d 145, 1991 Tenn. LEXIS 179 (Tenn. 1991); NCNB Nat'l Bank v. Thrailkill, 856 S.W.2d 150, 1993 Tenn. App. LEXIS 106 (Tenn. Ct. App. 1993).

The purpose of Tenn. R. Civ. P. 60 is to alleviate the effect of an oppressive or onerous final judgment. Bedow Killion v. Tennessee Dep't of Human Services, 845 S.W.2d 212, 1992 Tenn. LEXIS 719 (Tenn. 1992).

Despite its broad language, Tenn. R. Civ. P. 60.02(5) is construed narrowly; the standards of Rule 60.02(5) are more demanding than those applicable to the other grounds for Rule 60.02 relief. NCNB Nat'l Bank v. Thrailkill, 856 S.W.2d 150, 1993 Tenn. App. LEXIS 106 (Tenn. Ct. App. 1993).

Thirty days after entry of a nonsuit, a trial court was without authority to reinstate a cause of action and plaintiffs' only remedy was pursuant to a motion for relief from judgment. Algee v. State Farm Gen. Ins. Co., 890 S.W.2d 445, 1994 Tenn. App. LEXIS 373 (Tenn. Ct. App. 1994).

Although the purpose of Tenn. R. Civ. P. 60 is to alleviate the effect of an oppressive or onerous final judgment, the rule is equally aimed at striking a balance between the competing interests of justice and finality. Whitaker v. Whirlpool Corp., 32 S.W.3d 222, 2000 Tenn. App. LEXIS 171 (Tenn. Ct. App. 2000).

Motions under both Tenn. R. Civ. P. 60.02(1) and (2) must be filed both within a reasonable time and within one year after the judgment or offer was entered. Rogers v. Estate of Russell, 50 S.W.3d 441, 2001 Tenn. App. LEXIS 28 (Tenn. Ct. App. 2001).

Granting of the minor's Tenn. R. Civ. P. 60.02 motion seeking to have the settlement order revised to reflect the true facts of the settlement was affirmed when the driver was not a party to the probate court proceeding, and had no standing either to resist the Tenn. R. Civ. P. 60.02(5) motion or to perfect an appeal from the grant thereof. Garrison v. Stamps, 109 S.W.3d 374, 2003 Tenn. App. LEXIS 100 (Tenn. Ct. App. 2003), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 655 (Tenn. 2003).

Trial court did not abuse its discretion in modifying the QDRO, as it was inequitable for the wife to receive all of the husband's retirement benefits accrued during 31 years of employment for a marriage that only lasted four years. Beason v. Beason, 120 S.W.3d 833, 2003 Tenn. App. LEXIS 331 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 889 (Tenn. 2003).

It was not an abuse of discretion for the trial court to deny the wife's motion, as the judgment she sought relief from had been entered 12 years before. Beason v. Beason, 120 S.W.3d 833, 2003 Tenn. App. LEXIS 331 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 889 (Tenn. 2003).

Although not notified of the exact filing date, all parties received a copy of the proposed order for summary judgment, but rather than setting the Tenn. R. Civ. P. 60 motion to be heard in a timely fashion, the client's attorney waited until December of 2002, nearly 19 months after the entry of the motion for summary judgment to schedule the matter for hearing; thus, the trial court did not abuse its discretion in denying the client's Rule 60 motion because the client's attorney was derelict, and because the unwarranted delay could have prejudiced the other party's case. Thompson v. Chafetz, 164 S.W.3d 571, 2004 Tenn. App. LEXIS 152 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 813 (Tenn. Sept. 13, 2004).

Because the father and his attorney could have ascertained the correct date upon which the final judgment actually was entered, the father failed to meet his burden of demonstrating why either he or his attorney were justified in failing to avoid the alleged mistake; thus, the trial court did not err in refusing to grant the father relief under Tenn. R. Civ. P. 60.02(1). In re Joeda J., 300 S.W.3d 710, 2009 Tenn. App. LEXIS 391 (Tenn. Ct. App. June 24, 2009), appeal denied, In re J.M.J., — S.W.3d —, 2009 Tenn. LEXIS 712 (Tenn. Oct. 26, 2009).

Mere fact that a judgment was entered by consent did not deprive a court from considering a motion to set aside the judgment. Silliman v. City of Memphis, 449 S.W.3d 440, 2014 Tenn. App. LEXIS 407 (Tenn. Ct. App. July 2, 2014), appeal denied, — S.W.3d —, 2014 Tenn. LEXIS 920 (Tenn. Nov. 12, 2014).

2. Meaning of Terms.

"Any other reason" under Tenn. R. Civ. P. 60.02(5) is defined as a reason of "overriding importance," one of extraordinary circumstances or extreme hardship. Gaines v. Gaines, 599 S.W.2d 561, 1980 Tenn. App. LEXIS 342 (Tenn. Ct. App. 1980).

3. Jurisdiction.

The provisions limiting the bringing of claims or entering judgments against employees did not remove subject-matter jurisdiction of the circuit courts, but instead defined the scope of liability, and therefore a Tenn. R. Civ. P. 60.02(3) motion for relief because the judgment was void for lack of jurisdiction did not lie. Cain v. Macklin, 663 S.W.2d 794, 1984 Tenn. LEXIS 732 (Tenn. 1984).

Because Tenn. R. Civ. P. 60.02(3) states that a judgment may be set aside if void, courts will most commonly refuse to give full faith and credit to a foreign judgment when the court entering the foreign judgment has no personal or subject matter jurisdiction, and when enforcing the judgment would be contrary to Tennessee's public policy. Biogen Distributors, Inc. v. Tanner, 842 S.W.2d 253, 1992 Tenn. App. LEXIS 751 (Tenn. Ct. App. 1992).

Juvenile court did not have subject matter jurisdiction to set aside a voluntary acknowledgment of paternity (VAP) based on fraud, and relieve respondent of any future obligation to pay child support and grant his petition against the mother and award him damages consisting of the child support that he had erroneously paid. State ex rel. Whitley v. Lewis, 244 S.W.3d 824, 2007 Tenn. App. LEXIS 458 (Tenn. Ct. App. July 24, 2007), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 1065 (Tenn. Nov. 19, 2007), appeal denied, State v. Whitley, — S.W.3d —, 2008 Tenn. LEXIS 732 (Tenn. Sept. 29, 2008).

While the juvenile courts have broad statutory authority to establish a child's paternity and to issue orders setting, modifying, or even terminating child support, the court of appeals found no statute giving the juvenile courts authority, expressly or by implication, to order the state to reimburse a person who has voluntarily paid child support based on the mistaken belief that he was the child's biological father. State ex rel. Whitley v. Lewis, 244 S.W.3d 824, 2007 Tenn. App. LEXIS 458 (Tenn. Ct. App. July 24, 2007), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 1065 (Tenn. Nov. 19, 2007), appeal denied, State v. Whitley, — S.W.3d —, 2008 Tenn. LEXIS 732 (Tenn. Sept. 29, 2008).

Appellate court dismissed a builder's appeal of an order denying its motion for relief from judgment based on excusable neglect where the trial court's decision denying the builder's motion was rendered after the trial court's judgment in favor of a church became final; hence, the trial court lacked subject matter jurisdiction over the case when it denied the builder's motion. Born Again Church & Christian Outreach Ministries, Inc. v. Myler Church Bldg. Sys. of the Midsouth, Inc., 266 S.W.3d 421, 2007 Tenn. App. LEXIS 774 (Tenn. Ct. App. Dec. 17, 2007), appeal denied, Born Again Church v. Myler Church Bldg. Sys., — S.W.3d —, 2008 Tenn. LEXIS 480 (Tenn. June 23, 2008).

Defendant in a personal injury suit properly perfected her appeal from general sessions court as required by T.C.A. § 27-5-103, although her insurer's checks for the costs of the appeal were not accepted by the general sessions court. The record established that the general sessions court clerk paid the appeal bond to the circuit court clerk's office. Therefore, the plaintiff was not entitled to relief from the circuit court's judgment against her under Tenn. R. Civ. P. 60.02. Carter v. Batts, 373 S.W.3d 547, 2011 Tenn. App. LEXIS 587 (Tenn. Ct. App. Oct. 28, 2011), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 233 (Tenn. Apr. 11, 2012).

Although filed prematurely, a former employee's second notice of appeal was timely and vested the appellate court with jurisdiction because the trial court's purported final order failed to rule on all the issues, and, without ruling on these requests, the judgment was not final, so that the appellate court never acquired jurisdiction over the employee's first appeal. Thus, any order by the appellate court on that appeal was void and the trial court retained jurisdiction to adjudicate the claims until it filed its final order. Foster-Henderson v. Memphis Health Ctr., Inc., 479 S.W.3d 214, 2015 Tenn. App. LEXIS 582 (Tenn. Ct. App. July 22, 2015), appeal denied, Foster v. Memphis Health Ctr., Inc., — S.W.3d —, 2015 Tenn. LEXIS 1074 (Tenn. Dec. 14, 2015).

There was no error in the Tennessee State Board of Equalization's consideration of a county's motion to set aside an agreed order or the trial court's decision that it had subject matter jurisdiction over the matter because, although the county did not pursue any of the statutory remedies within the prescribed time limits, the county moved for extraordinary relief from the Board's final judgment due to mistake or fraud. Anderson Cty. Tenn. v. Tenn. State Bd. of Equalization, — S.W.3d —, 2020 Tenn. App. LEXIS 65 (Tenn. Ct. App. Feb. 14, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 533 (Tenn. Sept. 16, 2020).

4. Savings Clause.

The Tennessee supreme court has interpreted the savings clause as retaining the independent action in equity to impeach or set aside a judgment for fraud, accident, surprise or mistake. Brown v. Raines, 611 S.W.2d 594, 1980 Tenn. App. LEXIS 407 (Tenn. Ct. App. 1980).

Unlike fraud claimed under Tenn. R. Civ. P. 60.02(2), the appellant in an independent action under the savings clause to set aside a judgment is limited to the proof of extrinsic fraud. Brown v. Raines, 611 S.W.2d 594, 1980 Tenn. App. LEXIS 407 (Tenn. Ct. App. 1980).

In their 2000 divorce, the wife and the husband executed a marital dissolution agreement (MDA), and in 2003, the wife filed a "complaint for damages for fraud, deceit, and coercion," alleging the lawyer husband coerced her into signing the MDA while she was under the influence of alcohol; as to extrinsic fraud, the reviewing court, in examining the allegations in the complaint in conjunction with the wording of the MDA, found the wife failed to allege sufficient facts to have supported either an independent action to set aside the final divorce decree under Tenn. R. Civ. P. 60.02 or separate

common law causes of action for fraud or coercion. Black v. Black, 166 S.W.3d 699, 2005 Tenn. LEXIS 611 (Tenn. 2005).

5. Appellate Behavior.

It was not the purpose of Tenn. R. Civ. P. 60 for a trial judge to act as an appellate court in reviewing division of property settlements approved by special judges, and where the movant failed to submit adequate proof, and the trial court did not make any findings of mistake or misrepresentation, it was improper for the trial court to set aside the division of property because it was not fair. Page v. Page, 672 S.W.2d 423, 1984 Tenn. App. LEXIS 2811 (Tenn. Ct. App. 1984).

Tennessee Court of Appeals erred in remanding case for discovery concerning allegations of misconduct by chancellor and in ordering that discovery materials be transmitted to it as a supplemental record, where the clear effect of the order was that the court of appeals, not the trial court, would determine the merits of allegations, requiring the court of appeals to make factual findings based upon the "supplemental record," which determination was an unauthorized exercise of original jurisdiction; proper remedy was for plaintiff to file motion asking court of appeals to remand the case to the trial court for the filing and adjudication of a motion pursuant to Tenn. R. Civ. P. 60. Peck v. Tanner, 181 S.W.3d 262, 2005 Tenn. LEXIS 579 (Tenn. 2005).

6. Default Judgments.

Where there is reasonable doubt as to whether a default judgment should be set aside, the court should exercise its discretion in favor of granting the application to permit the cause to be decided upon the merits. Keck v. Nationwide Systems, Inc., 499 S.W.2d 266, 1973 Tenn. App. LEXIS 291 (Tenn. Ct. App. 1973).

Defenses of an uninsured motorist insurer must be asserted in the tort action brought against the uninsured motorist, and if failure to do so results in a default judgment against the insurer, the insurer is bound by such judgment. Derryberry v. Pratt, 557 S.W.2d 923, 1977 Tenn. App. LEXIS 319 (Tenn. Ct. App. 1977).

When there is a reasonable doubt as to whether a default judgment should be set aside upon proper application, the court should exercise its discretion in favor of granting the application so as to permit a determination of the cause upon the merits. Tennessee State Bank v. Lay, 609 S.W.2d 525, 1980 Tenn. App. LEXIS 388 (Tenn. Ct. App. 1980).

Negligence on the part of the moving party is precisely the type of error Tenn. R. Civ. P. 60 is designed to relieve, and mistake, inadvertence, surprise, excusable neglect or misfortune of the moving party's attorney may be grounds for vacating a default judgment. Tennessee State Bank v. Lay, 609 S.W.2d 525, 1980 Tenn. App. LEXIS 388 (Tenn. Ct. App. 1980).

Where the record did not disclose defendant acted without due diligence or in a careless manner nor that any neglect on her part was not excusable or justified by the circumstances of the case, and from the record it could be reasonably concluded that defendant was not informed of the chancery court proceeding until after judgment was rendered and that she thereafter acted diligently in attempting to protect her rights, the default judgment was set aside. Tennessee State Bank v. Lay, 609 S.W.2d 525, 1980 Tenn. App. LEXIS 388 (Tenn. Ct. App. 1980).

The setting aside of a default judgment lies within the sound discretion of the court. Henson v. Diehl Machines, Inc., 674 S.W.2d 307, 1984 Tenn. App. LEXIS 2868 (Tenn. Ct. App. 1984); Nelson v. Simpson, 826 S.W.2d 483, 1991 Tenn. App. LEXIS 919 (Tenn. Ct. App. 1991); In re Estate of Mayes, 843 S.W.2d 418, 1992 Tenn. App. LEXIS 294 (Tenn. Ct. App. 1992).

Federal courts have made a sharp distinction, in the application of similar Rule 60, Fed. R. Civ. P., between final judgments and default judgments. Tennessee Dep't of Human Services v. Barbee, 689 S.W.2d 863, 1985 Tenn. LEXIS 515 (Tenn. 1985).

The courts should construe Tenn. R. Civ. P. 60's requirements liberally when a party is seeking relief from a default judgment. They should also examine the moving party's proof to determine whether the default was willful and to assess the extent to which the defaulting party's conduct has prejudiced the nondefaulting party. Nelson v. Simpson, 826 S.W.2d 483, 1991 Tenn. App. LEXIS 919 (Tenn. Ct. App. 1991).

The mere passage of time is not the sort of prejudice that supports declining to set a default judgment aside. Nelson v. Simpson, 826 S.W.2d 483, 1991 Tenn. App. LEXIS 919 (Tenn. Ct. App. 1991).

Trial court erred in denying defendants' motion to set aside a default judgment as, according to the certificates of service attested to by the plaintiffs, proper notice to defendants was not made; consequently, sufficient doubt existed to justify setting the default judgment aside. Reynolds v. Battles, 108 S.W.3d 249, 2003 Tenn. App. LEXIS 13 (Tenn. Ct. App. 2003), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 509 (Tenn. 2003).

Default judgment in a customer's action against a bank arising out of unauthorized charges to a checking account should have been vacated under Tenn. R. Civ. P. 55.02 because the bank demonstrated grounds under Tenn. R. Civ. P. 60.02(1) by showing excusable neglect by counsel as to who was handling the case, a meritorious defense based on federal banking law, and that the customer did not argue and would not be prejudiced by setting aside the

judgment and proceeding to trial. Patterson v. Suntrust Bank, 328 S.W.3d 505, 2010 Tenn. App. LEXIS 305 (Tenn. Ct. App. Apr. 30, 2010), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 1066 (Tenn. Nov. 12, 2010).

Trial court did not apply an incorrect standard in ruling on a motion for relief from a default judgment as the same test applied for relief under Tenn. R. Civ. P. 54.02 and Tenn. R. Civ. P. 60.02. Discover Bank v. Morgan, 363 S.W.3d 479, 2012 Tenn. LEXIS 215 (Tenn. Mar. 27, 2012).

Interest in finality is heightened once a final judgment has been entered, and while the same factors must guide the inquiry, relief from a partial default judgment may be granted more liberally under Tenn. R. Civ. P. 54.02 than relief from final default judgments under Tenn. R. Civ. P. 59.04 or Tenn. R. Civ. P. 60.02. Discover Bank v. Morgan, 363 S.W.3d 479, 2012 Tenn. LEXIS 215 (Tenn. Mar. 27, 2012).

7. Subsequent Change in Law.

A final divorce decree is not subject to modification under Tenn. R. Civ. P. 60 because of a change in the law subsequent to the decree. Penland v. Penland, 521 S.W.2d 222, 1975 Tenn. LEXIS 681 (Tenn. 1975).

Because a city's annexation ordinance became operative prior to the moratorium established by T.C.A. § 6-51-122, a trial court erred in setting aside a consent order, between property owners and a city regarding annexation, on the basis of Tenn. R. Civ. P. 60.02. Silliman v. City of Memphis, 449 S.W.3d 440, 2014 Tenn. App. LEXIS 407 (Tenn. Ct. App. July 2, 2014), appeal denied, — S.W.3d —, 2014 Tenn. LEXIS 920 (Tenn. Nov. 12, 2014).

8. Relief Through Independent Action.

Where there was no attack on the merits of the judgment but only on procedural errors which were correctible in the main suit, or reviewable by appeal or writ of error, and where the relief sought was a new trial, an independent action attacking the judgment was improper. Jerkins v. McKinney, 533 S.W.2d 275, 1976 Tenn. LEXIS 499 (Tenn. 1976).

In order to bring an independent suit under Tenn. R. Civ. P. 60, it must appear that the situation in which the party seeking relief finds himself is not due to his own fault, neglect or carelessness. In others, the petitioning party must not be negligent in creating the situation from which relief is sought; if he is, no independent suit under Tenn. R. Civ. P. 60 can be maintained. Tate v. County of Monroe, 578 S.W.2d 642, 1978 Tenn. App. LEXIS 328 (Tenn. Ct. App. 1978).

The time limit in Tenn. R. Civ. P. 60 has no application to an independent action to relieve a party from judgment obtained by default where defendant had not been served. Hawley v. Lavelle, 602 S.W.2d 499, 1980 Tenn. App. LEXIS 364 (Tenn. Ct. App. 1980).

Because the employee failed to establish at least two of the three criteria necessary to obtain relief in an independent action collaterally attacking a final judgment as it was clear that the employee had other available and adequate remedies, the employee either could have timely sought relief for the alleged mistake pursuant to Tenn. R. Civ. P. 60.02(1) or appealed from the Department-approved settlement pursuant to T.C.A. § 50-6-206(c)(2) [applicable only to injuries occurring prior to July 1, 2014], the employee availed himself of neither remedy, and it could not be concluded that the employee was without fault, the court could not exercise inherent authority and consider the petition as an independent action. Furlough v. Spherion Atl. Workforce, LLC, 397 S.W.3d 114, 2013 Tenn. LEXIS 204 (Tenn. Feb. 22, 2013).

9. Clerical Mistake.

The trial court could properly correct an error in an order specifying the time for filing a bill of exceptions when the motion for a new trial was granted in part and denied in part where through a clerical oversight the number 30 instead of 90 was entered for the number of days and the trial judge stated that said order did not recite his ruling and the correction did not result in an extension of time in violation of Tenn. R. Civ. P. 60. Green Meadow Park v. American Heritage Life Ins. Co., 540 S.W.2d 267, 1976 Tenn. App. LEXIS 245 (Tenn. Ct. App. 1976).

"Clerical mistake" does not apply to every act of a clerk but to mechanical errors of computation or copying. Zeitlin v. Zeitlin, 544 S.W.2d 103, 1976 Tenn. App. LEXIS 231 (Tenn. Ct. App. 1976), superseded by statute as stated in, Aubin v. Aubin, — S.W.2d —, 1989 Tenn. App. LEXIS 101 (1989), superseded by statute as stated in, State ex rel. Woody v. Morris, — S.W.2d —, 1990 Tenn. App. LEXIS 22 (1990).

Where unsuccessful plaintiff in a civil action moved for a new trial upon the basis that he was denied effective review without fault on his part, the court reporter having erased the transcript, the case was remanded to the trial court to clarify the issue whether plaintiff could have obtained an adequate transcript for the purpose of appeal. Trice v. Moyers, 561 S.W.2d 153, 1978 Tenn. LEXIS 576 (Tenn. 1978).

10. —Error of Oversight or Omission.

Under Tenn. R. Civ. P. 60, the court has the authority to correct an error of oversight or omission at any time on its own initiative or own motion. This the court correctly did. Pennington v. Pennington, 592 S.W.2d 576, 1979 Tenn. App. LEXIS 364 (Tenn. Ct. App. 1979).

The trial court was not at fault for correcting its earlier order to conform the scope of its wording once the narrowness of the order was brought to its attention, as this was a proper

exercise of the court's authority under Tenn. R. Civ. P. 60. Spann v. Abraham, 36 S.W.3d 452, 1999 Tenn. App. LEXIS 746 (Tenn. Ct. App. 1999).

11. Fraud or Misconduct.

Where one party to a divorce suit deceived the other in order to prevent her from taking action before the decree became final, this is a classic case for the application of Tenn. R. Civ. P. 60. Brown v. Brown, 548 S.W.2d 660, 1977 Tenn. LEXIS 549 (Tenn. 1977).

It was not error to deny a party relief until he purged himself of contempt. Segelke v. Segelke, 584 S.W.2d 211, 1978 Tenn. App. LEXIS 357 (Tenn. Ct. App. 1978).

Examples of extrinsic fraud include inducing the opposite party by false representations to him or his attorney to stay away from court, or keeping him in ignorance of the suit, or fraudulent conduct of counsel for the successful party whereby the opposite party is deceived. Brown v. Raines, 611 S.W.2d 594, 1980 Tenn. App. LEXIS 407 (Tenn. Ct. App. 1980).

Post-judgment relief is available under Tenn. R. Civ. P. 60.02(2) for intrinsic fraud, as well as extrinsic fraud. Duncan v. Duncan, 789 S.W.2d 557, 1990 Tenn. App. LEXIS 46 (Tenn. Ct. App. 1990).

Where defendant sought relief from a divorce judgment under Tenn. R. Civ. P. 60.02, but the only "threshold" evidence of fraudulent misrepresentation cited or found in the evidentiary record was testimony that plaintiff told defendant that his financial condition was bad, and that defendant would receive all that he could afford, such evidence was not sufficient to justify an investigation of the business affairs of plaintiff which could have been made as a matter of right during the divorce proceedings. Brown v. Brown, 863 S.W.2d 432, 1993 Tenn. App. LEXIS 469 (Tenn. Ct. App. 1993).

The reason for the common law distinction between intrinsic and extrinsic fraud, and the reason that the distinction is maintained in Tenn. R. Civ. P. 60 is grounded in the need for finality of judgments. Whitaker v. Whirlpool Corp., 32 S.W.3d 222, 2000 Tenn. App. LEXIS 171 (Tenn. Ct. App. 2000).

In a workers' compensation case, the trial court did not err in denying an employee's motion to set aside a judgment approving a settlement between the parties where the employee failed to meet her burden of proving that she was entitled to relief based upon Tenn. R. Civ. P. 60.02(2). Erroneous information that the employee's husband purportedly received from the Tennessee Department of Labor, namely that the employee's benefits were the maximum permitted by law, could not have been imputed to the employer where there was no indication that the employer was even aware that the employee's husband sought information from the Department of Labor. Henderson v. Saia, Inc., 318 S.W.3d 328, 2010 Tenn. LEXIS 678 (Tenn. Aug. 24, 2010), rehearing denied, Henderson v. SAIA, Inc., — S.W.3d —, 2010 Tenn. LEXIS 866 (Tenn. Sept. 8, 2010).

Trial court did not err in dismissing a daughter's action seeking to overturn a settlement agreement she entered into with a stepfather based upon fraud in the inducement under Tenn. R. Civ. P. 60.02 because there was no actionable claim for fraud; the daughter never relied on the stepfather's representation that he did not kill her mother, but rather, the daughter's entire case always rested on a scenario whereby the stepfather killed the mother in a manner covered by the "Slayer's Statute," T.C.A. § 31-1-106. Gentry v. Larkin, 389 S.W.3d 330, 2012 Tenn. App. LEXIS 465 (Tenn. Ct. App. July 13, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 953 (Tenn. Dec. 10, 2012).

Trial court did not abuse its discretion in denying the relief requested by a surviving spouse when the spouse sought to proceed on a separate claim against a relative for extrinsic fraud because the only relief available to the surviving spouse was the setting aside of the orders of the court closing the estate of the decedent and those by which the relative purchased the stock of the decedent's business company. Coffey v. Coffey, 578 S.W.3d 10, 2018 Tenn. App. LEXIS 552 (Tenn. Ct. App. Sept. 20, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 136 (Tenn. Feb. 20, 2019).

12. Mistake.

Where the parties believed that the "agreed order" had been entered into, the court will not permit their resulting actions to compel it to enter an order which did not and does not represent the judgment of the court. Zeitlin v. Zeitlin, 544 S.W.2d 103, 1976 Tenn. App. LEXIS 231 (Tenn. Ct. App. 1976), superseded by statute as stated in, Aubin v. Aubin, — S.W.2d —, 1989 Tenn. App. LEXIS 101 (1989), superseded by statute as stated in, State ex rel. Woody v. Morris, — S.W.2d —, 1990 Tenn. App. LEXIS 22 (1990).

The mere fact that a lawyer is ignorant of the rules or mistakenly reads the rules is not within itself reason to invoke Tenn. R. Civ. P. 60.02(1). Kilby v. Sivley, 745 S.W.2d 284, 1987 Tenn. App. LEXIS 3010 (Tenn. Ct. App. 1987); Dewees v. Sweeney, 947 S.W.2d 861, 1996 Tenn. App. LEXIS 821 (Tenn. Ct. App. 1996).

As a prerequisite to the extraordinary relief available under Tenn. R. Civ. P. 60.02(1), movant is required to set forth in a motion or petition, or in supporting affidavits, facts explaining why movant was justified in failing to avoid mistake, inadvertence, surprise or neglect. Turner v. Turner, 776 S.W.2d 88, 1988 Tenn. App. LEXIS 841 (Tenn. Ct. App. 1988).

A foreign lawyer's ignorance of Supreme Court Rule 19, requiring that a Tennessee law-

yer, or the plaintiff, sign a notice of appeal, was not sufficient reason to invoke the rule authorizing relief from judgment. Bivins v. Hospital Corp. of Am., 910 S.W.2d 441, 1995 Tenn. App. LEXIS 421 (Tenn. Ct. App. 1995).

A mistake of law is not a basis for relief under Tenn. R. Civ. P. 60. Spruce v. Spruce, 2 S.W.3d 192, 1998 Tenn. App. LEXIS 791 (Tenn. Ct. App. 1998), rehearing denied, — S.W.3d —, 1999 Tenn. App. LEXIS 21 (Tenn. Ct. App. Jan. 14, 1999), review or rehearing denied, — S.W.3d —, 1999 Tenn. LEXIS 359 (Tenn. July 6, 1999).

An attorney's ignorance of the applicable law or rules is not the type of mistake that invokes the relief provided for under Tenn. R. Civ. P. 60.02(1). Holiday v. Shoney's South, Inc., 42 S.W.3d 90, 2000 Tenn. App. LEXIS 367 (Tenn. Ct. App. 2000).

In a workers' compensation case, the trial court did not err in denying an employee's motion to set aside a judgment approving a settlement between the parties where the employee failed to meet her burden of proving that she was entitled to relief based upon Tenn. R. Civ. P. 60.02(1). The employee at all times had the right to consult an attorney for independent legal advice, and the employee's failure to do so was not a basis for relief under Rule 60.02. Henderson v. Saia, Inc., 318 S.W.3d 328, 2010 Tenn. LEXIS 678 (Tenn. Aug. 24, 2010), rehearing denied, Henderson v. SAIA, Inc., — S.W.3d —, 2010 Tenn. LEXIS 866 (Tenn. Sept. 8, 2010).

13. Failure to Timely File.

Tenn. R. Civ. P. 60.02 is available to persons who fail to timely file a notice of appeal. Kilby v. Sivley, 745 S.W.2d 284, 1987 Tenn. App. LEXIS 3010 (Tenn. Ct. App. 1987).

Although the filing requirements for notices of appeal in civil cases are mandatory and jurisdictional, and neither the trial nor the appellate courts may waive or expand the time for filing a notice of appeal, a trial court may grant an appellant relief from an untimely notice of appeal in unusual or compelling circumstances. Where plaintiffs' failure to file a timely notice of appeal was in part caused by the trial court's decision to grant them an interlocutory appeal even though the court's order was final, the order granting the interlocutory appeal could have induced the plaintiffs' lawyer to conclude that filing a notice of appeal was no longer necessary, and therefore the trial court correctly granted the plaintiffs Tenn. R. Civ. P. 60.02 relief to enable them to file a timely notice of appeal. McCracken v. Brentwood United Methodist Church, 958 S.W.2d 792, 1997 Tenn. App. LEXIS 483 (Tenn. Ct. App. 1997).

In a divorce case, the trial court did not err in denying the wife post-judgment relief pursuant to Tenn. R. Civ. P. 60.02(1); the wife's failure to take any action with the trial court until more than four months after entry of the order was not justified by mistake, inadvertence, surprise or excusable neglect. The wife was provided a copy of the decree the same day it was entered; she was apparently dissatisfied with it from the time she saw it, if not earlier. Walker v. Walker, 211 S.W.3d 232, 2006 Tenn. App. LEXIS 361 (Tenn. Ct. App. 2006), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 1027 (Tenn. Oct. 30, 2006).

Trial court erred in granting the decedent's family's Tenn. R. Civ. P. 60.02 motion to set aside an order of dismissal where the order facially met Tenn. R. Civ. P. 58's requirements for a final judgment, and neither the clerk's delay nor any other evidence met the family's burden of providing clear and convincing evidence that some extraordinary circumstance existed to justify relief from their failure to timely file an appeal. Mack v. Baptist Mem'l Hosp., — S.W.3d —, 2021 Tenn. App. LEXIS 125 (Tenn. Ct. App. Mar. 30, 2021).

14. Excusable Neglect.

Counsel could claim excusable neglect where he had not been informed by the clerk that his motion for a new trial had been overruled. Tate v. County of Monroe, 578 S.W.2d 642, 1978 Tenn. App. LEXIS 328 (Tenn. Ct. App. 1978).

Where the fault in regard to the failure to appear for the trial lies in the manner in which the case was set for trial, the clerk's failure to notify defense counsel that the case was set and in defense counsel's office which failed to notice that the trial was set when plaintiff's counsel informed it of this fact, such lapses have been held to be excusable neglect by Tennessee courts. Tennessee Dep't of Human Services v. Barbee, 689 S.W.2d 863, 1985 Tenn. LEXIS 515 (Tenn. 1985).

Tenn. R. Civ. P. 60 may not be used to provide relief to a party whose lawyer failed to file a timely notice of appeal because he was busy with other clients' work. Jefferson v. Pneumo Services Corp., 699 S.W.2d 181, 1985 Tenn. App. LEXIS 3418 (Tenn. Ct. App. 1985).

Trial courts can, in certain extraordinary circumstances, grant relief in accordance with the requirements of Tenn. R. Civ. P. 60.02 to parties who failed to file their notice of appeal within the period of time provided for in T.R.A.P. 4(a). Jefferson v. Pneumo Services Corp., 699 S.W.2d 181, 1985 Tenn. App. LEXIS 3418 (Tenn. Ct. App. 1985).

Where plaintiffs made a conscious decision to nonsuit their case and where their decision may have been made in ignorance of the law, it was not the sort of excusable neglect contemplated by the rule on relief from judgment as ground for vacating an adverse judgment. Algee v. State Farm Gen. Ins. Co., 890 S.W.2d 445, 1994 Tenn. App. LEXIS 373 (Tenn. Ct. App. 1994).

Mailing of a notice of appeal within two days of the deadline for so doing was not excusable

neglect as that term is used in Tenn. R. Civ. P. 60. First Nat'l Bank v. Goss, 912 S.W.2d 147, 1995 Tenn. App. LEXIS 337 (Tenn. Ct. App. 1995), appeal denied, — S.W.2d —, 1995 Tenn. LEXIS 491 (Tenn. 1995).

Verdict in favor of plaintiffs was reinstated because the trial court did not abuse its discretion in reinstating their claims, as plaintiffs demonstrated excusable neglect as a ground for relief pursuant to Tenn. R. Civ. P. 60.02(1), where the trial court failed to provide notice of dismissal, plaintiffs' had a meritorious claim, and prejudice would not result from reinstating the claims. Henry v. Goins, 104 S.W.3d 475, 2003 Tenn. LEXIS 409 (Tenn. 2003).

Because of the similarity between default judgments and dismissals, the Tennessee supreme court finds instructive those factors that are used to determine if a default judgment should be vacated under Tenn. R. Civ. P. 60.02(1), which include whether the default was willful, whether the defendant has a meritorious defense, and whether the non-defaulting party would be prejudiced if relief were granted; these same factors should apply in cases when relief from an order of dismissal is sought under Tenn. R. Civ. P. 60.02(1). Henry v. Goins, 104 S.W.3d 475, 2003 Tenn. LEXIS 409 (Tenn. 2003).

Trial court did not err in denying apartment owner's motion to set aside default judgment, Tenn. R. Civ. P. 55.02, in favor of the resident because the owner failed to demonstrate a meritorious defense in its motion to set aside the default judgment, Tenn. R. Civ. P. 60.02(1); the owner did not present evidence showing that it exercised reasonable diligence. Pryor v. Rivergate Meadows Apt. Assocs. L.P., 338 S.W.3d 882, 2009 Tenn. App. LEXIS 181 (Tenn. Ct. App. May 1, 2009), appeal denied, — S.W.3d —, 2009 Tenn. LEXIS 785 (Tenn. Nov. 23, 2009).

When a party seeks relief from a default judgment due to "excusable neglect," whether pursuant to Tenn. R. Civ. P. 54.02 (for interlocutory judgments), Tenn. R. Civ. P. 59.04 (for final judgments within thirty days of entry), or Tenn. R. Civ. P. 60.02 (for final judgments more than thirty days after entry), a reviewing court must first determine whether the conduct precipitating the default was willful; if the court finds that the defaulting party has acted willfully, the judgment cannot be set aside on "excusable neglect" grounds, and the court need not consider the other factors. If the conduct was not willful, however, then the court must consider whether the defaulting party has a meritorious defense and whether the non-defaulting party would be prejudiced by the granting of relief; the court may also consider any other factor that it deems relevant. Discover Bank v. Morgan, 363 S.W.3d 479, 2012 Tenn. LEXIS 215 (Tenn. Mar. 27, 2012).

Appellant was not entitled to relief from a default judgment; because he did not meet his burden to show that his failure to answer was not willful but was due to excusable neglect, whether he set forth a meritorious defense to the underlying action was irrelevant. H.G. Hill Realty Co., LLC v. Re/Max Carriage House, Inc., 428 S.W.3d 23, 2013 Tenn. App. LEXIS 474 (Tenn. Ct. App. July 23, 2013), appeal denied, H.G. Hill Realty Co., LLC v. Re/Max Carriage House Inc., — S.W.3d —, 2013 Tenn. LEXIS 897 (Tenn. Nov. 14, 2013).

15. Failure to File Notice of Dismissal.

Where plaintiffs' counsel told the clerk that plaintiffs were requesting a voluntary nonsuit but where written notice of dismissal was not filed pursuant to Tenn. R. Civ. P. 41.01 until several months later, the dismissal of the case was not actually effectuated until the written notice had been filed, and the trial court was without authority to correct the order of dismissal to reflect the entry of the nonsuit as of the date of the conversation between counsel and the clerk. Snell v. Leffew, 558 S.W.2d 849, 1977 Tenn. App. LEXIS 315 (Tenn. Ct. App. 1977).

16. Errors in Orders Relating to Time.

Trial court could correct an error in an order setting the time for filing a bill of exceptions, so long as it was an error that was being corrected and not an extension of time being given. Green Meadow Park v. American Heritage Life Ins. Co., 540 S.W.2d 267, 1976 Tenn. App. LEXIS 245 (Tenn. Ct. App. 1976).

17. Any Other Reason.

The exception in Tenn. R. Civ. P. 60.02(5) for extraordinary relief from a final judgment has been construed very narrowly by Tennessee courts. Tyler v. Tyler, 671 S.W.2d 492, 1984 Tenn. App. LEXIS 3399 (Tenn. Ct. App. 1984).

The broad power granted by Tenn. R. Civ. P. 60.02(5) was not for the purpose of relieving a party from free, calculated, and deliberate choices he has made, and it was inappropriate to relieve the divorced husband of his free, calculated, and deliberate choice in signing the settlement agreement, in effect, consenting to a finding of paternity, and assenting to the payment of child support when he full well knew he was not the natural father. Tyler v. Tyler, 671 S.W.2d 492, 1984 Tenn. App. LEXIS 3399 (Tenn. Ct. App. 1984).

Judgment entered on the basis of an agreed-upon order could not be re-opened and modified seven years later in order to permit additional recovery for medical expenses and impairment arising after the original action was settled. Thompson v. Firemen's Fund Ins. Co., 798 S.W.2d 235, 1990 Tenn. LEXIS 374 (Tenn. 1990).

Withholding evidence and the knowing use of perjured testimony can provide grounds for

granting post-judgment relief pursuant to Tenn. R. Civ. P. 60.02(2). Duncan v. Duncan, 789 S.W.2d 557, 1990 Tenn. App. LEXIS 46 (Tenn. Ct. App. 1990).

Tenn. R. Civ. P. 60.02(5) is, as a general rule, applicable to situations that are not covered by the other clauses in Tenn. R. Civ. P. 60.02 or to cases of extreme hardship. Duncan v. Duncan, 789 S.W.2d 557, 1990 Tenn. App. LEXIS 46 (Tenn. Ct. App. 1990).

The trial judge abused his discretion in finding that the barring of plaintiff's claim by the statute of limitations in opposition to his earlier intentions constituted "extraordinary circumstances or extreme hardship" within the meaning of "any other reason justifying relief from the operation of the judgment." Banks v. Dement Constr. Co., 817 S.W.2d 16, 1991 Tenn. LEXIS 419 (Tenn. 1991).

Tenn. R. Civ. P. 60.02(5) is to be invoked only in cases of overwhelming importance, or those involving extraordinary circumstances or extreme hardship. Underwood v. Zurich Ins. Co., 854 S.W.2d 94, 1993 Tenn. LEXIS 185, 26 A.L.R.5th 820, 5 A.L.R. 2208 (Tenn. 1993).

The broad power granted by Tenn. R. Civ. P. 60.02(5) is not to be used to relieve a party from free, calculated and deliberate choices he has made. Underwood v. Zurich Ins. Co., 854 S.W.2d 94, 1993 Tenn. LEXIS 185, 26 A.L.R.5th 820, 5 A.L.R. 2208 (Tenn. 1993).

Tenn. R. Civ. P. 60.02(5) is intended to provide relief only in the most unique, exceptional, or extraordinary circumstances; it is applicable only to situations that are not covered by the other clauses in Tenn. R. Civ. P. 60.02 or in the cases of extreme hardship. NCNB Nat'l Bank v. Thrailkill, 856 S.W.2d 150, 1993 Tenn. App. LEXIS 106 (Tenn. Ct. App. 1993).

A claim that was untimely filed under Tenn. R. Civ. P. 60.2(1) could not be asserted under Rule 60.2(5). Henderson v. Kirby, 944 S.W.2d 602, 1996 Tenn. App. LEXIS 612 (Tenn. Ct. App. 1996).

Chancellor abused his discretion in modifying workers' compensation award because Tenn. R. Civ. P. 60.02(5) may not be used to relieve a party of its free, calculated and deliberate choices. Federated Ins. Co. v. Lethcoe, 18 S.W.3d 621, 2000 Tenn. LEXIS 158 (Tenn. 2000).

Because a final order entered by a trial court changed an earlier order entered by the trial court, it was considered an alteration or amendment pursuant to Tenn. R. Civ. P. 59.05, and the final order superceded the earlier order; thus, the trial court properly denied a party's motion to set aside, pursuant to Tenn. R. Civ. P. 60.02, the earlier order because it was of no continuing legal effect. Edwards v. Banco Lumber Co., 101 S.W.3d 69, 2002 Tenn. App. LEXIS 779 (Tenn. Ct. App. 2002), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 195 (Tenn. Feb. 24, 2003).

State court dismissal of a wrongful death suit for failure to prosecute did not have preclusive effect on a federal action. The trial court erred by denying plaintiff's Tenn. R. Civ. P. 60 motion requesting modification of the dismissal order to reflect that it was not an adjudication on the merits. DeLong v. Vanderbilt Univ., 186 S.W.3d 506, 2005 Tenn. App. LEXIS 497 (Tenn. Ct. App. 2005), appeal denied, Delong v. Vanderbilt Univ., — S.W.3d —, 2005 Tenn. LEXIS 1189 (Tenn. Dec. 19, 2005).

Given the even more demanding standards that must be met in order to establish entitlement to relief under Tenn. R. Civ. P. 60.02(5), as well as the facts and the finding that the father was not entitled to relief under Tenn. R. Civ. P. 60.02(1), the trial court did not abuse its discretion when it denied the father relief from the final judgment pursuant to Tenn. R. Civ. P. 60.02(5). In re Joeda J., 300 S.W.3d 710, 2009 Tenn. App. LEXIS 391 (Tenn. Ct. App. June 24, 2009), appeal denied, In re J.M.J., — S.W.3d —, 2009 Tenn. LEXIS 712 (Tenn. Oct. 26, 2009).

Granting a husband Tenn. R. Civ. P. 60.02(5) relief was not an abuse of discretion where his testimony and that of his psychiatrist provided clear and convincing evidence that he could not reasonably understand the nature and consequences of the marital dissolution agreement (MDA) and supported the finding that his cognitive abilities were impaired as to his ability to advocate for himself or understand the MDA's terms. The psychiatrist's testimony as to the husband's vacillating treatment history after the divorce showed that his 17-month delay in filing for relief was reasonable. Middendorf v. Middendorf, — S.W.3d —, 2019 Tenn. App. LEXIS 323 (Tenn. Ct. App. June 27, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 575 (Tenn. Dec. 4, 2019).

18. —Fairness of Verdict.

Tenn. R. Civ. P. 60.02 does not contemplate the invalidation of a solemn judgment upon the unsupported allegation that the judge rendering the judgment did not make independent investigation of the fairness of documents signed by both parties. Brown v. Brown, 863 S.W.2d 432, 1993 Tenn. App. LEXIS 469 (Tenn. Ct. App. 1993).

19. Relief Through Equity Suit.

The filing of a separate or independent suit in equity for relief from a judgment is recognized as a permissible remedy under Tenn. R. Civ. P. 60. Trice v. Moyers, 561 S.W.2d 153, 1978 Tenn. LEXIS 576 (Tenn. 1978).

Tenn. R. Civ. P. 60 does not expressly limit the time within which the independent action in equity must be brought; the action must be brought seasonably in light of all the circumstances involved. Brown v. Raines, 611 S.W.2d 594, 1980 Tenn. App. LEXIS 407 (Tenn. Ct. App. 1980).

20. Pleading.

The trial court may grant relief without the filing of a formal motion. Jerkins v. McKinney, 533 S.W.2d 275, 1976 Tenn. LEXIS 499 (Tenn. 1976).

Tenn. R. Civ. P. 7.02 and 9.02, requiring particularity of pleading, are mandatory as a prerequisite to invoking the jurisdiction of the trial judge to exercise his discretion in granting or refusing the extraordinary relief of disturbing the finality of a judgment on any of the grounds authorized in Tenn. R. Civ. P. 60.02(1). Hopkins v. Hopkins, 572 S.W.2d 639, 1978 Tenn. LEXIS 655 (Tenn. 1978).

The trial court did not err in denying relief under Tenn. R. Civ. P. 60.02 to correct a final divorce decree which did not mention an award to the wife of the husband's interest in certain real and personal property which the wife claimed she received at the divorce hearing wherein the pleading filed and at the hearing thereon, the wife failed to explain or justify the failure to include in the final decree presented 16 days after the divorce hearing, vestiture of the property alleged to have been awarded to her, and the failure to discover that omission within 30 days following entry of the decree, during which time the trial judge retained control. Hopkins v. Hopkins, 572 S.W.2d 639, 1978 Tenn. LEXIS 655 (Tenn. 1978).

Where default judgment requiring husband to pay alimony was improper because the prayer for relief in the complaint did not request alimony, it was proper for court of appeals to remand case to trial court with directions that wife be permitted to amend complaint to pray for alimony and that husband be permitted to respond and that a hearing be conducted on the merits of the issue. Qualls v. Qualls, 589 S.W.2d 906, 1979 Tenn. LEXIS 513 (Tenn. 1979).

21. Burden of Proof.

Where the extraordinary relief provided in Tenn. R. Civ. P. 60.02(1) is sought, the burden is upon movant to set forth in a motion or petition, or in affidavits in support thereof, facts explaining why movant was justified in failing to avoid mistake, inadvertence, surprise or neglect. Hopkins v. Hopkins, 572 S.W.2d 639, 1978 Tenn. LEXIS 655 (Tenn. 1978); Travis v. Murfreesboro, 686 S.W.2d 68, 1985 Tenn. LEXIS 487 (Tenn. 1985).

Under Tenn. R. Civ. P. 60.02(1) the burden is upon the movant to set forth in a motion or petition and supporting affidavits facts explaining why the movant was justified in failing to avoid the mistake, inadvertence, surprise or neglect. Tennessee State Bank v. Lay, 609 S.W.2d 525, 1980 Tenn. App. LEXIS 388 (Tenn. Ct. App. 1980).

A final order of adoption is subject to the provision of Tenn. R. Civ. P. 60 providing that fraud or undue influence are good grounds for vacating an adoption order; however, the physical and emotional welfare of all parties requires assurance of the finality of the adoption order. Therefore, after a final adoption order is entered, a natural parent who consented to the adoption must present clear and convincing evidence in order to set aside the adoption order. In re Bishop, 678 S.W.2d 471, 1984 Tenn. App. LEXIS 2925 (Tenn. Ct. App. 1984); Walker v. Baker, 738 S.W.2d 194, 1987 Tenn. App. LEXIS 2736 (Tenn. Ct. App. 1987).

The burden of proof is on the one seeking relief from a judgment under Tenn. R. Civ. P. 60.02 to show the facts giving rise to the relief. Holt v. Holt, 751 S.W.2d 426, 1988 Tenn. App. LEXIS 61 (Tenn. Ct. App. 1988); Nelson v. Simpson, 826 S.W.2d 483, 1991 Tenn. App. LEXIS 919 (Tenn. Ct. App. 1991).

Information sought to be discovered by defendant was not material to the issue of relief under Tenn. R. Civ. P. 60.02 unless and until the defendant produced evidence that a fraudulent misrepresentation was made by the plaintiff to the defendant prior to the judgment with respect to the information sought. Brown v. Brown, 863 S.W.2d 432, 1993 Tenn. App. LEXIS 469 (Tenn. Ct. App. 1993).

Where a husband, who was seeking to set aside a divorce decree, presented no evidence in support of his motion, trial court did not err in denying his motion under Tenn. R. Civ. P. 60. Howard v. Howard, 991 S.W.2d 251, 1999 Tenn. App. LEXIS 1 (Tenn. Ct. App. 1999).

Actual notice of the judgment is a prerequisite to the ability to seek relief pursuant to Tenn. R. Civ. P. 60.02(3). Cornerstone Fin. Credit Union v. Mundy, — S.W.3d —, 2019 Tenn. App. LEXIS 517 (Tenn. Ct. App. Oct. 23, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 204 (Tenn. Mar. 25, 2020).

22. Alimony.

Where decree of divorce granted by default contained provision for periodic alimony, although prayer of complaint did not request alimony, it was proper to obtain relief under Tenn. R. Civ. P. 60. Qualls v. Qualls, 589 S.W.2d 906, 1979 Tenn. LEXIS 513 (Tenn. 1979).

Where divorce decree obtained by default contained provision for periodic alimony, although no alimony was requested in prayer of complaint, the fact that husband paid part of alimony after being threatened with contempt and the fact that he waited 11 months after judgment did not estop him from seeking relief under Tenn. R. Civ. P. 60. Qualls v. Qualls, 589 S.W.2d 906, 1979 Tenn. LEXIS 513 (Tenn. 1979).

Father's inability to pay alimony due to a significant change in his employment in and of itself was wholly deficient to constitute a case of extreme or extraordinary circumstance, and the father's failure to anticipate that he might experience a significant adverse change in his

earning capacity during the period of his alimony obligation wholly inadequate to modify a final decree that was not modifiable except for extreme or extraordinary circumstances. Wine v. Wine, 245 S.W.3d 389, 2007 Tenn. App. LEXIS 324 (Tenn. Ct. App. May 18, 2007), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 953 (Tenn. Oct. 22, 2007).

23. Relief from Tax Sales.

The entering of decrees setting aside tax sales upon redemption payments being made by taxpayers was improper, as the decrees confirming the tax sales and vesting title to the properties in the purchasers had been entered months prior to the redemption. The proper procedure would be the entering of decrees ordering purchasers to convey properties to the taxpayer. In re Delinquent Taxpayers, 529 S.W.2d 48, 1975 Tenn. LEXIS 575 (Tenn. 1975).

24. Time Limit.

Where appellant was seeking relief under the "any other reason" clause and her "reason" was a legal argument which could have been raised at a hearing two years earlier on appellee's petition for termination of alimony, the failure to so raise it at the appropriate time could not be characterized as anything other than mistake, inadvertence or excusable neglect, the reasons for relief set out in Tenn. R. Civ. P. 60.02(1); and since the time limit for seeking relief under that section of the rule is one year from entry of the order, in the absence of extraordinary circumstance or extreme hardship, that time limit barred appellant from relief. Gaines v. Gaines, 599 S.W.2d 561, 1980 Tenn. App. LEXIS 342 (Tenn. Ct. App. 1980).

The time restraints applicable to motions under this rule to be applied in the trial courts are those expressed in Tenn. R. Civ. P. 60.02, without regard to the status of an appeal. If the proceedings under this rule are concluded in the trial court while the appeal is still pending, it may be brought to the appellate courts by a T.R.A.P. 14 motion for consideration of post-judgment facts. In the appellate courts, the issue of timeliness will be governed by a reasonable time rule, considering the posture of the case at the time the motion and the record of the proceedings in the trial court are presented. Andrews Distrib. Co. v. Oak Square at Gatlinburg, 757 S.W.2d 663, 1988 Tenn. LEXIS 274 (Tenn. 1988), overruled in part, Spence v. Allstate Ins. Co., 883 S.W.2d 586, 1994 Tenn. LEXIS 251 (Tenn. 1994).

Request for relief was not filed within a reasonable time. Steioff v. Steioff, 833 S.W.2d 94, 1992 Tenn. App. LEXIS 115 (Tenn. Ct. App. 1992).

A trial court has no jurisdiction to consider a Tenn. R. Civ. P. 60.02 motion during the pendency of an appeal; reversing *Andrews Distrib. Co. v. Oak Square at Gatlinburg*, 757 S.W.2d 663, 1988 Tenn. LEXIS 274 (Tenn. 1988), overruled in part, *Spence v. Allstate Ins. Co.*, 883 S.W.2d 586, 1994 Tenn. LEXIS 251 (Tenn. 1994). Spence v. Allstate Ins. Co., 883 S.W.2d 586, 1994 Tenn. LEXIS 251 (Tenn. 1994)

A motion to set aside an adverse judgment based on fraud in securing the judgment was not timely where it was filed over 40 months after entry of the judgment. Ellison v. Alley, 902 S.W.2d 415, 1995 Tenn. App. LEXIS 246 (Tenn. Ct. App. 1995), appeal denied, — S.W.2d —, 1995 Tenn. LEXIS 363 (Tenn. 1995).

Where a petition was filed approximately 14 months after the divorce decree became final and after many proceedings in court in which petitioner could have raised the same issue, and where he made a "free, calculated, and deliberate choice" not to appeal from the final decree awarding alimony in solido, petitioner was not entitled to relief. Day v. Day, 931 S.W.2d 936, 1996 Tenn. App. LEXIS 233 (Tenn. Ct. App. 1996).

The timeliness of a Tenn. R. Civ. P. 60 motion after a voluntary nonsuit should be measured from the date of entry of the order of voluntary nonsuit, and not from the date of filing of the notice of voluntary nonsuit. Montgomery County v. Nichols, 10 S.W.3d 258, 1999 Tenn. App. LEXIS 498 (Tenn. Ct. App. 1999).

An untimely request under Tenn. R. Civ. P. 60.02(1) may not be asserted under Tenn. R. Civ. P. 60.02(5). Holiday v. Shoney's South, Inc., 42 S.W.3d 90, 2000 Tenn. App. LEXIS 367 (Tenn. Ct. App. 2000).

Where the plaintiff did not file a Tenn. R. Civ. P. 60.02(1) motion asking the court to set aside the plaintiff's non-suit until more than one year after the taking of the non-suit, the motion was untimely. Holiday v. Shoney's South, Inc., 42 S.W.3d 90, 2000 Tenn. App. LEXIS 367 (Tenn. Ct. App. 2000).

Trial court erred when it granted husband's motion for a new trial because it was not filed in a timely manner. Wright v. Quillen, 75 S.W.3d 413, 2001 Tenn. App. LEXIS 484 (Tenn. Ct. App. 2001).

In a child custody case where the parties were divorced in Ohio and the mother moved to Tennessee with the parties' child, the trial court erred by overruling the father's Tenn. R. Civ. P. 60.02 motion as untimely because, given the complicated factual and procedural posture of the case, the evidence preponderated against the trial court's decision that the motion was not filed within a reasonable time; furthermore, because the father had remained a resident of Ohio at all times relevant to this action, T.C.A. § 36-6-218(2) was not applicable and could not be used to confer jurisdiction of this matter upon a Tennessee court. Kelso v. Decker, 262 S.W.3d 307, 2008 Tenn. App. LEXIS 3 (Tenn. Ct. App. Jan. 7, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 486 (Tenn. June 23, 2008).

Trial court did not err in dismissing a daughter's action seeking to overturn a settlement agreement she entered into with a stepfather based upon fraud in the inducement because the statute of limitations was not tolled on account of the daughter's minority status at the time of the mediated settlement, T.C.A. §§ 28-1-106 and 28-3-105; statute of limitations governing either a claim for fraud or the limitation period on Tenn. R. Civ. P. 60.02 relief is not tolled by minority status where the minor, with all the requisite safeguards, entered into a judicially approved and mediated settlement. Gentry v. Larkin, 389 S.W.3d 330, 2012 Tenn. App. LEXIS 465 (Tenn. Ct. App. July 13, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 953 (Tenn. Dec. 10, 2012).

Because property owners' motion for relief was filed approximately seven months from the enactment of T.C.A. § 6-51-122, and less than one month from when the owner received notice that the annexation was to go forward, the trial court did not abuse its discretion in considering the owners' motion as filed within a reasonable time. Silliman v. City of Memphis, 449 S.W.3d 440, 2014 Tenn. App. LEXIS 407 (Tenn. Ct. App. July 2, 2014), appeal denied, — S.W.3d —, 2014 Tenn. LEXIS 920 (Tenn. Nov. 12, 2014).

25. Unreasonable Delay.

Where party filed motion to set aside judgment under Tenn. R. Civ. P. 60.02 more than three years after judgment and failed to give any reasonable explanation for the delay and such motion was based on circumstances known to such party at the time of entry and payment of judgment, such delay was unreasonable. Magnavox Co. of Tennessee v. Boles & Hite Constr. Co., 583 S.W.2d 611, 1979 Tenn. App. LEXIS 311 (Tenn. Ct. App. 1979).

Motion under Tenn. R. Civ. P. 60.02, filed on anniversary date of order approving lump-sum workers' compensation settlement, was not timely where the trial court found, as a matter of fact, that the movant had not acted reasonably and that he could have fairly and reasonably been expected to file the motion much more promptly. Wooley v. Gould, Inc., 654 S.W.2d 669, 1983 Tenn. LEXIS 706 (Tenn. 1983), overruled, Betts v. Tom Wade Gin, 810 S.W.2d 140, 1991 Tenn. LEXIS 174 (Tenn. 1991), overruled in part, Betts v. Tom Wade Gin, 810 S.W.2d 140, 1991 Tenn. LEXIS 174 (Tenn. 1991).

Plaintiff's failure to timely object to probate of will was not due to either mistake, inadvertence, surprise or excusable neglect where their failure to timely object was the result of their decision to not promptly hire an attorney to file the objection after two other attorneys whom they had contacted had refused to take their case. In re Estate of Mayes, 843 S.W.2d 418, 1992 Tenn. App. LEXIS 294 (Tenn. Ct. App. 1992).

Alleged change in circumstances did not authorize relief under Tenn. R. Civ. P. 60.02(5) from judgment accepting voluntary surrender of minor child more than three years prior to filing suit for revocation of surrender. Bedow Killion v. Tennessee Dep't of Human Services, 845 S.W.2d 212, 1992 Tenn. LEXIS 719 (Tenn. 1992).

Trial court erred in allowing the husband in a divorce case to proceed on a post-decree petition challenging the paternity of the child for whom the husband had agreed to pay support where the information causing the husband to doubt his paternity had been known to the husband for several years before he filed his petition, and the petition was brought almost 10 years after the divorce. State ex rel. Russell v. West, 115 S.W.3d 886, 2003 Tenn. App. LEXIS 262 (Tenn. Ct. App. 2003).

Trial court did not abuse its discretion by dismissing pro se inmate's divorce petition for failure to prosecute the claim without having given him prior notice of the dismissal where he knew that the original summons had been returned unserved and permitted the case to languish for seven months without making any effort to see to it that his wife was properly served; moreover, his position on appeal was undermined by his failure to avail himself of the post-judgment remedies available to him through a Tenn. R. Civ. P. 59.04 motion to alter or amend the trial court's judgment within 30 days after entry explaining his reasons for failing to serve his wife or otherwise prosecute his case, or Tenn. R. Civ. P. 60.02 arguing mistake, inadvertence, surprise, or excusable neglect. Hessmer v. Hessmer, 138 S.W.3d 901, 2003 Tenn. App. LEXIS 346 (Tenn. Ct. App. 2003).

26. Workers' Compensation.

As to a rule requiring a tender of the amount received under a settlement in a workers' compensation case when seeking to reopen the settlement, see Wooley v. Gould, Inc., 654 S.W.2d 669, 1983 Tenn. LEXIS 706 (Tenn. 1983), overruled, Betts v. Tom Wade Gin, 810 S.W.2d 140, 1991 Tenn. LEXIS 174 (Tenn. 1991), overruled in part, Betts v. Tom Wade Gin, 810 S.W.2d 140, 1991 Tenn. LEXIS 174 (Tenn. 1991).

When a party agrees to settle a workers' compensation claim and the trial court approves the settlement, the settling party is generally not entitled to relief pursuant to Tenn. R. Civ. P. 60.02(5). Federated Ins. Co. v. Lethcoe, 18 S.W.3d 621, 2000 Tenn. LEXIS 158 (Tenn. 2000).

27. —Increased Disability.

In workers' compensation case, post-trial increase in disability did not constitute a reason justifying relief from a final lump-sum judgment under Tenn. R. Civ. P. 60.02(5). Underwood v. Zurich Ins. Co., 854 S.W.2d 94,

1993 Tenn. LEXIS 185, 26 A.L.R.5th 820, 5 A.L.R. 2208 (Tenn. 1993).

28. Newly Discovered Evidence.

A new trial can be granted on the grounds of newly discovered evidence only when it is clear that the introduction of such evidence at a subsequent retrial would produce a different result. S.M.R. Enterprises, Inc. v. Southern Haircutters, Inc., 662 S.W.2d 944, 1983 Tenn. App. LEXIS 645 (Tenn. Ct. App. 1983).

29. Probate.

Trial court had authority to reopen case where will proponent erroneously sought to probate will in solemn form in the absence of any formal notice of administratrix's opposition to admission of will. In re Estate of King, 760 S.W.2d 208, 1988 Tenn. LEXIS 193 (Tenn. 1988).

30. Discharge in Bankruptcy.

Where guarantors of a note filed a Tenn. R. Civ. P. 60.02 motion after the debtor's discharge in bankruptcy, contending that the indebtedness was satisfied pursuant to the debtor's plan of reorganization, the court did not err in denying the motion because the debtor's bankruptcy did not affect the liability of the guarantors and thus did not impair the noteholder's right to recover the deficiency. J & B Invs., LLC v. Surti, 258 S.W.3d 127, 2007 Tenn. App. LEXIS 816 (Tenn. Ct. App. Dec. 27, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 396 (Tenn. May 27, 2008).

31. Scope of Appellate Review.

A motion for relief from a judgment pursuant to Tenn. R. Civ. P. 60 addresses the sound discretion of the trial judge; the scope of review on appeal is whether the trial judge abused his discretion. Toney v. Mueller Co., 810 S.W.2d 145, 1991 Tenn. LEXIS 179 (Tenn. 1991); Underwood v. Zurich Ins. Co., 854 S.W.2d 94, 1993 Tenn. LEXIS 185, 26 A.L.R.5th 820, 5 A.L.R. 2208 (Tenn. 1993); Ellison v. Alley, 902 S.W.2d 415, 1995 Tenn. App. LEXIS 246 (Tenn. Ct. App. 1995), appeal denied, — S.W.2d —, 1995 Tenn. LEXIS 363 (Tenn. 1995).

A motion for relief under Tenn. R. Civ. P. 60 addresses itself to the sound discretion of the trial judge, and the scope of review is whether the trial judge abused that discretion. Day v. Day, 931 S.W.2d 936, 1996 Tenn. App. LEXIS 233 (Tenn. Ct. App. 1996).

The broad power granted by Tenn. R. Civ. P. 60 is not to be used to relieve a party from free, calculated, and deliberate choices he or she has made. Day v. Day, 931 S.W.2d 936, 1996 Tenn. App. LEXIS 233 (Tenn. Ct. App. 1996).

32. Denial of Motion Appropriate.

Relief under Tenn. R. Civ. P. 60.02 on the grounds that a husband lacked the capacity to understand a final divorce decree was inappropriate as the evidence failed to establish his mental condition on the hearing date, the exact medications he took, or whether he experienced a cognitive flare up at the time. Selitsch v. Selitsch, 492 S.W.3d 677, 2015 Tenn. App. LEXIS 841 (Tenn. Ct. App. Oct. 14, 2015), appeal denied, — S.W.3d —, 2016 Tenn. LEXIS 144 (Tenn. Feb. 17, 2016).

Denying Tenn. R. Civ. P. 60.02 relief on the grounds of mutual mistake was appropriate as the parties had agreed to share the military retirement equally, the husband was to receive 100 percent of his VA disability benefit, and federal case law did not preclude enforcement of a contractual agreement to divide military funds that fell outside of disposable retired pay under 10 U.S.C.S. § 1408(a)(4)(C). Selitsch v. Selitsch, 492 S.W.3d 677, 2015 Tenn. App. LEXIS 841 (Tenn. Ct. App. Oct. 14, 2015), appeal denied, — S.W.3d —, 2016 Tenn. LEXIS 144 (Tenn. Feb. 17, 2016).

Denying Tenn. R. Civ. P. 60.02 relief based on a mistake was not error as a mistake of law was not cognizable, the fact that the Army had given the husband a permanent disability rating of 100 percent was not new or surprising, and thus, the husband failed to explain why he justifiably failed to avoid a mistake of fact. Selitsch v. Selitsch, 492 S.W.3d 677, 2015 Tenn. App. LEXIS 841 (Tenn. Ct. App. Oct. 14, 2015), appeal denied, — S.W.3d —, 2016 Tenn. LEXIS 144 (Tenn. Feb. 17, 2016).

Parent was not entitled to relief from an agreed permanent parenting plan order because the parent never specified the particular subsection of the rule upon which the parent sought to rely as a basis for relief from the trial court's final order. Furthermore, the parent failed to provide support for relief under any subsection of the rule. Davis v. Henry, — S.W.3d —, 2020 Tenn. App. LEXIS 44 (Tenn. Ct. App. Jan. 31, 2020).

County was not entitled to set aside an agreed assessment order because the county failed to show by clear and convincing evidence that the county assessor did not approve of the agreed order or give a Tennessee Division of Property attorney permission to sign the order on behalf of the taxpayer's counsel and the assessor. The judge found that the assessor was aware of the pending settlement, engaged in negotiations, received the agreed order after it was entered, and made no written objection until after the settlement was certified as final. Anderson Cty. Tenn. v. Tenn. State Bd. of Equalization, — S.W.3d —, 2020 Tenn. App. LEXIS 65 (Tenn. Ct. App. Feb. 14, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 533 (Tenn. Sept. 16, 2020).

33. Foreign Judgments.

As a Texas court had jurisdiction over petitioner's challenge to an acknowledgement of paternity pursuant to Tex. Fam. Code Ann. § 160.308, the Tennessee Juvenile Court erred

when it refused to give it full faith and credit under T.C.A. § 26-6-103(c) and Tenn. R. Civ. P. 60.02 upon finding that the Texas court lacked jurisdiction; as the Texas court had jurisdiction, full faith and credit was warranted. In re K.M., 382 S.W.3d 354, 2012 Tenn. App. LEXIS 242 (Tenn. Ct. App. Apr. 17, 2012).

Chancery court erred in granting summary judgment in favor of a Florida collection agency on its petition to enroll a Florida judgment in Tennessee because Tennessee courts commonly refused to give full faith and credit to a foreign judgment where the court entering the foreign judgment had no personal jurisdiction and issues of fact existed as to whether the Florida court obtained personal jurisdiction over the facility, whether the facility was even a party to the contract at issue (the contract was signed by an independent management contractor), and whether "substantial services" were rendered in Florida, or if payment was merely meant to be tendered to a Florida company. Cannon & Assocs., LLC v. Hillcrest Healthcare, LLC, — S.W.3d —, 2019 Tenn. App. LEXIS 201 (Tenn. Ct. App. Apr. 29, 2019).

34. Final Judgment.

Trial court did not abuse its discretion in denying plaintiffs' motion to alter or amend a grant of summary judgment in favor of defendants pursuant to Tenn. R. Civ. P. 60.02 because the order granting summary judgment was not a final order. Bilbo v. Ocoee Place Condo. Homeowners Ass'n, 462 S.W.3d 490, 2014 Tenn. App. LEXIS 803 (Tenn. Ct. App. Dec. 12, 2014), appeal denied, Bilbo v. OCOEE Place Condo. Homeowners Ass'n, — S.W.3d —, 2015 Tenn. LEXIS 318 (Tenn. Apr. 10, 2015).

35. Satisfaction.

Trial court properly granted summary judgment in favor of a judgment creditor because, while satisfaction was a defense to the enforcement of a judgment, it was not a defense to the enrollment of a foreign judgment pursuant to the Full Faith and Credit Clause of the United States Constitution and the Uniform Enforcement of Foreign Judgments Act, and the debtor's due process rights were not violated where he had no right to an evidentiary hearing when no material facts were in dispute. Guseinov v. Synergy Ventures, Inc., 467 S.W.3d 920, 2014 Tenn. App. LEXIS 675 (Tenn. Ct. App. Oct. 21, 2014).

36. Appellate Procedure.

Court will apply de novo review, with no presumption of correctness, when reviewing a trial court's ruling on a motion to set aside a judgment as void. Turner v. Turner, 473 S.W.3d 257, 2015 Tenn. LEXIS 831 (Tenn. Oct. 21, 2015).

37. Void Judgments.

Rule does not abrogate the longstanding rule that void judgments may be attacked at any time, and the reasonable time filing requirement thus may not be applied to bar motions seeking relief from void judgments; nevertheless, relief from a void judgment should be denied if the following exceptional circumstances exist: the party seeking relief, after having had actual notice of the judgment, manifested an intention to treat the judgment as valid, and granting the relief would impair another person's substantial interest of reliance on the judgment. Turner v. Turner, 473 S.W.3d 257, 2015 Tenn. LEXIS 831 (Tenn. Oct. 21, 2015).

Trial court properly denied a judgment debtor's motion to set aside a judgment and renewed the judgment because the court applied the proper legal standard and correctly held that, because the judgment was not void, it was not subject to being set aside where the judgment constituted a judgment on the merits in all respects that was based on the issues joined by the pleadings and the testimony and evidence presented at trial. Reese v. Amari, — S.W.3d —, 2020 Tenn. App. LEXIS 331 (Tenn. Ct. App. July 28, 2020), modified, — S.W.3d —, 2020 Tenn. App. LEXIS 370 (Tenn. Ct. App. Aug. 18, 2020).

38. Service.

Assuming that a wife did avoid service of the husband's motion for relief in the past, the transcript indicated that this was cured during the hearing when the trial court allowed service on the wife's counsel. Nelson v. Justice, — S.W.3d —, 2021 Tenn. App. LEXIS 91 (Tenn. Ct. App. Mar. 9, 2021).

RULE 61

(RESERVED)

RULE 62

STAY OF PROCEEDINGS TO ENFORCE A JUDGMENT

62.01. Initial Stay; Exceptions. Except as otherwise provided in this rule, no execution shall issue upon a judgment, nor shall proceedings be taken for its enforcement until the expiration of 30 days after its entry. In injunction and receivership actions, and in actions that remove a public officer as otherwise provided by law or that award, change or otherwise affect the custody of a minor child, an interlocutory or final judgment shall not be stayed after entry unless otherwise ordered by the court and upon such terms as to bond or otherwise as it deems proper to secure the other party. The party in whose favor judgment is entered may also obtain execution or take proceedings to enforce the judgment prior to expiration of the 30-day period if the party against whom judgment is entered is about fraudulently to dispose of, conceal or remove his or her property, thereby endangering satisfaction of the judgment. [As amended July 1, 1979.]

NOTES TO DECISIONS

1. Applicability.

Trial court did not abuse its discretion in conditioning a stay of execution of its summary judgment order upon the posting of a proper bond, when the court found that an agreement between two hunting clubs for the lease of a lake had expired, because the initial 30-day stay provided by rule was inapplicable. Furthermore, the bond merely secured potential payment for an amount that was to be determined at a later date. Open Lake Sporting Club v. Lauderdale Haywood Angling Club, 511 S.W.3d 494, 2015 Tenn. App. LEXIS 679 (Tenn. Ct. App. Aug. 25, 2015), appeal denied, — S.W.3d —, 2016 Tenn. LEXIS 30 (Tenn. Jan. 14, 2016).

Rule did not apply to the dismissal of the writs of certiorari and supersedeas, and a landlord was entitled to seek and enforce the writ of possession because a writ was injunctive in nature, and to the extent the circuit court's order dismissed the writs, the order was the equivalent of a denial of injunctive relief; once the writ of supersedeas was dismissed, the landlord, as the prevailing party in general sessions court, was entitled to the issuance and execution of the writ of possession. Gallatin Hous. Auth. v. Pelt, 532 S.W.3d 760, 2017 Tenn. App. LEXIS 329 (Tenn. Ct. App. May 16, 2017), appeal denied, — S.W.3d —, 2017 Tenn. LEXIS 610 (Tenn. Sept. 21, 2017).

62.02. Additional Stay on Specified Timely Motions. The execution of or any proceedings to enforce a judgment shall also be stayed pending and for 30 days after entry of any of the following orders made upon timely motion: (1) granting or denying a motion under Rule 50.02 for judgment in accordance with a motion for a directed verdict; (2) granting or denying a motion under Rule 52.02 to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59.04 to alter or amend the judgment; and (4) denying a motion under Rule 59.07 for a new trial. [As amended July 1, 1979; as amended by order entered January 28, 2000, effective July 1, 2000; and by order entered December 21, 2010, effective July 1, 2011.]

Advisory Commission Comments [2011]. The amendment of Rule 62.02 corrects an erroneous cross-reference, changing "59.02" to "59.07."

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order filed December 21, 2010, was ratified and approved by 2011 House Resolution 34 and Senate Resolution 12. The order promulgating the amendment of this rule provided that it take effect July 1, 2011.

NOTES TO DECISIONS

1. Application.

Insurer's reliance on Tenn. R. Civ. P. 62 was misplaced, because the answer to the question of whether the insurer was liable for the judgment was found within the uninsured motorist provisions of Title 56 of the Tennessee Code, when the appeal was brought by the insurer, which sought to limit or reverse its own obligation to the insureds, and the insureds did not appeal the award of damages and was not required to seek a stay. Clark v. Shoaf, 302 S.W.3d 849, 2008 Tenn. App. LEXIS 798 (Tenn. Ct. App. Dec. 15, 2008), rehearing denied, — S.W.3d —, 2009 Tenn. App. LEXIS 902 (Tenn. Ct. App. Jan. 14, 2009).

62.03. Relief Pending Appeal. When an appeal is taken from an interlocutory or final judgment in actions specified in Rule 62.01 or in actions for alimony or child support, the court in its discretion may suspend relief or grant whatever additional or modified relief is deemed appropriate during the pendency of the appeal and upon such terms as to bond or otherwise as it deems proper to secure the other party. [As amended July 1, 1979.]

62.04. Stay on Appeal. Except as otherwise provided in Rule 62.01, when an appeal is taken the appellant by giving a bond may obtain a stay. The bond may be given at or after the time of filing the notice of appeal. The stay is effective when the bond is approved by the court. [As amended July 1, 1979.]

NOTES TO DECISIONS

1. Application.

Insurer's reliance on Tenn. R. Civ. P. 62 was misplaced, because the answer to the question of whether the insurer was liable for the judgment was found within the uninsured motorist provisions of Title 56 of the Tennessee Code, when the appeal was brought by the insurer, which sought to limit or reverse its own obligation to the insureds, and the insureds did not appeal the award of damages and was not required to seek a stay. Clark v. Shoaf, 302 S.W.3d 849, 2008 Tenn. App. LEXIS 798 (Tenn. Ct. App. Dec. 15, 2008), rehearing denied, — S.W.3d —, 2009 Tenn. App. LEXIS 902 (Tenn. Ct. App. Jan. 14, 2009).

Although the effectiveness of a stay was contingent upon the court's approval of the appeal bond, the validity of the appeal bond itself was not contingent upon such recognition. In addition, the plain language of the bond at issue did not set forth as a condition precedent to its enforceability the trial court's formal approval of the bond. Nelson v. Justice, — S.W.3d —, 2021 Tenn. App. LEXIS 91 (Tenn. Ct. App. Mar. 9, 2021).

62.05. Bond for Stay. A bond for stay shall have sufficient surety and:

(1) If an appeal is from a judgment directing the payment of money, the bond shall be conditioned to secure the payment of the judgment in full, interest, damages for delay, and costs on appeal; in cases involving judgments payable in periodic installments, bond shall be fixed in such a manner as the court shall deem sufficient;

(2) If an appeal is from a judgment ordering the assignment, sale, delivery or possession of personal or real property, the bond shall be conditioned to secure obedience of the judgment and payment for the use, occupancy, detention and damage or waste of the property from the time of appeal until delivery of possession of the property and costs on appeal. If the appellant places personal property in the custody of an officer designated by the court, such fact shall be considered by the court in fixing the amount of the bond. A party may proceed as an indigent person without giving any security as provided in Rule 18 of the Tennessee Rules of Appellate Procedure. Upon motion submitted to the trial court and for good cause shown, the bond for stay

may be set in an amount less than that called for in the first sentence of this section of this rule. In ruling on such a motion, the trial court may consider all appropriate factors including, but not limited to, the appealing party's financial condition and the amount of the appealing party's insurance coverage, if any. If the motion is granted, the party may obtain a stay by giving such security as the court deems proper. If leave to obtain a stay required by this rule is denied, the court shall state in writing the reasons for denial.

(3) If the amount of a judgment is fully bonded as provided in subsection (1), the court upon motion may order the judgment creditor to remove any judgment lien from the register's office. [As amended July 1, 1979; by order entered January 31, 1984, effective August 20, 1984; by order filed January 31, 2003, effective July 1, 2003; and by order filed December 18, 2012, effective July 1, 2013.]

Advisory Commission Comments [2013]. The rule was amended to replace the term "poor person" with the term "indigent person." The amendment was not intended to change the meaning or application of the rule.

Compiler's Notes. The amendment of Rule 62.05, which substituted "an indigent person" for "a poor person" in the third sentence of (2) and added the 2013 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 18, 2012, was ratified and approved by House Resolution 36 and Senate Resolution 12. The order promulgating the amendment of Rule 62.05(2) and the addition of the 2013 Advisory Commission Comments provided that it take effect July 1, 2013.

NOTES TO DECISIONS

1. Unlawful Detainer.

By reading the plain language of T.C.A. § 29-18-130(b)(2) and construing it harmoniously with Tenn. R. Civ. P. 62.05, the statute did not require a tenant who had surrendered possession of the property to post a bond for one year's rent when appealing an adverse judgment of the general sessions court in an unlawful detainer action; the cost bond that the tenants had already posted pursuant to T.C.A. § 27-5-103(a) was sufficient to perfect their appeal and confer subject matter jurisdiction on the circuit court. Johnson v. Hopkins, 432 S.W.3d 840, 2013 Tenn. LEXIS 1010 (Tenn. Dec. 19, 2013).

In allowing plaintiff to retain possession of the property on appeal without posting bond, the trial court determined this was an exceptional case after considering the facts and circumstances described in plaintiff's motion for a stay and declaration, as well as those in plaintiff's response and motion to set appropriate bond. The trial court's decision on this issue was discretionary, and the appellate court found abuse of the trial court's discretion. Brown v. Wright, — S.W.3d —, 2019 Tenn. App. LEXIS 496 (Tenn. Ct. App. Oct. 7, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 235 (Tenn. Mar. 25, 2020).

62.06. Stay in Favor of the State or Agency Thereof. When an appeal is taken by the state, a county, a municipal corporation, or an officer or agency thereof acting in its behalf, the judgment may be stayed in the court's discretion. If the court grants a stay, no stay or cost bond or other security shall be required from the appellant. Notwithstanding the foregoing, the bond or other security for a government officer shall not be waived pursuant to this subsection except to the extent the governmental entity is financially responsible if the appeal is unsuccessful. [As amended July 1, 1979; and by order entered January 23, 1986, effective August 1, 1986.]

62.07. Power of Trial Court not Limited. Nothing in this rule shall be construed to limit the power of the court in exceptional cases to stay proceedings on any other terms or conditions as the court deems proper. [As amended July 1, 1979.]

NOTES TO DECISIONS

Analysis

1. Application.
2. Posting of Bond.

1. Application.

Insurer's reliance on Tenn. R. Civ. P. 62 was misplaced, because the answer to the question of whether the insurer was liable for the judgment was found within the uninsured motorist provisions of Title 56 of the Tennessee Code, when the appeal was brought by the insurer, which sought to limit or reverse its own obligation to the insureds, and the insureds did not appeal the award of damages and was not required to seek a stay. Clark v. Shoaf, 302 S.W.3d 849, 2008 Tenn. App. LEXIS 798 (Tenn. Ct. App. Dec. 15, 2008), rehearing denied, — S.W.3d —, 2009 Tenn. App. LEXIS 902 (Tenn. Ct. App. Jan. 14, 2009).

2. Posting of Bond.

Trial court did not abuse its discretion in conditioning a stay of execution of its summary judgment order upon the posting of a proper bond, when the court found that an agreement between two hunting clubs for the lease of a lake had expired, because the initial 30-day stay provided by rule was inapplicable. Furthermore, the bond merely secured potential payment for an amount that was to be determined at a later date. Open Lake Sporting Club v. Lauderdale Haywood Angling Club, 511 S.W.3d 494, 2015 Tenn. App. LEXIS 679 (Tenn. Ct. App. Aug. 25, 2015), appeal denied, — S.W.3d —, 2016 Tenn. LEXIS 30 (Tenn. Jan. 14, 2016).

62.08. Power of Appellate Court not Limited. Nothing in this rule shall be construed to limit the power of an appellate court or a judge thereof to stay proceedings or to suspend relief or grant whatever additional or modified relief is deemed appropriate during the pendency of an appeal or to make any order appropriate to preserve the status quo or the effectiveness of any judgment that may subsequently be entered. [As amended July 1, 1979.]

NOTES TO DECISIONS

1. Application.

Insurer's reliance on Tenn. R. Civ. P. 62 was misplaced, because the answer to the question of whether the insurer was liable for the judgment was found within the uninsured motorist provisions of Title 56 of the Tennessee Code, when the appeal was brought by the insurer, which sought to limit or reverse its own obligation to the insureds, and the insureds did not appeal the award of damages and was not required to seek a stay. Clark v. Shoaf, 302 S.W.3d 849, 2008 Tenn. App. LEXIS 798 (Tenn. Ct. App. Dec. 15, 2008), rehearing denied, — S.W.3d —, 2009 Tenn. App. LEXIS 902 (Tenn. Ct. App. Jan. 14, 2009).

62.09. Entry, Enforcement or Stay of Judgment as to Multiple Claims or Multiple Parties. If the trial court grants permission to appeal under Rule 9(a) of the Tennessee Rules of Appellate Procedure as to one or more but fewer than all the claims and all of the parties in an action involving multiple claims or multiple parties, the trial court may enter a judgment and stay enforcement of that judgment until the entering of a subsequent judgment and may prescribe such terms as to bond or otherwise as it deems proper to secure the party in whose favor the judgment is entered. The bond may be given at or after the time permission to appeal is granted. The stay is effective when the bond is approved by the court. [Added July 1, 1979.]

Advisory Commission Comments. The statutory provisions for immediate issuance of execution are contained in Tenn. Code Ann. § 26-1-206 et seq. These statutes are not affected by the provisions of this Rule.

Rule 62.01 provides that in certain circumstances an interlocutory or final judgment is not stayed after entry. These are injunction and receivership actions, and actions that remove a public officer, or that award, change, or otherwise affect the custody of a minor child. The statutory provision for immediate execution contained in Tenn. Code Ann. § 26-1-206(a) is also not affected by the automatic stay provi-

sion of this rule. In addition, Rule 62.03 provides that even after an appeal is taken the trial court does not lose its authority to grant any additional or modified relief during the pendency of an appeal in actions specified in Rule 62.01 or in actions for alimony or child support. Finally, Rule 62.04 makes clear that except as otherwise provided in Rule 62.01, the mere taking of an appeal does not operate to stay execution upon a judgment. Instead, a stay may be obtained only by giving a bond, the conditions of which are specified in Rule 62.05. The costs on appeal that must be included in the bond are set forth in Rule 40(c) of the Tennessee Rules of Appellate Procedure. If a party is unable to supply any security, the party may be exempted from the bond provisions. Similarly persons who cannot provide security in the full amount specified in Rule 62.05 may make a motion to have the amount of security reduced. Summary review of the trial court's determination under this rule may be had in accordance with Tennessee Rule of Appellate Procedure 7. [1979.]

62.05. The amended language makes it clear that a bond to secure the amount of the judgment could be modified where the judgment debtor has plentiful assets or adequate insurance coverage, as well as where the judgment debtor is financially embarrassed but not a "poor person." The comment to the 1979 amendments led to a contrary implication: "Similarly persons who cannot provide security in the full amount specified in Rule 62.05 may make a motion to have the amount of security reduced." [1984.]

62.06. There are instances where security from a government is not necessary, and the revision is drafted to accommodate those situations, at the same time preserving the victorious litigant's realization of an excess judgment against an individual officer. This revision does not affect the judge's discretion under T.R.C.P. 62.05. [1986.]

Advisory Commission Comments [2000]. The amendment of Rule 62.02 conforms the language to renumbered paragraphs in Rule 59.

Advisory Commission Comments [2003]. Rule 62.05(3) is a procedure needed to prevent abuse when a judgment creditor unnecessarily files a judgment lien despite the judgment being fully bonded. Some trial judges have heretofore been sympathetic with a judgment debtor's plight but found no vehicle for relief.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 31, 2003, was ratified and approved by 2003 House Resolution 21 and Senate Resolution 8. The order promulgating the 2003 amendment of this rule provided that it take effect on July 1, 2003.

This rule may supersede T.C.A. §§ 27-6-109, 27-6-111.

This rule may affect T.C.A. §§ 8-47-123, 20-12-125, 36-4-123.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 232, 604, 611.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-62.01-1, 1-62.01-2, 1-62.02-1, 1-62.03-1, 1-62.04-1, 1-62.05-1, 1-62.09-1, 2-7-1 — 2-7-4.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 30-88; 3 Tenn. Juris., Assumpsit, § 20; 3 Tenn. Juris., Attachment and Garnishment, § 103; 8 Tenn. Juris., Costs, § 12; 12 Tenn. Juris., Exceptions, Bill of, § 13; 12 Tenn. Juris., Executions, §§ 3, 4, 52; 13 Tenn. Juris., Exemptions From Executions and Attachment, § 15; 15 Tenn. Juris., Injunctions, §§ 43, 51; 16 Tenn. Juris., Judges, § 15; 20 Tenn. Juris., Possession, Writ of, § 1.

Law Reviews. The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure, III. Security and Stay Pending Appeal (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 23.

When Insurance Policies Have No Limits (George H. Nolan), 36 No. 1 Tenn. B.J. 12 (2000).

NOTES TO DECISIONS

Analysis

1. Discretion of Court.
2. Applicability to Court of Criminal Appeals.
3. Rule Not Applicable.
4. Final Judgment Not Shown.
5. Stay on Appeal.
6. Child Custody Awards.

1. Discretion of Court.

Where counsel for defendant in suit for specific performance appeared and agreed his motion for post-trial relief despite the filing of a motion to stay all proceedings in the action, and where counsel took no steps to seek appellate review of the trial court's order overruling the motion for a new trial, the trial court did not abuse its discretion in refusing to grant a stay or continuance of a hearing on the post-trial motion. McGhee v. Moore, 537 S.W.2d 697, 1976 Tenn. LEXIS 495 (Tenn. 1976).

2. Applicability to Court of Criminal Appeals.

Though T.R.A.P. 7 designates only the supreme court and court of appeals as forums in which motions may be filed for review of orders entered pursuant to this rule, Tenn. R. Civ. P. 62 is applicable to the court of criminal appeals with respect to a fine, since it is in the nature of a civil judgment. State v. Copeland, 647 S.W.2d

241, 1983 Tenn. Crim. App. LEXIS 333 (Tenn. Crim. App. 1983).

Since T.C.A. § 40-24-105 places the judgment of a fine in the status of a judgment in a civil action, Tenn. R. Civ. P. 62 governing stay proceedings to enforce a civil judgment is applicable. State v. Copeland, 647 S.W.2d 241, 1983 Tenn. Crim. App. LEXIS 333 (Tenn. Crim. App. 1983).

3. Rule Not Applicable.

Tenn. R. Civ. P. 62 relates to stay of proceedings "to enforce a judgment," it does not apply to the acts of a conservator in the protection and management of the ward's estate. In re Rockwell, 673 S.W.2d 512, 1983 Tenn. App. LEXIS 687 (Tenn. Ct. App. 1983).

4. Final Judgment Not Shown.

The occurrence of a contingency terminating support was not a "final judgment" subject to the provisions of Tenn. R. Civ. P. 62 and T.R.A.P. 3. Waddey v. Waddey, 6 S.W.3d 230, 1999 Tenn. LEXIS 422 (Tenn. 1999).

5. Stay on Appeal.

The taking of an appeal does not, in and of itself, bring about a stay of judgment. Underwood v. Liberty Mut. Ins. Co., 782 S.W.2d 175, 1989 Tenn. LEXIS 542 (Tenn. 1989).

Where surety judgment creditor paid the full amount of damages which were affirmed on appeal, surety was not required to pay new judgment for attorney's fees awarded by the trial court upon remand. Holmes v. United States Fidelity & Guaranty Co., 844 S.W.2d 632, 1992 Tenn. App. LEXIS 577 (Tenn. Ct. App. 1992).

6. Child Custody Awards.

Tenn. R. Civ. P. Rule 62.02 applies to the trial courts of this state, was not intended to supersede the 64 day period set forth in T.R.A.P. 42 and is inapplicable in cases in which an appellate court has awarded or otherwise affected custody of a minor child. Brooks v. Carter, 993 S.W.2d 603, 1999 Tenn. LEXIS 275 (Tenn. 1999).

Bankruptcy court lacked jurisdiction to suspend child support order pending state court appeal of transfer of custody where, because the Full Faith and Credit Act, 28 U.S.C. § 1738 directed the court to refer to the preclusive law of Tennessee in this matter, the court relied on T.C.A. § 36-5-101(f) to conclude that it had no power to alter the order without the debtor's filing of an action for modification; in addition, state court remedy existed for temporary suspension under Tenn. R. Civ. P. 62.03. In re Hurt, 389 B.R. 551, 2008 Bankr. LEXIS 1775 (Bankr. W.D. Tenn. June 17, 2008).

RULE 63

INABILITY OF A JUDGE TO PROCEED

If a trial or hearing has been commenced and the judge is unable to proceed, any other judge may proceed upon certifying familiarity with the record and determining that the proceedings in the case may be completed without prejudice to the parties. In a trial or hearing without a jury, the successor judge shall at the request of a party recall any witness whose testimony is material and disputed and who is available to testify again without undue burden. In any trial or hearing, with or without a jury, the successor judge may recall any witness. [Added by order filed February 1, 1995, effective July 1, 1995.]

Advisory Commission Comments [1995]. The addition of this rule, which is similar to the federal version, is needed to cover the various situations where a judge starts but cannot complete a trial or hearing or the post-trial motion proceedings.

Advisory Commission Comments [1996]. In many jury trials, the substitute judge would be forced to recall witnesses in order to observe their demeanor — where crucial — due to Tennessee's thirteenth juror rule, State v. Bibrey, 858 S.W.2d 911, 1993 Tenn. Crim. App. LEXIS 7 (Tenn. Crim. App. 1993).

NOTES TO DECISIONS

1. Duties of Successor Judge.

In a child custody case, a successor judge erred by presiding over the case without either ordering a retrial or certifying that she was familiar with the record of the prior proceeding and that continuing the proceeding without a retrial would not prejudice the parties because the judge had a duty to comply with Tenn. R. Civ. P. 63 whether requested to do so or not. Shofner v. Shofner, 181 S.W.3d 703, 2004 Tenn. App. LEXIS 865 (Tenn. Ct. App. 2004), rehearing denied, 181 S.W.3d 703, 2005 Tenn. App.

LEXIS 854 (Tenn. Ct. App. 2005), appeal denied, Shofner v. Kalisz, — S.W.3d —, 2005 Tenn. LEXIS 943 (Tenn. Oct. 24, 2005).

RULE 64

SEIZURE OF PERSON OR PROPERTY

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by law. These remedies include arrest, attachment, garnishment, replevin, sequestration and other corresponding or equivalent remedies, however designated and regardless of whether the remedy is ancillary to an action or must be obtained by an independent action.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), § 311.
Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-3-1, 1-64-2.

Law Reviews. Forms of Relief, 4 Mem. St. U.L. Rev. 400.

RULE 65

INJUNCTIONS

65.01. Injunctive Relief. Injunctive relief may be obtained by (1) restraining order, (2) temporary injunction, or (3) permanent injunction in a final judgment. A restraining order shall only restrict the doing of an act. An injunction may restrict or mandatorily direct the doing of an act.

65.02. Requisites of Restraining Order or Injunction — Parties Bound. (1) Every restraining order or injunction shall be specific in terms and shall describe in reasonable detail, and not by reference to the complaint or other document, the act restrained or enjoined.

(2) Every restraining order or injunction shall be binding upon the parties to the action, their officers, agents and attorneys; and upon other persons in active concert or participation with them who receive actual notice of the restraining order or injunction by personal service or otherwise.

65.03. Restraining Order. (1) When Authorized. The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:

(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party can be heard in opposition; and

(B) the applicant's attorney (or pro se applicant) certifies in writing efforts made to give notice and the reasons why it should not be required.

(2) Officers Who May Grant or Dissolve. A restraining order may be granted only by a judge of the court in which the action is pending or is to be filed; provided that if the judge of that court is disqualified, disabled or absent from the county, it may be granted by any judge having statutory power to enjoin or restrain. A restraining order may be dissolved on motion by the judge of the

court in which the action is pending, or if this judge is disqualified, disabled or absent from the county, by a judge of a court having comparable jurisdiction. Before a restraining order may be granted or dissolved by one other than the judge of the court in which the action is pending, or is to be filed, the party applying therefor must show by affidavit the disqualifications, disability or absence of the judge and the fact that no judge has refused such relief.

(3) Issuance, Signing and Filing. Every restraining order shall be indorsed with the date and hour of issuance, shall be signed by the judge granting it, and shall be forthwith filed in the clerk's office.

(4) Service. A copy of the restraining order for each party to be restrained shall be delivered to a person authorized to serve a summons. Such person shall forthwith serve the order as provided by Rule 4.04 and forthwith make return thereof on the order. If a restraining order is issued at the commencement of an action, a copy shall be served with the summons.

(5) Binding Effect and Duration. A restraining order becomes effective and binding on the party to be restrained at the time of service or when the party is informed of the order, whichever is earlier. Every temporary restraining order granted without notice shall expire by its terms within such time after entry, not to exceed fifteen days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period, or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. [As amended July 1, 1979; by order adopted December 10, 2003, effective July 1, 2004; and by order adopted January 8, 2009, effective July 1, 2009.]

Advisory Commission Comments [2009]. Rule 65.03(1) is rewritten to require in most instances notice to the adverse party before the court issues a temporary restraining order.

See Rule 65.07 on domestic relations cases.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 8, 2009, was ratified and approved by 2009 House Resolution 15 and Senate Resolution 16. The order promulgating the amendment of this rule provided that it take effect July 1, 2009.

NOTES TO DECISIONS

Analysis

1. Issue Waived.
2. Procedural Requirements.

1. Issue Waived.

Trial court's order, entered after a full hearing, granted permanent injunctive relief to the student's family, thereby rendering any interlocutory restrictions on the board's conduct moot, and thus the board's assertions of error would not be entertained. Bean v. Wilson Cnty. Sch. Sys., 488 S.W.3d 782, 2015 Tenn. App. LEXIS 884 (Tenn. Ct. App. Oct. 29, 2015), appeal denied, — S.W.3d —, 2016 Tenn. LEXIS 158 (Tenn. Feb. 18, 2016).

2. Procedural Requirements.

Trial courts are cautioned that temporary restraining orders should only issue without notice provided that the requirements outlined by the rule are specifically met. Bean v. Wilson Cnty. Sch. Sys., 488 S.W.3d 782, 2015 Tenn. App. LEXIS 884 (Tenn. Ct. App. Oct. 29, 2015), appeal denied, — S.W.3d —, 2016 Tenn. LEXIS 158 (Tenn. Feb. 18, 2016).

65.04. Temporary Injunction. (1) Notice. No temporary injunction shall be issued without notice to the adverse party.

(2) When Authorized. A temporary injunction may be granted during the pendency of an action if it is clearly shown by verified complaint, affidavit or other evidence that the movant's rights are being or will be violated by an

adverse party and the movant will suffer immediate and irreparable injury, loss or damage pending a final judgment in the action, or that the acts or omissions of the adverse party will tend to render such final judgment ineffectual.

(3) Officers Who May Grant, Modify or Dissolve. A temporary injunction may be granted, modified or dissolved on motion by a judge of the court in which the action is pending, or if this judge is disqualified, disabled or absent from the county, by a judge of a court having comparable jurisdiction.

(4) Issuance, Filing and Entry. Every temporary injunction shall be indorsed with the date and hour of issuance, shall be signed by the judge granting it and shall forthwith be filed in the clerk's office and entered.

(5) Binding Effect and Duration. A temporary injunction becomes effective and binding on the party enjoined when the order is entered. It shall remain in force until modified or dissolved on motion or until a permanent injunction is granted or denied.

(6) Findings of Fact and Conclusions of Law. In granting, denying or modifying a temporary injunction, the court shall set forth findings of fact and conclusions of law which constitute the grounds of its action as required by Rule 52.01.

(7) Consolidation of Hearing with Trial on Merits. Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision [65.04(7)] shall be so construed and applied as to save to the parties any rights they may have to trial by a jury. [As amended July 1, 1979.]

NOTES TO DECISIONS

Analysis

1. Application.
2. Findings of Fact And Conclusions of Law.

1. Application.

In an appeal concerning a noncompetition agreement, the appellate court concluded that the trial court erred by invoking Tenn. R. Civ. P. 65.04(7) without providing adequate notice to appellant. The trial court declared sua sponte at hearing's end that it intended to consolidate the injunction hearing with a trial on the merits, but that notice was too late to afford appellant a full opportunity to make his case. Total Garage Store, LLC v. Moody, — S.W.3d —, 2020 Tenn. App. LEXIS 531 (Tenn. Ct. App. Nov. 24, 2020).

Reversal of a trial court's decision to require a former employee to pay the attorneys' fees and expenses of an employer was required because the trial court never consolidated a temporary injunction hearing with a trial. Without a determination on the merits of whether the employee breached the non-compete provisions of the parties' agreement, the employer had no basis to assert a claim for attorney's fees and expenses. At-Last, Inc. v. Buckley, — S.W.3d —, 2021 Tenn. App. LEXIS 110 (Tenn. Ct. App. Mar. 22, 2021).

Trial court erred in declining to grant injunctive relief to plaintiff regarding its claims that defendant had been competing with plaintiff and soliciting its affiliated sellers to do the same in violation of the parties' written agreements because defendant granted to plaintiff the exclusive right to market and sell the medical devices globally, and agreed to refrain from selling the medical devices over the internet or to any other potential reseller that defendant had reason to believe intended to market and sell the medical devices via direct selling or online marketing; plaintiff presented proof that defendant was violating those contractual provisions; and plaintiff showed a threat of irreparable injury warranting injunctive relief. Nulife Ventures, LLC v. Avacen, Inc.,

— S.W.3d —, 2021 Tenn. App. LEXIS 154 (Tenn. Ct. App. Apr. 15, 2021).

2. Findings of Fact And Conclusions of Law.

Trial court erred in granting a temporary injunction enjoining the State from enforcing its current construction of the eligibility requirements for absentee voting stated in T.C.A. § 2-6-201(5)(C) and (D) (2014 and Supp. 2019) where the the burden on the right to vote was moderate, when weighed against the State's interests in voter fraud prevention, fiscal responsibility, and feasibility, the moderate burden placed on the right to vote of those who neither had special vulnerability to COVID-19 nor were caretakers for such persons was justified, and thus, the voters were unlikely to succeed on the merits of their claims. Fisher v. Hargett, 604 S.W.3d 381, 2020 Tenn. LEXIS 283 (Tenn. Aug. 5, 2020).

Because the trial court's decision regarding a motion to deem requests for admissions admitted was not a ruling concerning a motion for involuntary dismissal or a temporary injunction, it was not necessary for the trial court to make associated findings of fact. Lundell v. Hubbs, — S.W.3d —, 2020 Tenn. App. LEXIS 528 (Tenn. Ct. App. Nov. 23, 2020).

65.05. Injunction Bond. (1) Except in such actions as may be brought on pauper's oath, no restraining order or temporary injunction shall be granted except upon the giving of a bond by the applicant, with surety in such sum as the court to whom the application is made deems proper, for the payment of such costs and damages as may be incurred or suffered by any person who is found to have been wrongfully restrained or enjoined. The address of the surety shall be shown on the bond.

(2) A surety upon a bond under the provisions of this Rule submits himself to the jurisdiction of the court. The surety's liability may be enforced on motion without the necessity of an independent action. The motion shall be served on the surety as provided by Rule 5 at least twenty (20) days prior to the date of the hearing thereon.

(3) A party restrained or enjoined may move the court for additional security; and if it appear on such motion that the surety is insufficient or the amount of the bond is insufficient, the court may vacate the restraining order or temporary injunction unless within a reasonable time sufficient security is given.

65.06. Enforcement of Restraining Orders and Injunctions. Upon a showing by affidavit or other evidence of the breach or threatened breach of a restraining order or injunction, compliance with such order or injunction may be compelled or its disobedience punished as a contempt by a judge of the court in which the action is pending, or if this judge is disqualified, disabled or absent from the county, by a judge of a court having comparable jurisdiction.

65.07. Exceptions. The provisions of this rule shall be subject to any contrary statutory provisions governing restraining orders or injunctions. In domestic relations cases, restraining orders or injunctions may be issued upon such terms and conditions and remain in force for such time as shall seem just and proper to the judge to whom application therefor is made, and the provisions of this rule shall be followed only insofar as deemed appropriate by such judge. [As amended July 1, 1979; as amended by order adopted December 10, 2003, effective July 1, 2004.]

Advisory Commission Comments. The distinctions made in this Rule between restraining orders, temporary injunctions and permanent injunctions have been made in practice by some trial judges and have not been made by others. The Committee felt that uniformity in the handling of these matters was desirable. It was recognized that in the han-

dling of domestic relations cases, some departure from the handling suggested by these rules might be necessary, and the exception stated in Rule 65.07 was made accordingly.

Cross-References. Injunction against sale under trust deed or mortgage, T.C.A. §§ 29-23-201 — 29-23-204.

Injunction to stay proceedings on money judgment, T.C.A. §§ 29-23-101 — 29-23-105.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 3, 103, 114, 325, 329, 330, 383, 386, 387, 395, 401, 403, 407, 409, 414, 416, 418, 423, 468, 473, 543, 574, 589, 593, 594, 597, 600, 606, 609.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-65.03-1, 1-65.03-4, 1-65.03-5, 1-65.04-1 — 1-65.04-5, 1-65.06-1.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 50, 79-82; 11 Tenn. Juris., Equity, §§ 100, 102; 12 Tenn. Juris., Executions, § 54; 15 Tenn. Juris., Injunctions, §§ 29, 32, 35, 37, 39, 40, 42, 44, 47, 59, 62; 18 Tenn. Juris., Lis Pendens, § 7.

Law Reviews. Burying (With Kindness) the Felicific Calculus of Civil Procedure (Linda S. Mullenix), 40 Vand. L. Rev. 541 (1987).

Power of Sale Foreclosure in Tennessee: A Section 1983 Trap (Jack Jones and J. Michael Ivens), 51 Tenn. L. Rev. 279 (1984).

Temporary Restraining Orders (Robert S. Brandt), 28 Tenn. B.J. 33 (1992).

NOTES TO DECISIONS

Analysis

1. Termination of Restraining Orders.
2. Form of Injunction.
3. Presumption of Compliance.
4. Nonconforming Pleadings.
5. Permissible Orders.
6. Injunction Bond.
7. Wrongfully Enjoined or Restrained.
8. Temporary Restraining Order.
9. Temporary Injunction.
10. Application of Res Judicata.
11. Insufficient Detail.

1. Termination of Restraining Orders.

Removal of an action to federal court does not automatically terminate a restraining order issued by a state court. Standard Forms Co. v. Nave, 422 F. Supp. 619, 1976 U.S. Dist. LEXIS 14949 (E.D. Tenn. 1976).

2. Form of Injunction.

Where the description of untitled films was included in complaints and affidavits, but not in the injunction, other than by reference, the injunction is in violation of Tenn. R. Civ. P. 65. News Mart, Inc. v. State, 561 S.W.2d 752, 1978 Tenn. LEXIS 578 (Tenn. 1978).

Imposition of a permanent injunction against the father compelling him to restrain his new wife from engaging in parenting activities with the father's children was improper because the first sentence of the injunction lacked specificity, and because the injunction went well beyond the concept of controlling the environment to which the child was exposed. Marlow v. Parkinson, 236 S.W.3d 744, 2007 Tenn. App. LEXIS 243 (Tenn. Ct. App. Apr. 23, 2007), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 867 (Tenn. Sept. 17, 2007).

3. Presumption of Compliance.

Where record did not show that chancellor had acted improperly in issuing a restraining order, federal court on removal presumed that the chancellor had complied with Tenn. R. Civ. P. 65. Bellamy Explosives Co. v. Atlas Power Co., 452 F. Supp. 6, 1977 U.S. Dist. LEXIS 12779 (E.D. Tenn. 1977).

4. Nonconforming Pleadings.

Failure of pleadings to conform with Tenn. R. Civ. P. 65.03(1) did not make an injunction void. Segelke v. Segelke, 584 S.W.2d 211, 1978 Tenn. App. LEXIS 357 (Tenn. Ct. App. 1978).

5. Permissible Orders.

Trial judge had authority under Tenn. R. Civ. P. 65 to enjoin parent from attempting to alienate the affections of her child toward his father in any manner whatsoever, and such order was not impermissibly vague. Wilson v. Wilson, 987 S.W.2d 555, 1998 Tenn. App. LEXIS 612 (Tenn. Ct. App. 1998), rehearing denied, 987 S.W.2d 555, 1998 Tenn. App. LEXIS 630 (Tenn. Ct. App. 1998), rev'd, 984 S.W.2d 898, 1998 Tenn. LEXIS 744 (Tenn. 1998).

6. Injunction Bond.

The purpose of requiring a bond as a condition precedent to the issuance of a restraining order or preliminary injunction is to provide a mechanism for reimbursing an enjoined party for harm it suffers as a result of an improvidently issued injunction or restraining order. South Cent. Tenn. R.R. Auth. v. Harakas, 44 S.W.3d 912, 2000 Tenn. App. LEXIS 520 (Tenn. Ct. App. 2000).

In order to recover in an action on an injunction bond, the defendant in the original injunction suit need only show that defendant was wrongfully restrained or enjoined. South Cent. Tenn. R.R. Auth. v. Harakas, 44 S.W.3d 912, 2000 Tenn. App. LEXIS 520 (Tenn. Ct. App. 2000).

The fact that railroad company may have acted in good faith was not sufficient to relieve the company of liability in an action on an injunction bond. South Cent. Tenn. R.R. Auth. v. Harakas, 44 S.W.3d 912, 2000 Tenn. App. LEXIS 520 (Tenn. Ct. App. 2000).

7. Wrongfully Enjoined or Restrained.

Whether a party has been wrongfully restrained can be determined by the facts in each case and, in part, by reference to the criteria for the issuance of a temporary injunction such as those set forth in Tenn. R. Civ. P. 65.04(2). South Cent. Tenn. R.R. Auth. v. Harakas, 44 S.W.3d 912, 2000 Tenn. App. LEXIS 520 (Tenn. Ct. App. 2000).

Where the temporary restraining order (TRO) and temporary injunction were granted on the basis of allegations which were later shown to be inaccurate, the owners of property were wrongfully restrained or enjoined, and the trial court's decision not to award damages arising from the injunction was reversed. South Cent. Tenn. R.R. Auth. v. Harakas, 44 S.W.3d 912, 2000 Tenn. App. LEXIS 520 (Tenn. Ct. App. 2000).

8. Temporary Restraining Order.

Trial court did not err when it refused to grant a temporary restraining order (TRO) to shareholders where previously the court had granted the action that they had requested. The corporation held a meeting to vote on the merger, and once the vote was taken to proceed with the merger, the shareholders sought the TRO to prevent the voted upon merger. Denver Area Meat Cutters & Emplrs. Pension Plan v. Clayton, 120 S.W.3d 841, 2003 Tenn. App. LEXIS 629 (Tenn. Ct. App. 2003), review denied, — S.W.3d —, 2003 Tenn. LEXIS 845, (Tenn. 2003), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 860 (Tenn. Sept. 29, 2003).

9. Temporary Injunction.

Trial court did not order consolidation or provide notice to the parties of its intent to consolidate the hearings, and throughout the hearing, the parties emphasized that the hearing involved only the temporary injunction and that they wished to address the request for a declaratory judgment at a later date; the parties were not advised that the trial court had consolidated the hearings until the trial court issued its order finding that T.C.A. § 7-51-1402 met Tennessee constitutional standards; the trial court, therefore, failed to comply with Tenn. R. Civ. P. 65.04(7) and erred in addressing at that time the constitutionality of T.C.A. § 7-51-1402. Clinton Books, Inc. v. City of Memphis, 197 S.W.3d 749, 2006 Tenn. LEXIS 313 (Tenn. 2006), rehearing denied, 197 S.W.3d 749, 2006 Tenn. LEXIS 642 (Tenn. 2006).

Trial court did not err in failing to grant injunctive relief in favor of the employee where the judgment had already been entered on the substantive issues, and the only question remaining had to do with attorney fees. Moody v. Hutchison, 247 S.W.3d 187, 2007 Tenn. App. LEXIS 581 (Tenn. Ct. App. Sept. 17, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 144 (Tenn. Mar. 3, 2008).

10. Application of Res Judicata.

Where the trial court rendered a final judgment in a subcontractor's suit for payment of work performed on a hotel, a second suit for injunctive relief on the performance bond was barred by res judicata; Tenn. R. Civ. P. 65 presupposes that a party will bring the request for injunctive relief and the underlying claim together. Smith Mech. Contrs., Inc. v. Premier Hotel Dev. Group, 210 S.W.3d 557, 2006 Tenn. App. LEXIS 468 (Tenn. Ct. App. 2006), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 1166 (Tenn. Dec. 18, 2006).

11. Insufficient Detail.

Trial court's order limiting the father from recording his children, signing them up for activities, and posting information about the case on any social media was overbroad and vague. Scot v. Scot, — S.W.3d —, 2019 Tenn. App. LEXIS 278 (Tenn. Ct. App. May 31, 2019).

RULE 65A

FORM OF SECURITY; PROCEEDINGS AGAINST SURETIES

Whenever these rules require or permit the giving of a bond or other security, security may be given in any other form the court deems sufficient to secure the other party. Whenever security is given in the form of a bond or other undertaking with one or more sureties, the address of each surety shall be shown on the bond or other undertaking. Each surety submits to the jurisdiction of the court. A surety's liability may be enforced on motion without the necessity of an independent action. The motion shall be served on the surety as provided in Rule 5 at least 20 days prior to the hearing thereon. [Added July 1, 1979.]

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), No. 1-65.05-1.

NOTES TO DECISIONS

Analysis

1. In General.
2. Jurisdiction.

1. In General.

T.C.A. § 25-3-122 was not superseded by Tenn. R. Civ. P. 65A because Rule 65A was inapplicable to the claims by sureties against their principals as Rule 65A allowed for a judgment against the surety without the necessity of an independent action, while § 25-3-122 allowed for the surety to obtain a judgment against its principal by motion. Nelson v. Justice, — S.W.3d —, 2021 Tenn. App. LEXIS 91 (Tenn. Ct. App. Mar. 9, 2021).

2. Jurisdiction.

Entry of judgment on an appeal bond for attorney fees was appropriate when the appellant challenged the trial court's jurisdiction over the surety because the appeal bond expressly referenced the underlying Tennessee county of the judgment and the surety conceded that it likely consented to personal jurisdiction in the State of Tennessee despite being a Michigan corporation by issuing an appeal bond relative to a Tennessee judgment. Nelson v. Justice, — S.W.3d —, 2021 Tenn. App. LEXIS 91 (Tenn. Ct. App. Mar. 9, 2021).

RULE 66

RECEIVERS

An action wherein a receiver has been appointed shall not be dismissed except by order of the court. The practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the statutes of this state and with the practice heretofore followed in the courts of this state. In all other respects, an action in which the appointment of a receiver is sought or which is brought by or against a receiver shall be governed by these rules.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 103, 372.

Law Reviews. A Survey of Civil Procedure in Tennessee — 1977, IV. Pretrial Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 308.

Forms of Relief, 4 Mem. St. U.L. Rev. 400.

Nonsuits IV: An Updated List of Don'ts (Donald F. Paine), 39 Tenn. B.J. 15 (2003).

The Category of Tough: Nonsuits III (Donald F. Paine), 34 Tenn. B.J. 16 (1998).

Trial, 4 Mem. St. U.L. Rev. 335.

RULE 67

DEPOSIT IN COURT

67.01. In an Action. In an action in which any part of the relief sought is a judgment for a sum of money or the disposition of a sum of money or the disposition of any other thing capable of delivery, a party upon notice to every other party and by leave of court may deposit with the court all or any part of such sum or thing.

67.02. Court May Order Deposit or Seizure of Property. When it is admitted by the pleading or examination of a party that the party had in his or her possession or control any money or other thing capable of delivery which is the subject of the litigation and which is being held by the party as trustee for another party, or which belongs or is due to another party, the court may order the same to be deposited in court or delivered to such other party, with or without security, subject to further orders of the court, and the court may require the sheriff or other proper officer to take the money or property and deposit it or deliver it in accordance with the orders of the court.

67.03. Money Paid into Court. Where money is paid into court to abide the result of any legal proceeding, the judge may order it deposited in a designated state or national bank or savings and loan institution, to the credit of the court in the action or proceeding in which the money was paid. The money so deposited, with interest if any, shall be disbursed only upon the check of the clerk of the court pursuant to order of the court and in favor of the person to whom the order directs the payment to be made. Upon making a deposit in court a party shall not be liable for further interest on the sum deposited.

67.04. Post-Judgment Interest. This rule is inapplicable to post-judgment interest. [As amended by order effective July 1, 1998.]

Advisory Commission Comments [1998]. The losing defendant cannot avoid post-judgment interest due under Tenn. Code Ann. § 47-14-121 by depositing the verdict amount into the trial court clerk's office.

Advisory Commission Comments [2012]. The 1998 Comment is clarified, and an erroneous cross-reference in that Comment to "Tenn. Code Ann. § 47-14-222" is corrected to "Tenn. Code Ann. § 47-14-121."

Compiler's Notes. The 2012 amendment of the Advisory Commission Comments (1998), and the addition of the 2012 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated January 13, 2012, was ratified and approved by House Resolution 193 and Senate Resolution 78. The order promulgating the amendment of the Advisory Commission Comments provided that it take effect July 1, 2012.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-67.01-1, 1-67.02-1, 1-67.03-1.

Tennessee Jurisprudence. 20 Tenn. Juris., Payment Into Court, § 1.

Law Reviews. Forms of Relief, 4 Mem. St. U.L. Rev. 400.

NOTES TO DECISIONS

1. Applicability.

Tenn. R. Civ. P. 67 governs deposits made pending determination by the trial court of the right to the property or money; it cannot be interpreted to apply to relieve a defendant of post-judgment interest. Vooys v. Turner, 49 S.W.3d 318, 2001 Tenn. App. LEXIS 89 (Tenn. Ct. App. 2001).

RULE 68

OFFER OF JUDGMENT

At any time more than 10 days before the trial begins, a party defending against a claim may serve upon the adverse party an offer to allow judgment to be taken against the defending party for the money or property, or to the effect specified in the offer, with costs then accrued. Likewise a party prosecuting a claim may serve upon the adverse party an offer to allow judgment to be taken against that adverse party for the money or property or to the effect specified in the offer with costs then accrued. If within 10 days after service of the offer the adverse party serves written notice that the offer is accepted, either party may file the offer and notice of acceptance, together with proof of service thereof, with the court and thereupon judgment shall be rendered accordingly. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in the proceeding to determine costs. If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree shall pay all costs accruing after the making of the offer. The fact that an offer is made but not accepted does not preclude a subsequent offer. [As amended by order entered January 31, 1984, effective August 20, 1984.]

Advisory Commission Comments. At the time of the adoption of the Rules of Civil Procedure, the provisions of this Rule were new to Tennessee procedure, but the Committee felt them to be desirable. The use of the procedure provided for by this Rule may facilitate the settlement of cases in many instances.

The [1984] amendment gives the plaintiff the same advantage as that given the defendant under the prior text. [1984.]

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-68-1 — 1-68-4.

Law Reviews. Rule 68 Offers of Judgment: A Question of Costs (David M. Smythe), 23 No. 3 Tenn. B.J. 19 (1987).

Yesterday's Vision, Tomorrow's Challenge: Case Management and Alternative Dispute Resolution in Tennessee, 26 U. Mem. L. Rev. 957 (1996).

NOTES TO DECISIONS

ANALYSIS

1. Applicability.
2. Costs.
3. Revocability.

1. Applicability.

Application of Tenn. R. Civ. P. 68 to an administrative disciplinary proceeding would not be based on any underlying statutory authority. Tenn. Dep't of Health v. Collins, — S.W.3d —, 2020 Tenn. App. LEXIS 532 (Tenn. Ct. App. Nov. 25, 2020).

2. Costs.

The costs referred to in Tenn. R. Civ. P. 68 are those costs which are authorized by statute. Person v. Fletcher, 582 S.W.2d 765, 1979 Tenn. App. LEXIS 309 (Tenn. Ct. App. 1979).

The term "costs" as used in Tenn. R. Civ. P. 68 does not include attorneys' fees. Albright v. Mercer, 945 S.W.2d 749, 1996 Tenn. App. LEXIS 768 (Tenn. Ct. App. 1996).

The term "costs" as used in Tenn. R. Civ. P. 68 does not include court reporter's fees. Woods v. Herman Walldorf & Co., 26 S.W.3d 868, 1999 Tenn. App. LEXIS 18 (Tenn. Ct. App. 1999).

3. Revocability.

Trial court properly concluded that the automobile owners had properly accepted an offer of judgment proffered by the persons injured in an automobile accident where the injured persons attempted to revoke the offer within the 10-day time period for acceptance. McGinnis v. Cox, 465 S.W.3d 157, 2014 Tenn. App. LEXIS 710 (Tenn. Ct. App. Oct. 31, 2014), appeal denied, — S.W.3d —, 2015 Tenn. LEXIS 159 (Tenn. Feb. 12, 2015).

On an issue of first impression, the Court of Appeals of Tennessee concludes that Tenn. R. Civ. P. 68 offers of judgment are generally not revocable prior to the expiration of the time period for acceptance provided by the Rule, regardless of traditional contract principles. McGinnis v. Cox, 465 S.W.3d 157, 2014 Tenn. App. LEXIS 710 (Tenn. Ct. App. Oct. 31, 2014), appeal denied, — S.W.3d —, 2015 Tenn. LEXIS 159 (Tenn. Feb. 12, 2015).

RULE 69

EXECUTION ON JUDGMENTS

69.01. Scope. This rule applies to executions and garnishments on legal and equitable interests in personalty, including intangibles, and realty to satisfy judgments in all courts in Tennessee. A Circuit Court judgment will reach equitable interests without a Chancery Court action to enforce the judgment.

69.02. Sequence. Execution against personalty need not precede execution against realty.

69.03. Discovery. Discovery in aid of execution may be taken pursuant to Rules 26-37, excluding Rule 35.

69.04. Extension of Time. Within ten years from the entry of a judgment, the creditor whose judgment remains unsatisfied may file a motion to extend the judgment for another ten years. A copy of the motion shall be mailed by the judgment creditor to the last known address of the judgment debtor. If no response is filed by the judgment debtor within thirty days of the date the

motion is filed with the clerk of court, the motion shall be granted without further notice or hearing, and an order extending the judgment shall be entered by the court. If a response is filed within thirty days of the filing date of the motion, the burden is on the judgment debtor to show why the judgment should not be extended for an additional ten years. The same procedure can be repeated within any additional ten-year period. [As amended by order filed December 29, 2015, effective July 1, 2016.]

Compiler's Notes. The amendment of Rule 69.04 and the addition of [2016] Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 143 and Senate Resolution 81. The order promulgating the amendment of Rule 69.04 and the addition of [2016] Advisory Commission Comments provided that it take effect July 1, 2016.

NOTES TO DECISIONS

ANALYSIS

1. Construction.
2. "Additional Ten Years".

1. Construction.

Trial court properly denied a judgment debtor's motion to set aside a judgment and renewed the judgment because the court applied the proper legal standard and correctly held that, because the judgment was not void, it was not subject to being set aside where the judgment constituted a judgment on the merits in all respects that was based on the issues joined by the pleadings and the testimony and evidence presented at trial. Reese v. Amari, — S.W.3d —, 2020 Tenn. App. LEXIS 331 (Tenn. Ct. App. July 28, 2020), modified, — S.W.3d —, 2020 Tenn. App. LEXIS 370 (Tenn. Ct. App. Aug. 18, 2020).

2. "Additional Ten Years".

When a judgment creditor extends a judgment, he or she merely is prolonging the judgment's existence an additional ten years, and since an extended judgment is not a new judgment, the lifespan of that extended judgment begins to run at the expiration of the first ten years from the effective date of the judgment; this result is consistent with the language of Tenn. R. Civ. P. 69.04 which talks in terms of "an additional ten years" and, thus, the new ten year period is "tacked on" to the previous ten years, and does not begin to run from the date of the entry of the order granting the extension. Cook v. Alley, 419 S.W.3d 256, 2013 Tenn. App. LEXIS 227 (Tenn. Ct. App. Apr. 4, 2013), appeal denied, — S.W.3d —, 2013 Tenn. LEXIS 730 (Tenn. Sept. 10, 2013).

69.05. Garnishment. (1) Garnishee's Duty Generally. — A writ of garnishment served on a garnishee holding property of the judgment debtor requires the garnishee to answer the writ and make an accounting to the court. Property includes a judgment debtor's realty, personalty, money, wages, corporate stock, choses in action (whether due or not), and court judgments.

(2) Service of Writ of Garnishment. — The sheriff shall serve the garnishee with three copies of the writ of garnishment and one copy of the notice to judgment debtor.

(3) Garnishee's Duty Upon Service. — The garnishee by the next business day after service shall ascertain whether the garnishee holds property of the debtor. If so, the garnishee shall mail one copy of the writ of garnishment with the notice to the last known address of the judgment debtor. Where the garnishee is a financial institution, the balance in the judgment debtor's accounts on the night of the service date is the amount subject to that garnishment writ.

Within ten days of service, the garnishee shall file a written answer with the court accounting for any property of the judgment debtor held by the

garnishee.

Within thirty days of service, the garnishee shall file with the court any money or wages (minus statutory exemptions) otherwise payable to the judgment debtor. If the garnishee holds property other than money or wages, a judgment may be entered for that property and a writ of execution may issue against the garnishee.

(4) Failure of Garnishee to Respond. — If the garnishee fails to timely answer or pay money into court, a conditional judgment may be entered against the garnishee and an order served requiring the garnishee to show cause why the judgment should not be made final. If the garnishee does not show sufficient cause within ten days of service of the order, the conditional judgment shall be made final and a writ of execution may issue against the garnishee for the entire judgment owed to the judgment creditor, plus costs.

NOTES TO DECISIONS

1. Generally.

Because the balance in a bank account against which a garnishment was filed by a creditor on the night of the service date per Tenn. R. Civ. P. 69.05(3) was seventeen cents, a Chapter 7 debtor's claimed interference with the creditor's recovery of this amount did not result in an injury to the creditor's legal interests. Hulsing Hotels Tenn., Inc. v. Steffner (In re Steffner), 479 B.R. 746, 2012 Bankr. LEXIS 3805 (Bankr. E.D. Tenn. Aug. 17, 2012).

Conditional judgment against a garnishee was properly vacated because the garnishee responded within the time allowed by a trial court's order, even though that time exceeded ten days. Smith v. Smith, — S.W.3d —, 2019 Tenn. App. LEXIS 59 (Tenn. Ct. App. Jan. 31, 2019).

69.06. Execution on Personalty. (1) Levy. — A levy is effective when the sheriff with a writ of execution exercises control over the judgment debtor's personalty.

(2) Lien of Levy. — A lien of levy in the judgment creditor's favor is effective when the sheriff levies on the judgment debtor's personalty. The first judgment creditor to deliver a writ of execution to the sheriff, as shown by record in the clerk's office, has priority over other judgment creditors as to the property levied upon. A lien of levy remains effective until the property is sold or otherwise released from the sheriff's control.

(3) Sale. — The sheriff shall sell personalty by auction. At least ten days before the sale a notice generally describing the personalty and stating the time, place, and terms shall be published in a newspaper of general circulation at the judgment creditor's expense, taxable as court costs. If the personalty is perishable no notice of sale is required.

Proceeds of the sale shall be applied first to the sheriff's statutory fees and reasonable expenses, then to court costs, then to the judgment creditor, and then any remaining balance to the judgment debtor.

NOTES TO DECISIONS

1. Qualified Immunity.

Although seizure of plaintiff's real property and his eviction did violate his due process rights, the sheriff deputy was entitled to qualified immunity because the advice from the county attorney, combined with the language of the writs themselves, the newly promulgated Tenn. R. Civ. P. 69 and the absence of clearly established federal caselaw governing the post-judgment deprivation of real property, all support the proposition that the deputy's actions were not such that a reasonable officer would have understood that what he was doing violated the debtor's rights. Revis v. Meldrum, 489

F.3d 273, 2007 FED App. 139P, 2007 U.S. App. LEXIS 8951 (6th Cir. Apr. 19, 2007).

69.07. Execution on Realty. (1) Lien Lis Pendens. — A lien lis pendens applies only to realty that is the subject matter of a lawsuit and described in the complaint. To affect the rights of bona fide purchasers and encumbrancers, an abstract must be registered in the register's office of the county where the realty is located. The abstract must identify the court and contain names of parties to the action and a description of the realty and its ownership.

(2) Judgment Lien. — A judgment lien against the judgment debtor's realty is created by registering a certified copy of the judgment in the register's office of the county where the realty is located. Once a judgment lien is created by registration, it will last for the time remaining in a ten-year period from the date of final judgment entry in the court clerk's office and for any extension granted by the court pursuant to Rule 69.04. For the extension of the lien to be enforceable, the judgment creditor must register the court's order extending the judgment.

(3) Levy. — As long as a judgment lien is effective, no levy is necessary; the judgment creditor may move for an order of sale. Otherwise a levy occurs when the sheriff exercises control over the judgment debtor's realty. The first judgment creditor to deliver a writ of execution to the sheriff, as shown by record in the clerk's office, has priority over other judgment creditors as to the realty levied upon.

(4) Sale. — The sheriff shall sell the debtor's interest in realty by auction. At least thirty days before the sale a notice generally describing the realty (including a street address if available) and stating the time, place, and terms shall be published in a newspaper of general circulation at the judgment creditor's expense, taxable as court costs. Publication shall be repeated two times, with each of the three publications being separated by at least one week. At least twenty days before the sale, the judgment creditor shall mail a copy of the published notice to the judgment debtor and to all persons having an interest of record in the realty.

Proceeds of the sale shall be applied first to the sheriff's statutory fees and reasonable expenses, then to court costs, then to the judgment creditor, and then any remaining balance to the judgment debtor.

Bona fide purchasers for value at the sale shall take free of any defects concerning notice. The sale extinguishes all junior or subordinate liens.

(5) Termination Statement. — Upon satisfaction of the judgment, the judgment debtor may demand that the judgment creditor record in the register's office a termination statement to supersede any lien lis pendens or judgment lien of record. If the judgment creditor fails to register a termination statement within ten days after demand, the judgment creditor shall be liable to the judgment debtor for $100 and for any loss caused to the judgment debtor by failure to register. [As amended by order entered January 29, 1987, effective August 1, 1987; and by order entered December 10, 2003 effective July 1, 2004.]

Advisory Commission Comments [2004]. Rule 69 is rewritten in its entirety. The intent is to consolidate procedures established by statute, court precedent, and custom into a single

orderly rule. New Rule 69 does not radically change current law.

Advisory Commission Comments [2006]. The only change in Rule 69.07(2) is to drop the final word in the original paragraph, "lien." The court's order granted pursuant to Rule 69.04 extends the judgment, not the judgment lien. The lien is extended by registering that order.

Advisory Commission Comments [2016]. Rule 69.04 is revised to clarify that a judgment creditor must file a motion to extend a judgment, and that it is the motion which provides the judgment debtor notice and an opportunity to object. This revision eliminates the prior procedure of issuance of a show cause order by the court.

The requirement that notice is to the judgment debtor's last known address remains unchanged as the revision provides that the motion shall be mailed to the judgment debtor's last known address.

The revision replaces past practice of a show cause hearing. The revised procedure, subsequent to the filing of a motion by the judgment creditor, is the alternative of: (1) no hearing if the judgment debtor files no response to the motion in 30 days and the extension shall be automatically granted; or (2) if the judgment debtor files a response to the motion in 30 days, the extension is not automatically granted which provides each party an opportunity to set a hearing. If a hearing is convened, it is at that point that the revision maintains prior practice of placing the burden on the judgment debtor to show why the judgment should not be extended for an additional ten years. The Commission notes that, in most judicial districts, counsel for the judgment creditor will submit a proposed order to the trial court, unless otherwise directed by the court or by local rule.

The extension procedure set out in Rule 69.04 allows the judgment creditor to avoid having the judgment become unenforceable by operation of Section 28-3-110(a)(2), Tennessee Code Annotated. That section provides that an action on a judgment "shall be commenced within ten (10) years after the cause of action accrued." The Commission notes, however, that Section 28-3-110 was amended effective July 1,2014 to essentially exempt a narrow class of cases from the ten-year statute of limitation imposed by subsection (a)(2). *See* 2014 Tenn. Pub. Acts, ch. 596. The 2014 amendment added new subsections (b) and (c) to the statute. Subsection (b)(1) provides:

Notwithstanding the provisions of subsection (a), there is no time within which a judgment or decree of a court of record entered on or after July 1, 2014, must be acted upon in the following circumstances:

(A) The judgment is for the injury or death of a person that resulted from the judgment debtor's criminal conduct; and

(B) The judgment debtor is convicted of a criminal offense for the conduct that resulted in the injury or death; or

(C) The civil judgment is originally an order of restitution converted to a civil judgment pursuant to § 40-35-304.

And subsection (c) of the amended statute goes on to provide that, for any still-valid judgment awarded prior to July 1, 2014 and meeting the criteria set out in subsection (b)(1), the ten-year statute of limitation imposed by subsection (a) is tolled if the judgment creditor complies with various procedural requirements. The Commission merely points out these changes to section 28-3-110 for the benefit of any litigant or attorney involved in a case falling within subsection (b) or (c).

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated December 10, 2003, was ratified and approved by 2004 House Resolution 233 and Senate Resolution 115. The order promulgating the amendment of this rule provided that it take effect July 1, 2004.

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated December 29, 2005, was ratified and approved by 2006 House Resolution 200 and Senate Resolution 95. The order promulgating the amendment of this rule provided that it take effect July 1, 2006.

Textbooks. Tennessee Jurisprudence. 12 Tenn. Juris., Executions, § 2.

Law Reviews. Made Whole? (John A. Day), 36 No. 2 Tenn. B.J. 28 (2000).

The Collection of Debts from Insolvent and Fully-Mortgaged Debtors (John A. Walker, Jr.), 43 Tenn. L. Rev. 399.

NOTES TO DECISIONS

ANALYSIS

1. Perfection of Lien.
2. Qualified Immunity.

1. Perfection of Lien.

Because the debtor's ex-wife perfected her judgment lien prior to the bank, and the ten-year period had not lapsed, the ex-wife's rights as a lien holder were junior only to another creditor; her lien attached to the excess proceeds from the foreclosure sale and entitled her to payment in full before any payments were made to creditors of lesser priority, pursuant to Tenn. R. Civ. P. 69.07(2). Andrews v. Fifth Third Bank, 228 S.W.3d 102, 2007 Tenn. App. LEXIS 204 (Tenn. Ct. App. Apr. 5, 2007).

Where a creditor held a judicial lien on the debtors' real property under T.C.A. § 25-5-101(b) and Tenn. R. Civ. P. 69.07(2), and where

the real property was improved with the debtors' residence and with an unoccupied farmhouse, the debtors could avoid the judicial lien under 11 U.S.C. § 522(f) as against the entire property, including the farmhouse, as they were entitled to claim a homestead exemption under T.C.A. § 26-2-301 against their property as a whole, including any improvements on the real property on which their residence was located. In making this determination, the court noted that T.C.A. § 26-2-301(f) provided that the debtors were entitled to a homestead exemption on real property used as a principal place of residence and that T.C.A. § 67-5-501(9)(A) [now (10)(A)] defined real property as including structures and improvements. In re Young, 471 B.R. 715, 2012 Bankr. LEXIS 2153 (Bankr. E.D. Tenn. May 15, 2012).

2. Qualified Immunity.

Although seizure of plaintiff's real property and his eviction did violate his due process rights, the sheriff deputy was entitled to qualified immunity because the advice from the county attorney, combined with the language of the writs themselves, the newly promulgated Tenn. R. Civ. P. 69 and the absence of clearly established federal caselaw governing the post-judgment deprivation of real property, all support the proposition that the deputy's actions were not such that a reasonable officer would have understood that what he was doing violated the debtor's rights. Revis v. Meldrum, 489 F.3d 273, 2007 FED App. 139P, 2007 U.S. App. LEXIS 8951 (6th Cir. Apr. 19, 2007).

RULE 70

JUDGMENT FOR SPECIFIC ACTS; VESTING TITLE

A decree for specific performance shall, if so ordered by the court, operate as a deed to convey land located in this state, or, in appropriate cases, other property, without any conveyance being executed by the vendor. In the case of land a copy of such decree certified by the clerk shall be recorded in the register's office in the county where the land lies and shall stand in the place of a deed. In all other cases where a judgment or decree directs a party to execute a conveyance of land or other property or to deliver deeds or other documents or to perform any other specific act and the party fails to comply within the time specified (or within a reasonable time if no time is specified), the court may direct the act to be done at the cost of the disobedient party by some other person appointed by the court, and the act when so done has like effect as if done by the party. The court may also in proper cases adjudge the party in contempt. In lieu of directing a conveyance of land or personal property, the court may enter a decree divesting the title of any party and vesting it in others, and such decree has the effect of a conveyance executed in due form of law. When any order or judgment is for the delivery of possession, the party in whose favor it is entered is entitled to a writ of execution or possession upon application to the clerk.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 301, 303, 306, 638.

Tennessee Form (Robinson, Ramsey and Harwell), No. 1-70-1.

Tennessee Jurisprudence. 11 Tenn. Juris., Equity, § 102; 16 Tenn. Juris., Judgments and Decrees, § 3; 16 Tenn. Juris., Judicial Sales, § 12; 22 Tenn. Juris., Rescission, Cancellation and Reformation, § 32.

Law Reviews. The Tennessee Court System — Circuit Court (Frederic S. Le Clercq), 8 Mem. St. U.L. Rev. 241.

RULE 71

CONDEMNATION OF PROPERTY

The procedure for the condemnation of both real and personal property under the power of eminent domain shall be in accordance with the statutes of this state. Furthermore, to the extent that they are not in conflict with or do not contradict or contravene the provisions of said statutes, these rules, where

applicable, shall be followed. [As amended July 1, 1979.]

Textbooks. Tennessee Jurisprudence. 7 Tenn. Juris., Corporations, § 118.

Law Reviews. Forms of Relief, 4 Mem. St. U.L. Rev. 400.

NOTES TO DECISIONS

1. Construction with Other Rules.

Tenn. R. Civ. P. 71 does not preclude the use of summary judgment in condemnation proceedings. Metropolitan Dev. & Hous. Agency v. Trinity Marine Nashville, Inc., 40 S.W.3d 73, 2000 Tenn. App. LEXIS 473 (Tenn. Ct. App. 2000).

RULE 72

DECLARATIONS MADE UNDER PENALTY OF PERJURY

Wherever these rules require or permit an affidavit or sworn declaration, an unsworn declaration made under penalty of perjury may be filed in lieu of an affidavit or sworn declaration. Such declaration must be signed and dated by the declarant and must state in substantially the following form: "I declare (or certify, verify or state) under penalty of perjury that the foregoing is true and correct." [As added by order filed December 21, 2010, effective July 1, 2011.]

Advisory Commission Comments [2011]. Rule 72 is intended to make the practice pursuant to the Tennessee Rules of Civil Procedure consistent with the practice in the federal courts in accordance with 28 U.S.C. § 1746. The Commission notes it is frequently difficult and expensive to procure notarization of an affidavit in a timely manner, particularly when testimony is required from a non-party witness who does not have ready access to a notary public. The Commission further notes that in 2010 the Tennessee General Assembly enacted the "Uniform Unsworn Foreign Declarations Act," which provides in part, "Except as otherwise provided in subsection (b), if a law of this state requires or permits use of a sworn declaration, an unsworn declaration meeting the requirements of this part has the same effect as a sworn declaration." 2010 Tenn. Pub. Acts, ch. 904, § 1.

Compiler's Notes. The addition of this rule, as promulgated and adopted by the Supreme Court in its order dated December 21, 2010, was ratified and approved by House Resolution 34 and Senate Resolution 12. The order promulgating the addition of this rule provided that it take effect July 1, 2011.

The publisher believes that the reference at the end of the proposed 2011 Advisory Commission Comments should be to 2010 Tenn. Pub. Acts, ch. 902, § 1, rather than to 2010 Tenn. Pub. Acts, ch. 904, § 1.

NOTES TO DECISIONS

Analysis

1. Construction with Other Rules.
2. Requirements.

1. Construction with Other Rules.

Tenn. R. Civ. P. 72 permits a party to file an unsworn declaration in support of or in opposition to a motion for summary judgment because Tenn. R. Civ. P. 56.06 requires or permits an affidavit to be filed concomitantly therewith, demonstrating a genuine issue of material fact; in this case, the declaration was made under the penalty of perjury, signed, and dated and the trial court erred by not considering the declaration filed in opposition to defendants' motion for summary judgment. Lundell v. Hubbs, — S.W.3d —, 2020 Tenn. App. LEXIS 528 (Tenn. Ct. App. Nov. 23, 2020).

2. Requirements.

To effect return of service, appellants needed to, and did, file with the clerk of court the summons, a return receipt evidencing service, and an unsworn declaration from their attorney attesting to the effective service, which met the requirement of an affidavit given the declaration's language of being made under penalty of perjury. Villalba v. McCown, — S.W.3d —, 2019 Tenn. App. LEXIS 424 (Tenn. Ct. App. Aug. 30, 2019).

Facts were insufficient to support personal jurisdiction because they did not establish that a former employer purposely directed his commercial activity toward the State of Tennessee;

a truck driver's responsive "affidavit" relied upon hearsay, was not made under oath, and did not satisfy the requirements of an unsworn declaration. Riebsame v. Schemel, — S.W.3d —, 2019 Tenn. App. LEXIS 469 (Tenn. Ct. App. Sept. 24, 2019).

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[EFFECTIVE JULY 1, 2006]

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Compiler's Notes. In its order filed January 18, 2006, the Supreme Court of Tennessee provided: "In *Binkley v. Medling*, 117 S.W.3d 252 (Tenn. 2003), the Supreme Court concluded that an Advisory Commission Comment to Rule 58, Tenn. R. Civ. P., was obsolete and that it should be removed. The Court went on to ask the Advisory Commission on the Rules of Practice & Procedure to 'undertake a review of the various rules of procedure and to recommend the removal of any other Advisory Commission Comments that are obsolete or otherwise inconsistent with later amendments to the various rules.' *Id.* at 258. In response to the Court's request, the Commission revised the Advisory Commission Comments to the Rules of Appellate Procedure, the Rules of Civil Procedure, and the Rules of Evidence; after reviewing the Commission's proposed revisions, the Court entered orders adopting the updated Comments to those three sets of rules.

"The Commission proposed to the Court a more substantial revision of the Rules of Criminal Procedure. In addition to updating the Advisory Commission Comments to those Rules, the Commission also proposed an overall reformatting of the Rules themselves. A draft of the proposed reformatted Rules was presented to the Commission in August 2005; a subcommittee of the Commission thereafter reviewed the proposal and presented a final draft to the Commission on November 18, 2005. On that date, the Commission voted to recommend the adoption of the proposed reformatted Rules of Criminal Procedure (including updated Advisory Commission Comments to those Rules).

"The Court published the proposed reformatted Rules and revised Comments and solicited written comments from the public, judges, lawyers, and other interested parties. The deadline for submitting written comments was December 29, 2005.

"Based upon the Court's review of the proposed reformatted Rules and revised Comments submitted by the Advisory Commission and the written comments received during the public comment period, the Court concludes that the reformatted Rules and revised Comments should be adopted, as modified by the Court.

"Accordingly, the Court adopts the attached Tennessee Rules of Criminal Procedure effective July 1, 2006, subject to approval by resolutions of the General Assembly. The current version of the Tennessee Rules of Criminal Procedure (including the Advisory Commission Comments thereto) will thereby be replaced in its entirety by the attached new version of the Tennessee Rules of Criminal Procedure, effective July 1, 2006."

The adoption of the revised Tennessee Rules of Criminal Procedure, as promulgated and adopted by the Supreme Court in its order dated December 29, 2005, was ratified and approved by 2006 House Resolution 199 and Senate Resolution 96 and takes effect July 1, 2006.

I. SCOPE—PURPOSE—CONSTRUCTION.

Rule 1. Scope and Definitions. —

(a) Courts of Record. — These rules govern the procedure in all criminal proceedings conducted in all Tennessee courts of record.

(b) General Sessions Court. — These rules govern the procedure in the general sessions courts in the following instances:

(1) the institution of criminal proceedings pursuant to Rules 3, 3.5, and 4;

(2) the disposition of criminal charges pursuant to Rule 5;

(3) preliminary hearings pursuant to Rule 5.1;

(4) subpoena pursuant to Rule 17;

(5) venue pursuant to Rule 18;

(6) search and seizure pursuant to Rule 41;

(7) assignment of counsel pursuant to Rule 44;

(8) the use of electronic audio-visual equipment to conduct initial appearances pursuant to Rule 43;

(9) the time computations for setting and the process for continuing preliminary hearings pursuant to Rule 45; and

(10) in any other situation where the context clearly indicates applicability.

(c) JUVENILE COURTS. — These rules do not apply in juvenile courts except when an adult is charged and the context clearly requires the application of the rule.

(d) OTHER INFERIOR TRIBUNALS. — These rules apply in other inferior tribunals when the context clearly so indicates.

(e) DEFINITIONS. — As used in these rules the following terms have the designated meanings:

(1) DEMURRER, MOTION, ETC. — The words "demurrer," "motion," "motion to quash," "plea in abatement," "plea in bar," or words to the same effect in any Tennessee statute are construed to mean the motion raising a defense or objection provided in Rule 12.

(2) LAW. — "Law" includes statutes, codifications contained in Tennessee Code Annotated, and published judicial decisions.

(3) MAGISTRATE. — "Magistrate" includes all judges of courts of record in the state but is primarily intended to mean judges of courts of general sessions. It also includes judicial commissioners and justices of the peace when they perform any of the functions contemplated by these rules.

(4) PERSON. — "Person" includes an individual, corporation, limited liability company, limited liability partnership, firm, company, or association.

(5) OATH. — "Oath" includes oaths and affirmations. [Amended by order filed January 2, 2007, effective July 1, 2007; and by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. These rules apply in cases which are clearly criminal in nature, including both misdemeanors and felonies. Procedures in purely juvenile and municipal courts are not covered. The term general sessions court, as used in these rules, includes all courts exercising the jurisdiction of a general sessions court in state criminal procedures, including: (1) municipal courts having such jurisdiction by special legislative enactment; (2) special courts of multiple functions that include some jurisdiction in state criminal cases the same as that exercised by general sessions courts; and (3) justices of the peace, to the extent that they may be permitted in some counties to perform any of the functions covered by these rules. In summary, the purpose of the commission was to formulate rules of practice in those state criminal cases presently considered to be state criminal procedures and now covered by rules serving the purposes of the ones promulgated herein.

These rules are not completely comprehensive. For example, they do not deal directly with pretrial release. It is intended that these rules be applied in every instance in which they address the procedure involved. If they do not expressly or by clear implication relate to the procedure in question, then existing law is to be applied.

These rules take precedence over preexisting statutes and case law which are in conflict with them, but statutes passed subsequent to their adoption which conflict with these rules shall control. These committee comments were not as such adopted with the rules. They have been periodically revised by the advisory commission and published with the rules subsequent to the general assembly's adoption of the resolution approving them. The purpose of these comments is to aid in the understanding and application of the rules; but it must be made clear that the committee comments are not a part of the rules and are not binding upon the courts.

Advisory Commission Comments [2006]. In 2006, the rules were updated and reformatted to make them more easily understood. The new format was based largely on a similar undertaking to update and reformat the Federal Rules of Criminal Procedure. The advisory commission comments also were extensively revised to update citations to particular parts of these rules, to remove obsolete language, and to make the comments more comprehensible. In revising the comments, the commission consolidated the original comments with the subsequent comments added over the years, as the rules were amended. Following the 2006 revisions, new advisory commission comments will be added as individual rules are amended. Where such new comments are added, the new comments are intended to supersede the older comments only to the extent that they are in conflict. However, the presence of both comments is designed to make alterations more readily apparent.

In the event a particular case involves application of a rule as it existed prior to the refor-

matting and updating of the rules in 2006, please refer to a historical volume of the rules.

Advisory Commission Comments [2007]. The comments to Rule 5 cross-reference the time for setting the preliminary hearing to the time computation provisions of Rule 45. However, Rule 45 does not explicitly apply to general sessions courts by its omission from Rule 1. The 2007 amendment to Rule 1(b)(9) corrects this omission but only concerning the time for setting, and process for continuing, the preliminary hearing once set. There is no intent to impact the requirements of Rule 5(a)(1) dictating that, with certain exceptions, an arrested person must be "taken without unnecessary delay before the nearest appropriate magistrate." As a result of the 2007 amendment adopting a new (b)(9), the then-existing (b)(9) was renumbered as (b)(10).

The amendment to Rule 1(e)(3) adds "judicial commissioner" to the definition of a magistrate. This alteration makes the rule appropriately consistent with Tenn. Code Ann. § 40-5-102 as it relates to courts which exercise jurisdiction at the initial stages of the criminal process as Rules 4 and 5 contemplate.

Advisory Commission Comments [2016]. Consistent with simultaneous amendments to Tenn. R. Crim. P. 5 and 5.1, obsolete references in Rule l(b) to "preliminary examinations" are changed to "preliminary hearings."

Additionally, the second sentence of the 2006 Advisory Commission Comment (which sentence referred to historical information previously available on the Tennessee Supreme Court's website) is deleted because the information mentioned in that sentence is no longer available on the Court's website.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 2, 2007, was ratified and approved by 2007 House Resolution 15 and Senate Resolution 10. The order promulgating the 2007 amendment of this rule provided that it take effect July 1, 2007.

The amendment of Rule 1, the [2006] Advisory Commission Comments and the addition of [2016] Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 147 and Senate Resolution 80. The order promulgating the amendment of Rule 1, the [2006] Advisory Commission Comments and the addition of [2016] Advisory Commission Comments provided that it take effect July 1, 2016.

Textbooks. Tennessee Jurisprudence. 15 Tenn. Juris., Instructions, § 4.

Law Reviews. Tennessee Rules of Citation (Lewis L. Laska), 12 Mem. St. U. L. Rev. 547 (1982).

Attorney General Opinions. Verbatim recording of guilty plea proceedings in general sessions court, OAG 98-048 (2/23/98).

NOTES TO DECISIONS

Analysis

1. Scope.
2. General Sessions Court.
3. Law of the State.
4. Sanctions Against State.
5. Adoption of Federal Rules.

1. Scope.

Broadly speaking, these rules are intended to govern the procedure in all criminal proceedings conducted in all courts of record in State v. Willoughby, 594 S.W.2d 388, 1980 Tenn. LEXIS 405 (Tenn. 1980).

Tenn. R. Crim. P. 1(c) defines the scope of the rules in such manner as to include "preliminary examinations pursuant to Rule 5.1." Tenn. R. Crim. P. 5.1 governs preliminary hearings. Its inclusion within the scope of the criminal rules was necessitated by this fact, and this fact alone. Its inclusion does not operate to make any other rule applicable to such hearings. State v. Willoughby, 594 S.W.2d 388, 1980 Tenn. LEXIS 405 (Tenn. 1980).

2. General Sessions Court.

Tenn. R. Crim. P. 1 shows on its face that the rules are applicable to general sessions court only to the extent enumerated and that the enumerated instances of applicability embrace only those proceedings peculiar to the practice in the general sessions court. Tenn. R. Crim. P. 16 is not such an area of practice. State v. Willoughby, 594 S.W.2d 388, 1980 Tenn. LEXIS 405 (Tenn. 1980).

These rules govern procedure in the general sessions courts of the state as well as the courts of record with respect to the conduct of various preliminary proceedings in criminal cases. Allen v. McWilliams, 715 S.W.2d 28, 1986 Tenn. LEXIS 840 (Tenn. 1986).

3. Law of the State.

Rules of Civil Procedure along with the Rules of Criminal Procedure and the Rules of Appellate Procedure are "law" of this state, in full force and effect until such time as they are superseded by legislative enactment or inconsistent rules are promulgated by this court and adopted by the general assembly. Tennessee Dep't of Human Services v. Vaughn, 595 S.W.2d 62, 1980 Tenn. LEXIS 417 (Tenn. 1980).

4. Sanctions Against State.

There is no express provision in the Rules of Criminal Procedure for involuntary dismissal as a sanction against the state for its failure to

comply with discovery rules or orders of the court and no express provision for such a dismissal to be either on the merits or otherwise a bar to reindictment. If such provisions exist at all they exist only by implication in that part of Tenn. R. Crim. P. 16(d)(2) for the court to "enter such order as it deems just under the circumstances." State v. Freseman, 684 S.W.2d 106, 1984 Tenn. Crim. App. LEXIS 2556 (Tenn. Crim. App. 1984).

5. Adoption of Federal Rules.

In State v. Morgan, 541 S.W.2d 385, 1976 Tenn. LEXIS 544 (Tenn. 1976), Rules 608(b) and 609(a) of the Federal Rules of Evidence were adopted by the supreme court of Tennessee. Rule 609(a) provides that crimes punishable by death or imprisonment in excess of one year, are admissible for impeachment purposes if the court determines that the probative value of evidence concerning the prior convictions outweighs its prejudicial effect on the defendant. The rule also provides that evidence of conviction for crimes involving dishonesty or false statements, regardless of punishment, is admissible. Rule 608(b) provides that a witness may be cross-examined relating to specific instances probative for credibility of the witness. State v. Crank, 721 S.W.2d 264, 1986 Tenn. Crim. App. LEXIS 2726 (Tenn. Crim. App. 1986).

In State v. Morgan, 541 S.W.2d 385, 1976 Tenn. LEXIS 544 (Tenn. 1976), the supreme court of Tennessee adopted Rule 609 of the Federal Rules of Evidence concerning the impeachment of a witness by evidence of a criminal conviction. The rule provides that a witness may be impeached by evidence of a conviction for any crime involving dishonesty or false statement, regardless of the punishment, or by evidence of a conviction for a crime punishable by imprisonment in excess of one year if the court determines that the probative value of the conviction outweighs its prejudicial effect. The question of whether a particular conviction is admissible must be determined by the trial judge out of the presence of the jury. All convictions over ten years old are presumptively inadmissible unless the court determines that the probative value of the evidence of the conviction substantially outweighs the prejudicial effect and the party who intends to introduce the evidence gives the adverse party "sufficient advance written notice" of intent to use the conviction to impeach. The ten year time limitation is measured from the date of conviction or the date of release from confinement, whichever is later. State v. Davis, 741 S.W.2d 120, 1987 Tenn. Crim. App. LEXIS 2654 (Tenn. Crim. App. 1987).

When evidence is going to be offered to impeach under State v. Morgan, 541 S.W.2d 385, 1976 Tenn. LEXIS 544 (Tenn. 1976), the state should request the jury-out hearing before blurting out questions about prior convictions. State v. Davis, 741 S.W.2d 120, 1987 Tenn. Crim. App. LEXIS 2654 (Tenn. Crim. App. 1987).

Rule 2. Purpose and Construction. —

These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure:

(a) simplicity in procedure;

(b) fairness in administration; and

(c) the elimination of:

(1) unjustifiable expense and delay; and

(2) unnecessary claims on the time of jurors.

Advisory Commission Comments. This rule conforms to Rule 2 of the Federal Rules of Criminal Procedure and is a clear statement of the intention of the commission.

Subdivision (c)(2) is designed to stress that the efficient use of jurors' time is a public interest that courts should consider in construing the Tennessee Rules of Criminal Procedure.

Law Reviews. Better, Happier Juries (Neil P. Cohen), 39 Tenn. B.J. 16 (2003).

Post-Conviction Relief in Tennessee — Fourteen Years of Judicial Administration Under the Post-Conviction Procedure Act (Gary L. Anderson), 48 Tenn. L. Rev. 605.

II. PRELIMINARY PROCEEDINGS.

Rule 3. The Affidavit of Complaint. —

The affidavit of complaint is a statement alleging that a person has committed an offense. It must:

(a) be in writing;

(b) be made on oath before a magistrate or a neutral and detached court clerk authorized by Rule 4 to make a probable cause determination; and

(c) allege the essential facts constituting the offense charged.

Advisory Commission Comments. This rule governs what must be done to secure the issuance of an arrest warrant. Under our statutory scheme, per T.C.A. § 40-6-214, clerks of courts of general sessions and their sworn deputies have jurisdiction and authority (concurrent with that of their judges) to issue arrest warrants. It is important that any clerk issuing an arrest warrant know and fully appreciate the legal significance of the fact that it is a judicial function which is being performed. The validity of the warrant depends upon the making of a probable cause determination; a warrant must never be issued as a mere ministerial act done simply upon application. Moreover, a valid warrant can be issued only by one who is neutral and detached and capable of making a probable cause determination, *Shadwick v. City of Tampa*, 407 U.S. 345 (1972), based upon an adequate showing of probable cause, *Aguilar v. Texas*, 378 U.S. 108 (1964) [overruled by *Illinois v. Gates*, 462 U.S. 213 (1983)]. One who is paid a fee for the issuance of a warrant, but nothing where such issuance is refused, is not a neutral and detached magistrate who can validly issue warrants, Connally v. Georgia, 429 U.S. 245 (1977).

It must be emphasized that before a valid arrest warrant can issue, the judicial officer issuing the warrant must be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant. *Whiteley v. Warden*, 401 U.S. 560 (1971). A factually sufficient basis for the probable cause judgment must appear within the affidavit of complaint. If hearsay evidence is relied upon, the basis for the credibility of both the informant and the informant's information must also appear in the affidavit. *Spinelli v. U.S.*, 393 U.S. 410 (1969) [overruled by *Illinois v. Gates*, 462 U.S. 213 (1983)]. The comparable federal rule calls this affidavit the "complaint." Since that technical term is used differently in our civil procedure, and also to further emphasize to the one issuing an arrest warrant the necessity for first having in hand a detailed complaint reduced to writing and sworn to, the commission adopted "affidavit of complaint" to describe the document upon which the issuance of the arrest warrant is based.

Cross-References. Notice of appeal not jurisdictional in criminal cases, T.C.A. § 27-1-123.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 3-4-2, 3-12-5.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, § 19.

Attorney General Opinions. Neutrality and detachment of deputy sheriff as magistrate or clerk, OAG 90-07 (1/17/90).

Applicability, OAG 90-63 (5/31/90).

County jailer serving as a judicial commissioner, OAG 92-16 (2/25/92).

Procedure where failure to appear in municipal court with general sessions jurisdiction charged, OAG 99-096 (4/27/99).

Authority of magistrate to prohibit the making and signing of an affidavit of complaint, OAG 99-188 (9/22/99).

An arrest warrant issued following the steps outlined in a detailed proposal would constitute a valid charging instrument, OAG 00-124 (8/7/00).

NOTES TO DECISIONS

Analysis

1. Affidavit of Complaint.
2. Oath Required.
3. Deficient Affidavit.

1. Affidavit of Complaint.

Plain language of T.C.A. § 40-2-104 provides five specific ways by which a prosecution may be commenced, and an affidavit of complaint is not listed among the alternatives; an affidavit of complaint is merely a statement alleging that a person has committed an offense pursuant to Tenn. R. Crim. P. 3 and is not, standing alone, sufficient to provide formal notice of the offense charged. Because an arrest warrant may or may not issue upon the affidavit of complaint, the affidavit of complaint will not necessarily provide a defendant with notice that he is being charged with an offense, and an affidavit of complaint, with nothing more to provide a defendant with notice, is not a charging instrument. State v. McCloud, 310 S.W.3d 851, 2009 Tenn. Crim. App. LEXIS 437 (Tenn. Crim. App. June 12, 2009).

Because no arrest warrant was issued and the affidavit of complaint which purported to be the charging instrument was void, the State failed to commence any prosecution against defendant within the applicable statute of limitations and the trial court properly granted defendant's motion to dismiss. State v. Jones, 512 S.W.3d 258, 2016 Tenn. Crim. App. LEXIS 463 (Tenn. Crim. App. June 29, 2016).

2. Oath Required.

Affidavit of complaint telephoned by a sheriff to a court clerk was insufficient to support a warrant for arrest where the sheriff was not under oath. State v. Burtis, 664 S.W.2d 305,

1983 Tenn. Crim. App. LEXIS 427 (Tenn. Crim. App. 1983).

3. Deficient Affidavit.

Where plaintiff was arrested and detained as a material witness, failure to assess probability of plaintiff's future appearance and testimony at suspect's trial was a harmless defect in affidavit of complaint where arrest was valid under T.C.A. § 40-11-110 and plaintiff appeared before a judge and was given opportunity to make bail within 24 hours of arrest. White v. Gerbitz, 892 F.2d 457, 1989 U.S. App. LEXIS 19177 (6th Cir. Tenn. 1989).

Rules 3.1 — 3.4. [Reserved.]

Rule 3.5. Criminal Citation. —

(a) USE OF CITATIONS. — The use of citations in misdemeanor arrests is as provided by law.

(b) REFERENCE TO CITATIONS. — All references in these rules to citations mean citations issued pursuant to law.

Advisory Commission Comments. Use of the criminal citation in misdemeanor cases where no danger to the public interest will result is a procedure in keeping with the expressed goal of securing simplicity in procedure and eliminating unjustified expense and delay. The original substantive content of this rule was deleted in 1988 because T.C.A. § 40-7-118 now provides a comprehensive treatment of citations and mandates their use in some instances.

Cross-References. Arrest without a warrant, T.C.A. § 40-7-103.

Municipal violations, citation or complaint in lieu of arrest, T.C.A. § 7-63-101.

Attorney General Opinions. Arrest or citation in counties with more than one general sessions court, OAG 99-149 (8/10/99).

Rule 4. Arrest Warrant or Summons on a Complaint. —

(a) ISSUANCE OF WARRANT OR SUMMONS. — If the affidavit of complaint and any supporting affidavits filed with it establish that there is probable cause to believe that an offense has been committed and that the defendant has committed it, the magistrate or clerk shall issue an arrest warrant to an officer authorized by law to execute it or shall issue a criminal summons for the appearance of the defendant. More than one warrant or criminal summons may issue on the same complaint.

(1) DISTRICT ATTORNEY GENERAL'S CHOICE. — The district attorney general may direct the clerk to issue either a criminal summons or a warrant.

(2) EXAMINATION UNDER OATH. — Before ruling on a request for a warrant, the magistrate or clerk may examine under oath the complainant and any witnesses the complainant produces.

(3) RECORD OF ISSUANCE. — The general sessions court clerk shall promptly record in a docket book the issuance of every warrant and summons in the county.

(4) FAILURE TO APPEAR FOR SUMMONS. — A warrant shall issue for a defendant who fails to appear in response to a criminal summons.

(b) EVIDENCE OF PROBABLE CAUSE FOR WARRANT OR SUMMONS. — The finding of probable cause shall be based on evidence which may be hearsay in whole or in part provided there is a substantial basis to believe:

(1) the source of the hearsay is credible; and

(2) there is a factual basis for the information furnished

(c) FORM. —

(1) WARRANT. — The arrest warrant shall:

(A) be signed by the magistrate or clerk;

(B) contain the name of the defendant or, if this name is unknown, any name or description by which the defendant can be identified with reasonable certainty;

(C) indicate the county in which the warrant is issued;

(D) describe the offense charged in the affidavit of complaint; and

(E) order that the defendant be arrested and brought before the nearest appropriate magistrate in the county of arrest.

(2) SUMMONS. — The criminal summons shall be in the same form as the arrest warrant except that it orders the defendant to appear before a magistrate at a stated time and place.

(d) BAIL WHEN WARRANT ISSUED IN ONE COUNTY AND EXECUTED IN ANOTHER. — A defendant arrested in one county on a warrant issued in another county for the commission of an offense for which the maximum punishment is imprisonment for ten (10) years or less is entitled to be admitted to bail in the county of arrest by the same officials and in the same manner as if arrested in the county issuing the warrant, subject to the following provisions:

(1) the appropriate clerk or magistrate shall determine the amount of bail and state it on the face of the warrant; and

(2) the sheriff or deputy sheriff of the county in which the arrest is made shall transmit the undertaking of bail to the sheriff of the county from which the warrant issued, who shall return it to the court as provided in T.C.A. § 40-11-106.

(e) EXECUTION OR SERVICE; RETURN. —

(1) BY WHOM. — The arrest warrant shall be executed by an officer authorized by law. The criminal summons shall be served by a person authorized to serve a summons in a civil action.

(2) TERRITORIAL LIMITS. — The arrest warrant or criminal summons may be executed or served in any Tennessee county.

(3) MANNER. —

(A) WARRANT. — An arrest warrant is executed by arresting the defendant. The arresting officer need not have the warrant in the officer's possession at the time of the arrest, but on request shall show the warrant to the defendant as soon as possible. If the arresting officer does not have possession of the warrant at the time of the arrest, the officer shall inform the defendant of the offense charged and that a warrant has been issued.

(B) SUMMONS. — A criminal summons is served in the same manner as a summons in a civil action.

(4) RETURN; CANCELLATION; REISSUANCE. —

(A) RETURN. — The officer executing a warrant shall return it to the magistrate or clerk or other officer before whom the defendant is brought pursuant to Rule 5. On or before the return day, the person to whom a criminal summons is delivered for service shall make a return to the magistrate or clerk before whom the summons is returnable.

(B) CANCELLATION OF UNEXECUTED WARRANT. — At the district attorney general's request, any unexecuted warrant shall be returned to the magistrate or clerk by whom it was issued, who shall cancel it.

(C) RE-EXECUTION OR RENEWED SERVICE OF WARRANT OR SUMMONS. — At the district attorney general's request made while the affidavit of complaint is

pending, the magistrate or clerk may deliver to any authorized person for execution or service the original or a duplicate of:

(i) a warrant, returned unexecuted and not cancelled; or

(ii) a summons returned unserved. [As amended by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. Note that the affidavit of complaint may be buttressed by additional affidavit(s) and that the magistrate or clerk may also examine under oath the complainant and any other witnesses.

A criminal summons may be issued instead of an arrest warrant; when a clerk is performing this judicial function, the district attorney general is empowered to direct the clerk whether to issue a warrant or a criminal summons upon a finding of probable cause.

Section (a)(3) requires that a docket book be kept in which every warrant and summons issued in a given county is recorded. This rule is meant to require any person issuing such a warrant or criminal summons who is not the clerk, to communicate this fact to the clerk of the court of general sessions and to see to it that the issuance is properly recorded. Rigid compliance with this rule is very important to the proper administration of criminal justice, and thus the rule is meant to be mandatory in nature.

Under section (b) probable cause for the issuance of arrest warrants and criminal summonses may be based in whole or in part upon credible hearsay. A different rule applies to the preliminary hearing structured under Rule 5.1, in which the "evidence may not be inadmissible hearsay except documentary proof of ownership and written reports of expert witnesses."

The form of the arrest warrant, as set out in Rule 4(c)(1), makes no distinction between warrants issued for persons not yet arrested and those warrants issued for persons already arrested without a warrant. Such a warrant serves a dual function: first, as the authority for an arrest (where an arrest has not already been lawfully made) and, secondly, as a statement of the charge which the accused is called upon to answer. The commission did not recommend two separate warrant forms, one for use where the accused had not yet been arrested, and the second to merely state the charge against one already under arrest, because it is more utilitarian to have only the one form. The command to arrest is obviously surplusage where the warrant is directed against one already in custody; but a warrant in such cases still serves as the official charging instrument, issued after a judicial finding of probable cause, and gives notice of the charge which must be answered.

Rule 4 was substantially derived from the corresponding federal rule and § 40-6-202 of the Law Revision Commission's proposed code.

Note that the rule provides specifically for the reissuance of unexecuted complaints and summonses.

Wherever the words "magistrate" and "clerk" appear in Rule 4, they are to be understood as being qualified by the words "who is neutral and detached and who is capable of the probable cause determination required by this rule." See *Shadwick v. City of Tampa*, 407 U.S. 345 (1972).

See T.C.A. § 39-15-101 which sets limits on the issuance of arrest warrants for violation of support orders.

Advisory Commission Comments [2007]. Tenn. Code Ann. §§ 40-6-205 and 40-6-215 require that a summons be issued instead of a warrant in certain circumstances.

Advisory Commission Comments [2011]. Rule 4(a)(3) requires the general sessions court clerk to "promptly record in a *docket book* the issuance of every warrant and summons in the county." (Emphasis added.) The words "docket book" must be interpreted in light of Tenn. Code Ann. § 10-7-121(a)(1), which provides (in pertinent part): "Notwithstanding any other provision of law to the contrary, any information required to be kept as a record by any government official may be maintained on a computer or removable computer storage media ... instead of bound books or paper records," if four standards listed in the statute are met.

Advisory Commission Comments [2016]. Consistent with simultaneous amendments to Tenn. R. Crim. P. 5 and 5.1, the fourth paragraph of the original Advisory Commission Comments to Rule 4 is amended to substitute the term "preliminary hearing" for the obsolete term "preliminary examination." No substantive changes are made to the Rule.

Compiler's Notes. The amendment of the Advisory Commission Comments, which added the 2007 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated January 2, 2007, was ratified and approved by 2007 House Resolution 15 and Senate Resolution 10. The order promulgating the amendment of the Advisory Commission Comments provided that it take effect July 1, 2007.

The amendment of the Advisory Commission Comments, which added the 2011 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 21, 2010, was ratified and approved by 2011 House Resolution 36 and Senate Resolution 14. The order promulgating the amendment of the Advisory Commission Comments provided that it take effect July 1, 2011.

The amendment of the existing Advisory Commission Comments to Rule 4 and the addition of [2016] Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 147 and Senate Resolution 80. The order promulgating the amendment of Rule 4's existing Advisory Commission Comments and the addition of [2016] Advisory Commission Comments provided that it take effect July 1, 2016.

Cross-References. Notice of appeal not jurisdictional in criminal cases, T.C.A. § 27-1-123.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 3-4-2, 3-12-5.

Attorney General Opinions. Neutrality and detachment of deputy sheriff as magistrate or clerk, OAG 90-07 (1/17/90).

County jailer serving as a judicial commissioner, OAG 92-16 (2/25/92).

Campus security officer serving as clerk, OAG 97-135 (9/30/97).

Procedure where failure to appear in municipal court with general sessions jurisdiction charged, OAG 99-096 (4/27/99).

Issuance of citations and arrest warrants by general sessions court clerks, OAG 00-044 (3/13/00).

Authority of law enforcement officers to make misdemeanor arrests, OAG 00-048 (3/16/00).

Security guards issuing criminal summons or citations, OAG 07-002 (1/4/07).

NOTES TO DECISIONS

Analysis

1. Description of Offense.
2. Probable Cause.
3. Arrest Without Warrant.
4. Affidavit of Complaint.
5. Informants.

1. Description of Offense.

Where the language used in search warrants stated simply that the authorities were to "arrest person or persons found violating the law in connection with" the gambling devices, this language fell far short of that needed for valid arrest warrants, was nothing more than a command for the arresting officers to do what they were already empowered to do, that is, to arrest persons whom they observed violating the law, and could not be said to be the initiation of formal charges against persons arrested with gambling devices. State v. Best, 614 S.W.2d 791, 1981 Tenn. LEXIS 437 (Tenn. 1981).

2. Probable Cause.

The test to determine probable cause to make an arrest should be equally as stringent as the test to determine whether probable cause exists to issue a search warrant. State v. Tays, 836 S.W.2d 596, 1992 Tenn. Crim. App. LEXIS 342 (Tenn. Crim. App. 1992).

The probable cause requirement in Tenn. R. Crim. P. 4(b) essentially encompasses the *Aguilar-Spinelli* (*Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723, 1964 U.S. LEXIS 994 (1964) [overruled by *Illinois v. Gates*, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527, 1983 U.S. LEXIS 54 (1983)]; *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637, 1969 U.S. LEXIS 2701 (1969) [overruled, Illinois v. Gates, 462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527, 1983 U.S. LEXIS 54 (1983), rehearing denied, 463 U.S. 1237, 104 S. Ct. 33, 77 L. Ed. 2d 1453, 1983 U.S. LEXIS 884, 52 U.S.L.W. 3141 (1983)]) two-pronged test that requiring an officer seeking a search warrant based upon information provided by an informant to swear out an affidavit stating to the magistrate that the informant is not only credible but has a basis of knowledge of the underlying circumstances. State v. Tays, 836 S.W.2d 596, 1992 Tenn. Crim. App. LEXIS 342 (Tenn. Crim. App. 1992).

Probable cause is a reasonable ground for suspicion supported by circumstances indicative of an illegal act. State v. Lewis, 36 S.W.3d 88, 2000 Tenn. Crim. App. LEXIS 253 (Tenn. Crim. App. 2000).

3. Arrest Without Warrant.

The principle of Tenn. R. Crim. P. 4 is applicable to establish probable cause where an arrest has been made without a warrant. State v. Raspberry, 640 S.W.2d 227, 1982 Tenn. Crim. App. LEXIS 463 (Tenn. Crim. App. 1982).

4. Affidavit of Complaint.

An arrest warrant issued upon the basis of unsworn statements telephoned by a sheriff to the circuit court clerk was invalid. State v. Burtis, 664 S.W.2d 305, 1983 Tenn. Crim. App. LEXIS 427 (Tenn. Crim. App. 1983).

Typically, offenses that are parts of a common scheme or plan are offered by the state to establish the identity of a perpetrator; thus, where identity was not an issue the court erred in not granting motion to sever offenses. State v. Moore, 6 S.W.3d 235, 1999 Tenn. LEXIS 574 (Tenn. 1999).

Criminal prosecution is commenced if, within the statute of limitations for a particular offense, a warrant is issued identifying the defendant by gender and his or her unique DNA profile; a DNA profile exclusively identifies an accused with nearly irrefutable precision and, as a general rule, satisfies the particularity requirements of the Fourth Amendment to the United States Constitution and Tenn. Const. art. I, § 7. State v. Burdick, 395 S.W.3d 120, 2012 Tenn. LEXIS 903 (Tenn. Dec. 18, 2012).

Prosecution for attempted aggravated rape was properly and timely commenced with in the eight-year statute of limitations by the filing of the "John Doe" arrest warrant because The "John Doe" designation in the warrant, coupled with the detailed DNA profile of the assailant, identified defendant with "reasonable certainty" as required by the Fourth Amendment, Tenn. Const. art. I, § 7, T.C.A. § 40-6-208, and Tenn. R. Crim. P. 4(c)(1)(B). State v. Burdick, 395 S.W.3d 120, 2012 Tenn. LEXIS 903 (Tenn. Dec. 18, 2012).

5. Informants.

If the arresting officers rely in part on information from an informant in the criminal milieu, they must be able to demonstrate that the informant: (1) Has a basis of knowledge; and (2) Is credible. On the other hand, if the information contributing to the existence of probable cause has been gathered from an ordinary citizen, no showing of the informant's basis of knowledge and veracity is required. State v. Lewis, 36 S.W.3d 88, 2000 Tenn. Crim. App. LEXIS 253 (Tenn. Crim. App. 2000).

Rule 5. Initial Appearance Before Magistrate. —

(a) In General. —

(1) Appearance Upon an Arrest. — Any person arrested–except upon a capias pursuant to an indictment or presentment–shall be taken without unnecessary delay before the nearest appropriate magistrate of:

(A) the county from which the arrest warrant issued; or

(B) the county in which the alleged offense occurred if the arrest was made without a warrant, unless a citation is issued pursuant to Rule 3.5.

(2) Affidavit of Complaint When No Arrest Warrant. — An affidavit of complaint shall be filed promptly when a person, arrested without a warrant, is brought before a magistrate.

(3) Governing Rules. — The magistrate shall proceed in accordance with this rule when an arrested person initially appears before the magistrate.

(b) Small Offenses Triable by Magistrate. —

(1) Advice and Plea Entry for Small Offense. — When the offense charged is a small offense triable by the magistrate, without regard to the plea, the magistrate shall advise the defendant of the charge, and determine defendant's plea.

(2) Judgment and Sentence Upon Plea. — When the defendant pleads guilty to a small offense, the magistrate may hear relevant evidence and sentence the defendant to pay a fine.

(3) Trial. — When the defendant pleads not guilty to a small offense, the case shall be set for trial at some future day and the defendant's pretrial release dealt with under the provisions of applicable law, unless the defendant agrees to an immediate trial.

(4) Appeal. — A defendant who is convicted of a small offense may appeal as a matter of right to the Circuit or Criminal Court for a trial de novo without a jury.

(c) Other Misdemeanors. —

(1) Upon Plea of Guilty. — If the offense charged is a misdemeanor, but of greater magnitude than a small offense, the magistrate shall inquire how the defendant pleads to the charge. If the plea is guilty, the plea shall be reduced to writing. The following rules shall then apply:

(A) Advice to Defendant. — The magistrate shall advise the defendant of the right to a jury trial and to be prosecuted only on an indictment or presentment.

(B) Set Preliminary Hearing Unless Not Required. — The magistrate shall schedule a preliminary hearing to be held within fourteen days if the

defendant remains in custody and within thirty days if released from custody, (and the fourteen days or thirty days shall be computed from the date of the defendant's appearance before the magistrate), unless:

(i) the defendant expressly waives the right to a jury trial and to a prosecution based only on an indictment or presentment; or

(ii) a preliminary hearing is not required under Rule 5(e) below.

(C) WAIVER. —

(i) OF PRELIMINARY HEARING. —The magistrate may bind the defendant over to the grand jury if the defendant waives a preliminary examination on a misdemeanor.

(ii) OF PRELIMINARY HEARING AND GRAND JURY. —If the defendant offers to waive the right to a grand jury investigation and a trial by jury, the court may permit it if the district attorney general or the district attorney general's representative does not then object. In the event of such waiver, the magistrate shall hear the misdemeanor case on the guilty plea and determine the sentence. The defendant may appeal judgment on a plea of guilty to a misdemeanor after waiver of a grand jury investigation and jury trial, but only as to the sentence imposed.

(2) UPON PLEA OF NOT GUILTY. —

(A) SET PRELIMINARY HEARING. — Unless the defendant expressly waives the right to a preliminary hearing, when the defendant pleads not guilty the magistrate shall schedule a preliminary hearing to be held within fourteen days if the defendant remains in custody and within thirty days if released, (and the fourteen days or thirty days shall be computed from the date of the defendant's appearance before the magistrate).

(B) WHEN PRELIMINARY HEARING WAIVED. — The magistrate may bind the case over to the grand jury if the defendant waives in writing the preliminary hearing.

(C) WHEN PRELIMINARY HEARING, GRAND JURY, AND JURY TRIAL WAIVED; APPEAL. — If the defendant offers to waive in writing the right to a grand jury investigation and a trial by jury, and to submit the case to the general sessions court–and the district attorney general or the district attorney general's representative does not object–the magistrate may accept the defendant's written waiver and hear the misdemeanor case on the not guilty plea. The magistrate may enter judgment, including any fine or jail sentence prescribed by law for the misdemeanor. The state may not appeal from a judgment of acquittal. The defendant may appeal a guilty judgment or the sentence imposed, or both, to the circuit or criminal court for a trial de novo as provided by law.

(d) FELONIES. —

(1) ADVICE TO DEFENDANT. — If the offense charged is a felony, the defendant shall not be called on to plead. The magistrate shall inform the defendant of:

(A) the charge and the contents of the affidavit of complaint;

(B) the right to counsel;

(C) the right to appointed counsel if indigent;

(D) the right to remain silent and give no statement;

(E) the fact that any statement given voluntarily may be used against the defendant;

(F) the general circumstances under which the defendant may obtain pretrial release; and

(G) the right to a preliminary hearing.

(2) Preliminary Hearing Waived. — When the defendant waives preliminary hearing, the magistrate shall promptly bind the defendant over to the grand jury.

(3) Schedule Preliminary Hearing. — When the defendant does not waive preliminary hearing and when a preliminary hearing is not rendered unnecessary under Rule 5(e), the magistrate shall schedule a preliminary hearing within fourteen days if the defendant remains in custody and within thirty days if released, (and the fourteen days or thirty days shall be computed from the date of the defendant's appearance before the magistrate).

(e) Extending the Time. — With the defendant's consent and upon a showing of good cause, a magistrate may extend the time limits in Rule 5(c) and (d) one or more times. If the defendant does not consent, the magistrate may extend the time limits only on a showing that extraordinary circumstances exist and justice requires the delay.

(f) Indictment Before Preliminary Hearing; Exceptions. —

(1) Entitlement to Preliminary Hearing. — Any defendant arrested or served with a criminal summons prior to indictment or presentment for a misdemeanor or felony, except small offenses, is entitled to a preliminary hearing. A preliminary hearing may be waived as set forth by subsection (2) or as otherwise provided in this rule.

(2) Waiver of Preliminary Hearing by Failure to Appear. — A defendant waives the right to a preliminary hearing by failing to appear for a scheduled preliminary hearing, unless the defendant presents before the general sessions court, and the court finds within fourteen days after the scheduled preliminary hearing, clear and convincing evidence that the failure to appear was beyond the defendant's control. Unless the general sessions court finds by clear and convincing evidence that the defendant's absence was beyond the defendant's control and resets the preliminary hearing, the grand jury may return an indictment or presentment on the charges.

(3) Expeditious Hearings. — While a defendant should have a reasonable opportunity to assert any legal right, preliminary hearings shall be conducted as expeditiously as possible considering the inconvenience to victims and witnesses, the parties, and the court by unnecessary delays.

(4) Remedy for Failure to Afford Preliminary Hearing. — If an indictment or presentment is returned against a defendant who has not waived his or her right to a preliminary hearing, the circuit or criminal court shall dismiss the indictment or presentment on motion of the defendant filed not more than thirty days from the arraignment on the indictment or presentment. The dismissal shall be without prejudice to a subsequent indictment or presentment and the case shall be remanded to the general sessions court for a preliminary hearing.

(g) Defendant's Presence. — The defendant's presence at the initial appearance is governed by Rule 43. [As amended by order filed January 2, 2007, effective July 1, 2007; by order entered December 14, 2009, effective July 1,

2010; and by order filed December 29, 2015, effective July 1, 2016; and by order filed January 8, 2018, effective July 1, 2018.]

Advisory Commission Comments. As far as the actions before a magistrate exercising the jurisdiction of a general sessions court are concerned, Rule 5 substantially embodies existing law as to jurisdiction and procedure. This rule is intended to provide comprehensive guidance for those exercising this jurisdiction. Small offenses are those which carry a maximum fine of fifty dollars and for which no imprisonment may be inflicted. T.C.A. § 40-408 [now repealed]. It should be noted in connection with subdivision (b), dealing with small offenses triable by a magistrate, that there is no appeal from the judgment in a case in which a guilty plea is entered. Where trial is held for a small offense upon a plea of not guilty and a conviction results, there is a right to a trial de novo upon appeal, but there is no right to a jury upon the new trial (there being no such right as to small offenses in the first instance). Further, where the defendant in serious misdemeanor cases waives the right to a jury trial, that waiver before the magistrate carries over into the criminal or circuit court and attaches to the trial de novo on appeal unless the defendant demands a jury as part of the appeal notice as required by § 27-5-108. See *State v. Jarnigan*, 958 S.W.2d 135 (Tenn. 1998). The rights in all (except small) offenses to be proceeded against only by indictment or presentment and to a trial by jury are grounded upon the provisions of Art. 1, Secs. 6 and 14, Constitution of Tennessee.

The preliminary hearing referred to in this rule is the proceeding formerly called a preliminary examination. It must be scheduled within ten days if the accused is in custody, and within thirty days if the accused is on bond. See Rule 45(a), dealing with the computation of time.

It is important to note that while the Constitution and the Rules vest the right to trial by jury in the accused, this right cannot be waived under this rule in the face of an objection by the district attorney general or his or her representative. This provision acts as a safeguard against the possibility that an accused might be permitted to enter a guilty plea to a lesser included offense and effectively bar prosecution for a more serious crime. *Price v. Georgia*, 398 U.S. 323 (1970); *Waller v. Florida*, 397 U.S. 387 (1970). Hence, in effect the state now has a right to a trial by jury, if the district attorney general or his or her representative asserts the right by objecting to the waiver by the defendant. Note that the rule does not require an affirmative act on behalf of the state before an accused can effectively waive the right, but simply provides that it cannot be done in the face of an objection. This wording by the commission was deliberate, because it is recognized that many general sessions courts must sometimes operate without the presence of the district attorney general or his or her representative. Nevertheless, in order to exercise an objection and thus protect the state's position, the district attorney general personally or by representative will need to know of the proceeding and to enter an objection. The court should construe the words "or the district attorney general's representative" to include anyone connected with law enforcement who reports to the court that the district attorney general or one of his or her assistants has requested that the objection be made.

Under Rule 5(d), covering a felony charge, it is extremely important that the magistrate inform the accused in substantial compliance with this rule.

Rule 5(e) simply carries over into the Rules the same conditional right to a preliminary hearing now embodied in T.C.A. § 40-1131 [repealed]. It was not the intention of the commission to enlarge or diminish that conditional right; therefore, the body of case law which has been developed in connection with the statute retains its precedential value. *Waugh v. State*, 564 S.W.2d 654 (Tenn. 1978).

The commission's rationale, which was presented to the Supreme Court prior to the approval of these rules, is that the court has jurisdiction to enter a judgment calling for a fine in excess of fifty dollars, where provided by law and set by a jury. If the accused waives the right to have a jury set the fine and agrees that the judge set it, this act confers upon the court jurisdiction to set such a fine. An analogous situation arises each time a defendant waives a jury and permits a trial before a judge. In either instance the judge can exercise the full jurisdiction of the court because there has been a valid waiver of the right to have jury participation. Thus, under these rules, a judge can set a fine to the full limit of the appropriate penal statute, when a jury has been waived.

Rule 5(c)(1) and (2) conform the rule to T.C.A. § 40-4-112, which allows an appeal of the sentence even upon a plea of guilty.

This rule allows a de novo appeal "as provided by law" which contemplates a jury trial as provided by T.C.A. Section 27-3-131(a). Attorneys should be aware, however, that T.C.A. § 27-3-131(b) requires that the demand for a jury must be made at the time of filing an appeal.

These rules permit general sessions courts to use audio-visual technology to conduct initial appearances where a plea of not guilty is entered by the defendant. Nothing in paragraph (d) prohibits the prosecutor or defense counsel from being present and heard. In addition,

paragraph (d) does not apply to preliminary hearings pursuant to Rule 5.1 nor misdemeanor trials. These amendments are substantially similar to Rule 5-303 of the New Mexico Rules of Criminal Procedure and Rule 10 of Hawaii Rules of Penal Procedure and reflect the growing need for the use of technology to expedite the processing of initial criminal proceedings and reduce the cost of such processing. The purposes for the Rules, which these amendments are intended to achieve, are set forth in Rule 2: "...to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

Advisory Commission Comments [2007]. Tenn. Code Ann. § 40-1-109 requires a written guilty plea for misdemeanors. The amendment to subsection (c) conforms the rule to the statute.

Advisory Commission Comments [2010]. Rule 5(e) has been amended in its entirety so as to clarify when the defendant is entitled to a preliminary hearing. Rule 5(e)(1) and (4) make clear that the defendant enjoys the right to a preliminary hearing following arrest on a warrant or an appearance by a criminal summons which cannot be defeated by either an indictment or presentment. The former rule omitted the presentment, apparently by oversight, and this has been corrected. The amendment retains the former procedure of requiring a motion to dismiss if there is a premature indictment or presentment but the time for the motion is no longer measured from the "arrest," but rather from the date of the arraignment on the indictment or presentment in circuit or criminal court.

Rule 5(e)(2) provides that a defendant waives the preliminary hearing by failing to appear. There is a relief from waiver provision if the defendant promptly establishes that the defendant's absence was beyond the defendant's control. The State has the right to seek an indictment or presentment during the intervening fourteen days, which is subject to a dismissal if the defendant makes the required showing.

Rules 5(c)(1)(B) and 5(d)(3) set forth the minimum time within which preliminary hearings must be held. Rule 5(e)(3) addresses the reverse issue: the pernicious problem of preliminary hearings being routinely continued for so long that witnesses, parties, and the Court are prejudiced. While there may be sound reasons for continuing the hearing, such as a mental examination, the hearing should not ordinarily be delayed unless it is essential for the interests of justice.

Rule 5 by its terms does not apply to an arrest upon a capias pursuant to indictment or presentment. Rule 5(a)(1). These amendments are in no way intended to change the rule that, when there is no arrest warrant or criminal summons issued on an affidavit of complaint (where the State commences the prosecution by indictment or presentment), there is no right to a preliminary hearing. See *Moore v. State*, 578 S.W.2d 78 (Tenn.1979).

Advisory Commission Comments [2016]. Consistent with simultaneous amendments to Tenn. R. Crim. P. 5.1, Tenn. R. Crim. P. 5 and its Advisory Commission Comments are amended to substitute the term "preliminary hearing" for the obsolete term "preliminary examination." No substantive changes are made to the Rule.

Advisory Commission Comments [2018]. The amendment effective July 1, 2018 extends the time within which a preliminary hearing must occur to fourteen days from ten days when a defendant remains in custody and confirms that the time period within which the preliminary hearing must be held shall be computed from the date of the initial appearance before the magistrate. Experience has shown frequent difficulty in scheduling preliminary hearings within a 10-day period. First, unlike in federal courts, where hearsay is admissible in preliminary hearings and federal law enforcement often can provide all testimony required, Tennessee's rules require witnesses to testify in person, and the attendance of witnesses often must be obtained by subpoena. Second, in some rural counties, general sessions courts convene only 2-3 times a month; therefore, longer than ten days may routinely pass between court sessions. The 2018 amendment tracks the current version of the federal analogue to this rule with respect to the in-custody time period, and, after review of other states' practices and data from Tennessee courts, the Advisory Commission determined that fourteen days represents a correct balance for the time period within which the preliminary hearing must occur after an initial appearance and when a defendant remains in custody.

Compiler's Notes. This rule may affect Tenn. Code Ann. § 53-8-115(c).

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 2, 2007, was ratified and approved by 2007 House Resolution 15 and Senate Resolution 10. The order promulgating the 2007 amendment of this rule provided that it take effect July 1, 2007.

The proposed amendment and advisory commission comments promulgated by the Supreme Court in its order dated January 8, 2009, were withdrawn by the supreme court in its order entered February 24, 2009, entered *nunc pro tunc* effective January 8, 2009.

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated December 14, 2009, was ratified and approved by 2010 Senate Resolution 179 and 2010 House Resolution 235. The order promulgating the amendment of this rule provided that it take effect July 1, 2010.

The amendment of Rule 5 and its existing Advisory Commission Comments and the addi-

tion of [2016] Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 147 and Senate Resolution 80. The order promulgating the amendment of Rule 5 and its existing Advisory Commission Comments and the addition of [2016] Advisory Commission Comments provided that it take effect July 1, 2016.

In its order filed January 8, 2018, the Supreme Court adopted amendments to this rule, effective July 1, 2018, subject to approval by resolution of the General Assembly.

The amendment of Rule 5, which amended subdivision (c) and (d) and added the [2018] Advisory Comments, as promulgated and adopted by the Supreme Court in its order dated January 8, 2018, was ratified and approved by 2018 House Resolution 207 and Senate Resolution 166. The order promulgating the amendment of subdivisions (c) and (d) and the addition of the [2018] Advisory Comments, provided that it take effect July 1, 2018.

Cross-References. Notice of appeal not jurisdictional in criminal cases, T.C.A. § 27-1-123.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 3-5-1, 3-5-3 — 3-5-6.

Tennessee Jurisprudence. 8 Tenn. Juris., Criminal Procedure, §§ 18-20, 23, 28; 10 Tenn. Juris., Double Jeopardy, §§ 12, 13; 11 Tenn. Juris., Evidence, § 180.

Tennessee Law of Evidence (Paine, Schaffner, and Ulin), § 140.

Law Reviews. Don't miss a move. Making rules 5 and 5.1 work for your clients in General Sessions Court (Robert Little), 37 Tenn. B.J. 12 (2001).

The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure, VI. Hearing of Appeals (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 86.

Attorney General Opinions. State's remedies to prevent general sessions court from improperly reducing a criminal offense, OAG 88-80 (4/7/88).

Presence of defendant at preliminary hearing, OAG 89-70 (5/2/89).

Municipal offenders incarcerated in county jails, OAG 90-94 (10/9/90).

Initial Appearance of Criminal Defendant Before Magistrate Following Arrest, OAG 91-84 (9/20/91).

Probable cause determinations for criminal defendants, OAG 91-105 (12/23/91).

Appearance by two-way video transmission, OAG 96-146 (12/16/96).

Transfer upon demand for jury trial in criminal contempt proceeding, OAG 98-048 (2/23/98).

Verbatim recording of guilty plea proceedings in general sessions court, OAG 98-048 (2/23/98).

Procedure where failure to appear in municipal court with general sessions jurisdiction charged, OAG 99-096 (4/27/99).

Arrest or citation in counties with more than one general sessions court, OAG 99-149 (8/10/99).

Discretion of judge to waive costs and fines when defendant declared indigent, OAG 99-197 (10/6/99).

Waiver of juvenile by right of attorney judge, OAG 99-214 (10/27/99).

Affidavits of complaint for warrantless arrests, OAG 99-223 (11/30/99).

General sessions judge's legal authority, OAG 00-001 (1/4/00).

Public housing authority officers have a duty to transport their arrestees to jail promptly so that a probable cause hearing occurs within 48 hours, OAG 00-150 (10/5/00).

T.C.A. § 69-10-221 does not preclude a preliminary hearing before the general sessions court and/or a bindover to the grand jury, OAG 01-001 (1/4/01).

County judicial commissioners are vested with the authority to make a probable cause determination on a warrantless arrest, OAG 01-038 (3/19/01).

All appeals of convictions in general sessions courts are reviewed de novo in circuit courts, OAG 01-079 (9/14/01).

A defendant who pleads guilty to a small offense in sessions court has no right to appeal, but a defendant who pleads guilty to a misdemeanor offense greater than a small offense in general sessions court may seek de novo review of only the sentence imposed in circuit court, OAG 01-079 (9/14/01).

While a case is pending before the grand jury, the general sessions court retains jurisdiction over the defendant and the warrant charges, except that its authority to determine bail matters ends after the case is bound over; the criminal court or circuit court, has authority to determine the conditions of bail "at any time prior to conviction," including during the period that the matter is pending before the grand jury, OAG 05-009 (1/20/05).

NOTES TO DECISIONS

Analysis

1. Constitutionality.
2. Jurisdiction.
3. Judicial Intent.
4. Jury Trial.
5. Unnecessary Delay.
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7. Waivers.
8. Objection by District Attorney.
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1. Constitutionality.

There was no constitutional merit to a defendant's contention that he was denied equal protection of law under Tenn. R. Crim. P. 5, which guarantees a preliminary examination to those whose prosecution is commenced by an arrest warrant, but fails to provide for such a hearing if the prosecution is initiated by the return of an indictment or presentment, except under certain limited circumstances. Keener v. State, 598 S.W.2d 836, 1980 Tenn. Crim. App. LEXIS 315 (Tenn. Crim. App. 1980).

There is no constitutional requirement for a preliminary hearing. State v. Lawson, 794 S.W.2d 363, 1990 Tenn. Crim. App. LEXIS 299 (Tenn. Crim. App. 1990), appeal denied, — S.W.2d —, 1990 Tenn. LEXIS 259 (Tenn. July 2, 1990).

Tenn. R. Crim. P. 5 does not violate separation of powers provisions of state constitution by allowing the district attorney general or his representatives to object to a proceeding in the city or general sessions court. State v. Brackett, 869 S.W.2d 936, 1993 Tenn. Crim. App. LEXIS 41 (Tenn. Crim. App. 1993), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 173 (Tenn. May 3, 1993).

2. Jurisdiction.

Since criminal contempt proceedings are not fully criminal, they do not fall under T.C.A. § 27-3-131 nor under Tenn. R. Crim. P. 5(c)(2) which provide for misdemeanor appeals from the general sessions court to circuit or criminal court; therefore, these statutes/rules do not give the criminal court of Davidson County the jurisdiction to hear the appeal of contempt charges arising from violations of the general sessions court's order of protection. State v. Wood, 91 S.W.3d 769, 2002 Tenn. App. LEXIS 330 (Tenn. Ct. App. 2002), appeal denied, — S.W.3d —, 2002 Tenn. LEXIS 526 (Tenn. Nov. 12, 2002).

3. Judicial Intent.

Tenn. R. Crim. P. 5 varies substantially from the federal rule of the same number, and was intended to be a statement of existing procedures in Tennessee courts, set out in an order that would aid understanding and practice. State v. Readus, 764 S.W.2d 770, 1988 Tenn. Crim. App. LEXIS 694 (Tenn. Crim. App. 1988).

4. Jury Trial.

Where a fine of more than $50.00 or any confinement of the accused may be imposed, the right to jury trial under the Tennessee constitution is well-established. State v. Dusina, 764 S.W.2d 766, 1989 Tenn. LEXIS 26 (Tenn. 1989), rehearing denied, 764 S.W.2d 766, 1989 Tenn. LEXIS 80 (Tenn. 1989).

5. Unnecessary Delay.

For the purpose of judging "unnecessary delay" under Tenn. R. Crim. P. 5(a), as raised in a suppression motion attacking a confession obtained during the questioned period, it is the time between the arrest and the obtaining of the confession sought to be suppressed that is central to the inquiry. State v. Readus, 764 S.W.2d 770, 1988 Tenn. Crim. App. LEXIS 694 (Tenn. Crim. App. 1988).

"Unreasonable delay" is one factor to be taken into account in evaluating the voluntariness of a confession; and if the totality of the surrounding circumstances indicates that a confession was voluntarily given, it shall not be excluded from evidence solely because of delay in carrying the confessor before a magistrate. State v. Readus, 764 S.W.2d 770, 1988 Tenn. Crim. App. LEXIS 694 (Tenn. Crim. App. 1988).

Exclusion of a confession given during a period of unnecessary delay, under Tenn. R. Crim. P. 5(a), is required only if an examination of the totality of the circumstances reveals that the statement was not voluntarily given. State v. Huddleston, 924 S.W.2d 666, 1996 Tenn. LEXIS 387 (Tenn. 1996).

If an individual is not brought before a magistrate within 72 hours, there has been unnecessary delay. State v. Carter, 16 S.W.3d 762, 2000 Tenn. LEXIS 195 (Tenn. 2000).

Nothing in Tenn. R. Crim. P. 5 provides that if there is an unnecessary delay between arrest and appearance before a magistrate, the charges against the accused must be dismissed. State v. Spratt, 31 S.W.3d 587, 2000 Tenn. Crim. App. LEXIS 465 (Tenn. Crim. App. 2000).

Where an admitted violation of Tenn. R. Crim. P. 5(a) occurred, defendant's confession made before being taken before a magistrate was suppressed because of the lack of attenuating circumstances and the fact that the defendant was detained pending further investigation even though law enforcement already had the victim's identification of defendant prior to the arrest. State v. Dean, 76 S.W.3d 352, 2001 Tenn. Crim. App. LEXIS 791 (Tenn. Crim. App. 2001), appeal denied, — S.W.3d —, 2002 Tenn. LEXIS 776 (Tenn. Mar. 11, 2002).

6. —Confessions.

Defendant's rights under both Tenn. R. Crim. P. 5(a) and the Fourth Amendment were violated by the state's failure to seek a prompt judicial determination of probable cause, while holding defendant in custody without a warrant. The Fourth Amendment violation required that the defendant's confession, though voluntary, be suppressed at trial. State

v. Huddleston, 924 S.W.2d 666, 1996 Tenn. LEXIS 387 (Tenn. 1996).

Although defendant allegedly was not taken before a magistrate until about a week after his arrest, in violation of Tenn. R. Crim. P. 5(a), such delay did not require suppression of his statements to police since they were deemed voluntarily given under the totality of the circumstances. Irick v. State, 973 S.W.2d 643, 1998 Tenn. Crim. App. LEXIS 59 (Tenn. Crim. App. 1998), appeal denied, — S.W.2d —, 1998 Tenn. LEXIS 348 (Tenn. June 15, 1998), cert. denied, Irick v. Tennessee, 525 U.S. 895, 119 S. Ct. 219, 142 L. Ed. 2d 180, 1998 U.S. LEXIS 5976 (1998).

A confession is not necessarily excluded from evidence simply because it was obtained during a period of unnecessary delay. State v. Carter, 16 S.W.3d 762, 2000 Tenn. LEXIS 195 (Tenn. 2000).

7. Waivers.

When defendant did not object to the want of a preliminary hearing by motion or otherwise before entering his plea of not guilty to the indictments, he waived his right to a hearing and cannot complain that he was denied a preliminary hearing. Houston v. Lane, 501 F. Supp. 5, 1978 U.S. Dist. LEXIS 14795 (E.D. Tenn. 1978), aff'd without opinion, 636 F.2d 1217, 1980 U.S. App. LEXIS 13343 (6th Cir. Tenn. 1980).

In all (except small) criminal offenses, the rights to be proceeded against only by indictment or presentment and to a trial by jury are grounded upon provisions of Tenn. Const., art. 1, §§ 6, 14, and these constitutional rights may be relinquished only by a valid written waiver. State v. Morgan, 598 S.W.2d 796, 1979 Tenn. Crim. App. LEXIS 321 (Tenn. Crim. App. 1979).

Tenn. R. Crim. P. 5 does not take away, abridge or modify the substantive right of an accused to trial by a jury, but merely provides an orderly procedural route by which this substantive right can be waived. State v. Ellis, 598 S.W.2d 826, 1980 Tenn. Crim. App. LEXIS 311 (Tenn. Crim. App. 1980).

Where defendant had not waived his right to a trial by jury in writing in the general sessions court, he still did not waive his right to a jury trial by his failure to demand a jury trial at the time of his appeal to the criminal court. State v. Jarnigan, 958 S.W.2d 135, 1997 Tenn. Crim. App. LEXIS 94 (Tenn. Crim. App. 1997).

8. Objection by District Attorney.

The right of district attorney under Tenn. R. Crim. P. 5 to object to defendant's waiver of right to presentment or indictment and trial by jury is not limited only to two circumstances, i.e., when guilty and when district attorney's office or representative is not present to prosecute case, but equally meritorious basis for rule is to grant state a right to a trial by jury. State v. Brackett, 869 S.W.2d 936, 1993 Tenn. Crim. App. LEXIS 41 (Tenn. Crim. App. 1993), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 173 (Tenn. May 3, 1993).

9. Appeal From City Court.

An appeal from the city court of Memphis, or any other city court so situated, from the revocation of a suspended sentence, which has been imposed under the exercise of jurisdiction to administer state law, goes to the criminal court of the appropriate county for trial de novo, just as would an appeal from a general sessions court. State v. Parrish, 598 S.W.2d 840, 1980 Tenn. Crim. App. LEXIS 316 (Tenn. Crim. App. 1980).

10. Warrantless Arrests.

Tenn. R. Crim. P. 5(a) clearly contemplates that normally, persons arrested without warrant will, "without unreasonable delay," be taken before a magistrate so that formal charges can be lodged against them by the filing of an affidavit of complaint. Without this follow-up procedure, the criminal prosecution terminates and so does the right to a preliminary hearing. State v. Best, 614 S.W.2d 791, 1981 Tenn. LEXIS 437 (Tenn. 1981).

Tenn. R. Crim. P. 5(e) does not apply to those situations where individuals are "arrested" without a warrant, or are merely taken into custody by the police or other authorities for the purpose of routine questioning, and are thereafter unconditionally released without being taken before a magistrate and without an affidavit of complaint being filed against them. State v. Best, 614 S.W.2d 791, 1981 Tenn. LEXIS 437 (Tenn. 1981).

11. Motion to Dismiss Indictment.

12. —Properly Overruled.

Where the preliminary examination on the charges was cut off by defendant's motion to suppress and even if the examination had been pursued successfully with the general session judge finding a lack of probable cause to bind him over nothing in the law would have prevented the state from initiating a new prosecution by indictment, the trial court properly overruled a motion to dismiss the indictment for failure to grant a preliminary hearing. State v. Gant, 622 S.W.2d 75, 1981 Tenn. Crim. App. LEXIS 372 (Tenn. Crim. App. 1981).

Trial court did not err by denying defendant's motion to dismiss the case based on the lack of a preliminary hearing because he offered no evidence to show that he was arrested pursuant to or served with the Tennessee warrant. The evidence showed that he was arrested in Nevada for alleged Nevada conduct, he was not served with the Tennessee warrant, the warrant was cancelled, and he was arraigned in Tennessee based on the presentment. State v. Green, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 376 (Tenn. Crim. App. June 28, 2019).

13. Continuance.

The mere failure of the state to object to a continuance, without also joining in the motion, does not amount to bad faith. State v. Mackey, 638 S.W.2d 830, 1982 Tenn. Crim. App. LEXIS 385 (Tenn. Crim. App. 1982).

14. Delay Allowed.

Defendant's confession was admissible even though he was arrested at 7:00 a.m. and was not taken before a magistrate until after the taping of his confession concluded at 1:30 p.m., six and one-half hours after his arrest. State v. Middlebrooks, 840 S.W.2d 317, 1992 Tenn. LEXIS 563 (Tenn. 1992), cert. dismissed, Tennessee v. Middlebrooks, 510 U.S. 124, 114 S. Ct. 651, 126 L. Ed. 2d 555, 1993 U.S. LEXIS 7942 (1993), cert. denied, Tennessee v. Middlebrooks, 510 U.S. 1064, 114 S. Ct. 740, 126 L. Ed. 2d 702, 1994 U.S. LEXIS 402 (1994), superseded by statute as stated in, State v. Banks, 271 S.W.3d 90, 2008 Tenn. LEXIS 963 (Tenn. 2008).

A statement given in violation of Tenn. R. Crim. P. 5(a) need not be suppressed if the statement was voluntarily given under the totality of the circumstances. Irick v. State, 973 S.W.2d 643, 1998 Tenn. Crim. App. LEXIS 59 (Tenn. Crim. App. 1998), appeal denied, — S.W.2d —, 1998 Tenn. LEXIS 348 (Tenn. June 15, 1998), cert. denied, Irick v. Tennessee, 525 U.S. 895, 119 S. Ct. 219, 142 L. Ed. 2d 180, 1998 U.S. LEXIS 5976 (1998).

15. Preliminary Examination.

A defendant's remedy for denial of a preliminary hearing is simply to request such a hearing and to move the court within thirty days of the arrest to dismiss any indictment returned while the hearing is pending. The remedy only ensures that the state may not avoid the hearing by delaying in order to obtain an indictment in the interim and does not include dismissal of the original warrant upon which the defendant was arrested. State v. Brooks, 880 S.W.2d 390, 1993 Tenn. Crim. App. LEXIS 616 (Tenn. Crim. App. 1993), rehearing denied, — S.W.2d —, 1993 Tenn. Crim. App. LEXIS 761 (Tenn. Crim. App. Nov. 18, 1993).

Prisoner involved in a killing within the prison was not arrested for Tenn. R. Crim. P. 5 purposes when he was removed from his prison unit and placed in lock down pending trial because the restricted nature of his confinement was part of an internal disciplinary action by the prison authorities and he was not entitled to a preliminary hearing to reweigh the probable cause determination made by the grand jury. State v. Goss, 995 S.W.2d 617, 1998 Tenn. Crim. App. LEXIS 1180 (Tenn. Crim. App. 1998).

Discrimination claims of two men, who were both hearing-impaired and mute, stemming from the lack of an interpreter at their initial appearances were summarily dismissed; both men entered pleas of not guilty and received a trial date, as contemplated by Tenn. R. Crim. P. 5, and both were present for the proceeding, as contemplated by Tenn. R. Crim. P. 43, and neither man presented an argument that the outcome would have been different if an interpreter would have been present. Tucker v. Hardin County, 448 F. Supp. 2d 901, 2006 U.S. Dist. LEXIS 60754 (W.D. Tenn. 2006), aff'd, Tucker v. Tennessee, 539 F.3d 526, 2008 FED App. 329P, 2008 U.S. App. LEXIS 18618 (6th Cir. Aug. 29, 2008).

Rule 5.1. Preliminary Hearing. —

(a) Procedures. — The following rules apply to a preliminary hearing:

(1) Evidence. — The finding that an offense has been committed and that there is probable cause to believe that the defendant committed it shall be based on evidence which may not be inadmissible hearsay except documentary proof of ownership and written reports of expert witnesses. Rules excluding evidence acquired by unlawful means are applicable.

(2) Defendant's Right to Present Evidence and Cross-Examine. — The defendant may cross-examine witnesses against him or her and may introduce evidence.

(3) Content and Access to Record of Proceeding. — The evidence of the witnesses does not have to be reduced to writing by the magistrate, or under the magistrate's direction, and signed by the respective witnesses; but the proceedings shall be preserved by electronic recording or its equivalent. If the defendant is subsequently indicted, such recording shall be made available to the defendant or defense counsel so they may listen to the recording in order to be apprised of the evidence introduced in the preliminary hearing. Where the recording is no longer available or is substantially inaudible, the trial court shall order a new preliminary hearing upon motion

of the defendant filed not more than 60 days following arraignment. The indictment shall not be dismissed while the new preliminary hearing is pending. If the magistrate conducting the new preliminary hearing determines that probable cause does not exist, the magistrate shall certify such finding to the trial court and the trial court shall then dismiss the indictment. The discharge of the defendant by the dismissal of the indictment in such circumstances does not preclude the state from instituting a subsequent prosecution for the same offense.

(b) When Probable Cause Found. — When the magistrate at a preliminary hearing determines from the evidence that an offense has been committed and there is probable cause to believe that the defendant committed it, the magistrate shall bind the defendant over to the grand jury and either release the defendant pursuant to applicable law or commit the defendant to jail by a written order.

(c) When Probable Cause Not Found. — When the magistrate determines from the evidence that there is not sufficient proof to establish that an offense has been committed or probable cause that the defendant committed it, the magistrate shall discharge the defendant. The discharge of the defendant does not preclude the state from instituting a subsequent prosecution for the same offense. The recording of the preliminary hearing shall be made available to the defendant in the event the defendant is subsequently prosecuted for the same offense by indictment or presentment. The remedy for the failure to preserve the recording in this circumstance shall be as set forth in subsection (a)(3).

(d) Transfer of Records. — At the conclusion of a proceeding where probable cause is found, the magistrate shall promptly transmit to the criminal court clerk all papers and records in the proceedings. When probable cause is not found, the magistrate shall return the records and papers to the general sessions court clerk. [As amended by order filed January 8, 2008, effective July 1, 2008; and by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. The subject of the preliminary hearing has been the focus of a considerable amount of litigation in recent years. The purpose, scope, and quality of evidence to be admitted upon a preliminary hearing have likewise been the subjects of intense debate. Despite the language in *McKeldin v. State*, 516 S.W.2d 82 (Tenn. 1974), suggesting that this stage of the proceeding is a discovery procedure for the accused, it is the commission's position, to the contrary, that *McKeldin* does not convert the preliminary hearing into a "fishing expedition," with unlimited potential for discovery. The case holds that the preliminary hearing is a probable cause hearing, which can result in providing discovery to the defendant, an important byproduct of its probable cause function.

Discovery is specifically addressed elsewhere in these rules, and the rights of the accused and of the state clearly spelled out. As stated above, the preliminary hearing is a probable cause hearing, and the scope of the proceeding is under the control of the magistrate in the exercise of a sound discretion. It is unnecessary for the magistrate to hear more of the state's proof than is necessary to establish probable cause, and the magistrate may terminate the hearing at any time that probable cause has been established and the accused has been afforded the opportunity to cross-examine the witnesses called by the state and to present defense proof reasonably tending to rebut probable cause. There is no right of the accused to call as witnesses all of the state's witnesses and question them. The magistrate may permit the accused to call witnesses summoned by the state, if in the exercise of a sound discretion the magistrate determines such testimony to be of use to the magistrate in determining probable cause, or the absence thereof. To repeat, the scope of the hearing is under the control of the magistrate, in the exercise of a sound discretion and governed by principles of fundamental fair-

ness. The purpose of the hearing is to adjudicate the existence or absence of probable cause, and not to discover the state's case.

The quality of the evidence required is clear; it may not be inadmissible hearsay, except in those two instances deemed by the commission to be sufficient to warrant their being exceptions, i.e., documentary proof of ownership and written reports of expert witnesses.

Rule 5.1(a)(3) is drafted to make it clear that the constitutional right of the defendant to have access to a recording of the proceedings must be honored. See *Britt v. North Carolina*, 404 U.S. 226 (1971). There is no requirement that a written transcript of the proceedings be made; and certainly the requirement for an electronic recording can be waived, if knowingly and voluntarily done.

Advisory Commission Comments [2008]. The amendments provide remedies when the recording of a preliminary hearing is lost or damaged.

Advisory Commission Comments [2016]. Consistent with simultaneous amendments to Tenn. R. Crim. P. 5, Tenn. R. Crim. P. 5.1 and its original Advisory Commission Comments are amended to substitute the term "preliminary hearing" for the obsolete term "preliminary examination." No substantive changes are made to the Rule.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 8, 2008, was ratified and approved by 2008 House Resolution 231 and Senate Resolution 219. The order promulgating the amendment of this rule provided that it take effect July 1, 2008.

The amendment of Rule 5.1, and its existing Advisory Commission Comments and the addition of [2016] Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 147 and Senate Resolution 80. The order promulgating the amendment of Rule 5.1 and its existing Advisory Commission Comments and the addition of [2016] Advisory Commission Comments provided that it take effect July 1, 2016.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 3-5.1-1 — 3-5.1-3.

Tennessee Jurisprudence. 8 Tenn. Juris., Criminal Procedure, § 22; 10 Tenn. Juris., Double Jeopardy, § 12.

Law Reviews. Don't miss a move. Making rules 5 and 5.1 work for your clients in General Sessions Court (Robert Little), 37 Tenn. B.J. 12 (2001).

Attorney General Opinions. Access to tape recordings of court proceedings, OAG 99-139 (7/27/99).

Tape recordings of court proceedings, OAG 99-140 (7/27/99).

T.C.A. § 69-10-221 does not preclude a preliminary hearing before the general sessions court and/or a bindover to the grand jury, OAG 01-001 (1/4/01).

NOTES TO DECISIONS

Analysis

1. In General.
2. Hearsay Evidence.
3. Rule Exclusive.
4. Discharge.
5. —Allegations Required.
6. Recording of Proceedings.
7. Dismissal Required.
8. Remedies.

1. In General.

A preliminary hearing is ordinarily a much less searching exploration into the merits of a case than a trial, simply because its function is the more limited one of determining whether probable cause exists to hold the accused for trial. State v. Armes, 607 S.W.2d 234, 1980 Tenn. LEXIS 507 (Tenn. 1980).

Supreme court held that the language and purpose of Tenn. R. Crim. P. 5.1 dictated that the critical issue was whether the defense had been apprised of the evidence introduced at the preliminary hearing by receiving the same information as an "electronic recording or its equivalent." The rule, however, states no sanction or remedy for a failure to prepare, preserve, or make available such a recording. State v. Graves, 126 S.W.3d 873, 2003 Tenn. LEXIS 487 (Tenn. 2003).

2. Hearsay Evidence.

If admitted without objection, hearsay could constitute sufficient evidence in a preliminary hearing. Waugh v. State, 564 S.W.2d 654, 1978 Tenn. LEXIS 541 (Tenn. 1978).

3. Rule Exclusive.

Tenn. R. Crim. P. 1(c) (now Tenn. R. Crim. P. 1(b)(3)) defines the scope of the rules in such manner as to include "preliminary examinations pursuant to Rule 5.1." Tenn. R. Crim. P. 5.1 governs preliminary hearings, alone, and its inclusion does not operate to make any other rule applicable to such hearings. State v. Willoughby, 594 S.W.2d 388, 1980 Tenn. LEXIS 405 (Tenn. 1980).

4. Discharge.

5. —Allegations Required.

An allegation of absence of admissible evidence sufficient to support a finding of probable cause upon which a general sessions judge could enter the bind over order is

required to entitle an accused to present evidence on a motion to dismiss a bind over order. Miller v. State, 621 S.W.2d 156, 1981 Tenn. Crim. App. LEXIS 369 (Tenn. Crim. App. 1981).

6. Recording of Proceedings.

The failure to provide a recording of proceedings at the preliminary hearing may constitute harmless error. State v. Butts, 640 S.W.2d 37, 1982 Tenn. Crim. App. LEXIS 390 (Tenn. Crim. App. 1982).

Where there is no evidence that the absence of an electronic recording prejudices the defendant and trial counsel has access to other statements made by the witnesses and is able to cross-examine them, the loss of the recording may constitute harmless error. State v. Carter, 970 S.W.2d 509, 1997 Tenn. Crim. App. LEXIS 271 (Tenn. Crim. App. 1997).

Trial court did not err in not dismissing an indictment and remanding the case for another preliminary hearing where, although the initial preliminary hearing had not been preserved electronically, all of the substantive evidence that had been subjected to cross-examination at the first hearing was available to defendant, and the failure to have recorded the hearing electronically was harmless error. State v. Graves, 126 S.W.3d 873, 2003 Tenn. LEXIS 487 (Tenn. 2003).

Language and purpose of Tenn. R. Crim. P. 5.1(a) dictate that the critical issue must be whether the defense was apprised of the evidence introduced at the preliminary hearing by receiving the same information as an "electronic recording or its equivalent." The state's failure to preserve an electronic recording or its equivalent of a preliminary hearing under Rule 5.1(a) therefore requires the dismissal of the indictment and a remand for a new preliminary hearing, unless the state establishes: (1) That all material and substantial evidence that was introduced at the preliminary hearing was made available to the defendant; and (2) That the testimony made available to the defendant was subject to cross-examination. In short, although automatic dismissal of the indictment is not required, the proper analysis should not simply focus on whether a violation of the rule was harmless error based on the degree of the evidence of guilt. State v. Graves, 126 S.W.3d 873, 2003 Tenn. LEXIS 487 (Tenn. 2003).

7. Dismissal Required.

Dismissal of an indictment was required where the state acted in bad faith in not opposing defendant's motion to suppress at a preliminary hearing. State v. Golden, 941 S.W.2d 905, 1996 Tenn. Crim. App. LEXIS 438 (Tenn. Crim. App. 1996).

8. Remedies.

Although Tenn. R. Crim. P. 5.1(a) provides no guidance as to the remedy to be applied for a violation of its terms, we believe that the appropriate procedural remedy must be tailored to the express language and purpose of the rule. Rule 5.1(a) is clearly a mandatory rule, as illustrated by its requirements that "the proceedings shall be preserved by electronic recording or its equivalent" and that "such record shall be made available" to the defendant or defense counsel. State v. Graves, 126 S.W.3d 873, 2003 Tenn. LEXIS 487 (Tenn. 2003).

Because the purpose of Tenn. R. Crim. P. 5.1(a) is to provide the defense with material that can be used to prepare for trial, a defendant should raise, and the trial court should attempt to resolve, this critical issue prior to trial. If the trial court denies defendant's motion to dismiss the indictment for failure to comply with Rule 5.1(a), defendant may request an interlocutory or extraordinary appeal and attempt to demonstrate that appellate review is appropriate under T.R.A.P. 9 and 10. State v. Graves, 126 S.W.3d 873, 2003 Tenn. LEXIS 487 (Tenn. 2003).

Defendant's petition for postconviction relief was properly denied as trial counsel was not ineffective for failing to move for a new preliminary hearing due to an incomplete recording of the first hearing because trial counsel stated that it would have been the same testimony; counsel was familiar with the State's witnesses and prepared to cross-examine them at trial; and both witnesses were cross-examined at trial about statements they made at the preliminary hearing. Cartwright v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 239 (Tenn. Crim. App. Apr. 14, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 430 (Tenn. Aug. 7, 2020).

III. INDICTMENT AND INFORMATION.

Rule 6. The Grand Jury. —

(a) Formation of the Grand Jury. —

(1) Formation at a Regular Term. — On the first day of each term of court at which a grand jury is required to be impaneled, the judge of the court authorized by law to charge the grand jury and to receive its report shall direct the names of all the qualified jurors in attendance for the criminal courts of the county to be written on separate slips of paper and placed in a

box or other suitable receptacle and drawn out by the judge in open court. The foreperson and the twelve qualified jurors whose names are first drawn constitute the grand jury for the term and shall attend the court until dismissed by the judge or until the next term.

(2) Formation at a Special Term. — The judge presiding at any special term of the court may impanel a grand jury in the same manner and of the same powers as at a regular term.

(3) Formation of Concurrent Grand Juries. — When the expeditious administration of justice so requires, the court may likewise impanel a second grand jury to operate concurrently with the first.

(4) Oath of Grand Jurors. — The following oath shall be administered to all members of the grand jury, including the foreperson:

You as members of the grand jury do solemnly swear (or affirm) that you will diligently inquire, and true presentment make, of all offenses given you in charge, or otherwise brought to your knowledge, committed or triable within this county; that you will keep secret the state's counsel, the other jurors' and your own; that you will present no person from hatred, malice, or ill will, nor leave any unpresented through fear, favor, or affection, or for any reward, or the promise or hope thereof, but that you will present the truth, the whole truth, and nothing but the truth, according to the best of your skill and understanding. So help you God.

(5) Charge to the Grand Jury. — After the grand jury has been impaneled and sworn, the judge shall instruct it concerning its powers and duties and the relevant law.

(b) Vacancies on the Grand Jury. —

(1) Vacancy as to Grand Juror. — When any grand juror becomes unable to serve out the term or is excused on any ground, the court shall fill the vacancy from the original panel. If the court is unable to fill the vacancy from the original panel, it must do so from qualified persons selected in accordance with Rule 6(b)(2).

(2) Vacancy as Foreperson. — When the foreperson of the grand jury is unable to serve or is relieved, the court shall appoint a new one according to Rule 6(g) until such time as the foreperson is able to serve or until expiration of his or her term.

(c) Disqualification of Grand Juror for Interest. —

(1) Disqualification. — No member of the grand jury shall be present during–or take part in–the consideration of a charge or the deliberation of the other grand jurors, if:

(A) the member is charged with an indictable offense;

(B) the member is a prosecutor;

(C) the offense was committed against the member's person or property; or

(D) the member is related to the person charged or to the victim of the alleged crime by blood or marriage within the sixth degree, computed by the civil law.

(2) Filling Vacancy Created by Temporary Disqualification. — When a grand juror is excluded because of interest and fewer than twelve grand jurors remain to investigate any matter, the court shall fill the vacancy according to Rule 6(b) only during such investigation.

(d) Powers of the Grand Jury. — The grand jury has inquisitorial powers over–and has the authority to return a presentment–of all indictable or presentable offenses found to have been committed or to be triable within the county. At all proper hours, the grand jurors are entitled to free access to all county offices and buildings and to examine, without charge, all records and other papers of any county officers in any way connected with the grand jurors' duties.

(e) Duties of the Grand Jury. — It is the duty of the grand jury to:

(1) inquire into, consider, and act on all criminal cases submitted to it by the district attorney general;

(2) inquire into any report of a criminal offense brought to its attention by a member of the grand jury;

(3) inquire into the condition and management of prisons and other county buildings and institutions within the county;

(4) inquire into the condition of the county treasury;

(5) inquire into the correctness and sufficiency of county officers' bonds;

(6) inquire into any state or local officers' abuse of office; and

(7) report the results of its actions to the court.

(f) Individual Grand Juror's Duty to Inform. — If a member of the grand jury knows or has reason to believe that an indictable public offense has been committed in the county, he or she shall inform the other jurors, who shall investigate it.

(g) Appointment, Qualifications, Term, Compensation, Vote, and Duties of Foreperson. —

(1) Appointment of Foreperson. — The judge of the court authorized by law to charge–and receive the report of–the grand jury shall appoint the grand jury foreperson. When concurrent grand juries are impaneled, the court shall appoint a foreperson for each grand jury.

(2) Qualifications of Foreperson. — The foreperson shall possess all the qualifications of a juror.

(3) Duration of Appointment. — The foreperson shall hold office and exercise powers for a term of two (2) years from appointment. In the discretion of the presiding judge, the foreperson may be removed, relieved, or excused from office for good cause at any time.

(4) Duties of Foreperson. — The grand jury foreperson has the following duties:

(A) to assist and cooperate with the district attorney general in ferreting out crime, to the end that the laws may be faithfully enforced;

(B) out of term, to advise the district attorney general about law violations and to furnish names of witnesses, whom the district attorney general may, if he or she deems proper, order summoned to go before the grand jury at the next term;

(C) in term, (in addition to the district attorney general who also has such authority) to order the issuance of subpoenas for grand jury witnesses; and

(D) to vote with the grand jury, which vote counts toward the twelve necessary for the return of an indictment.

(5) Compensation. — The county legislative body determines the foreperson's compensation, which must not be less than ten dollars ($10.00) per day

for each day the foreperson's grand jury is actually in session. The foreperson's compensation may not be diminished during the term of appointment. The foreperson shall receive no other compensation for these services. The foreperson's compensation shall be paid out of the county treasury in the same manner as jurors are paid.

(h) Duties of District Attorney General. —

(1) Attendance. — When required by the grand jury, the district attorney general may appear before the grand jury for the purpose of giving legal advice, but shall not be present — nor shall any other officer or person other than the grand jurors be present — when the grand jurors vote on an indictment or presentment.

(2) Preparation of Indictments. — The district attorney general shall promptly prepare indictments for the grand jury in all cases when a defendant has been bound over to answer a criminal charge or is in the sheriff's custody.

(i) Duties of Clerks. —

(1) Furnishing Information to District Attorney General. — On the first day of the term, the clerk shall furnish the district attorney general with the names of the prosecutor, defendant, and witnesses in each case.

(2) Issuing Subpoenas for Witnesses. — On application of the grand jury, the court clerk shall issue subpoenas for any witnesses the grand jury requires to give evidence before it.

(3) Issuing Process Between Terms. — Between terms of court, when the district attorney general believes it necessary to secure the ends of justice and protect the interests of the state, he or she may direct the clerks to issue process to secure the attendance of witnesses before the grand juries on the first day of the succeeding term.

(j) Witnesses Before Grand Jury. —

(1) Sending for Witnesses by Grand Jury. — The grand jury shall send for witnesses whenever the grand jury or any member suspects that an indictable offense has been committed.

(2) Process for Grand Jury Witnesses. — Process for grand jury witnesses shall be directed to the sheriff or other lawful officer, and may also be executed and returned by any officer the court appoints to assist the grand jury.

(3) Failure of Witnesses to Attend. — Witnesses subpoenaed by the grand jury who fail to attend may be proceeded against as other defaulting witnesses.

(4) Oath of Grand Jury Witnesses. — Witnesses summoned before the grand jury may be sworn by the clerk or foreperson. The foreperson of the grand jury may administer the oath to grand jury witnesses in all cases where the clerks of the criminal and circuit courts may administer such oaths. The person administering the oath shall indorse the fact on the subpoena, and sign his or her name to such indorsement.

(5) Compelling Witnesses to Testify. — A person who refuses to testify before the grand jury may be compelled to do so by the court:

(A) on motion of the district attorney general; and

(B) on a grant of immunity from prosecution for any offense in relation to which the person has been ordered to testify.

(6) Immunity of Certain Witnesses from Prosecution. — No witness shall be indicted for any offense in relation to which the district attorney general has compelled the witness to testify before the grand jury.

(7) Limited Detention of Grand Jury Witnesses. — The district attorney general shall endeavor to detain witnesses only one (1) day for appearance before the grand jury.

(8) Limited Claim of Attendance of Witnesses Living Within Ten Miles. — Witnesses who live within ten (10) miles of the court may claim only one (1) day's attendance before the grand jury, unless detained longer by court order.

(k) Secrecy of Proceedings; Exception. —

(1) Grand Jury Proceedings Secret. – Every member of the grand jury shall keep secret the proceedings of that body and the testimony given before it, except as provided in Rule 6(k)(2).

(2) Exception to Rule of Secrecy. — The court may require a grand juror to reveal the testimony of a grand jury witness:

(A) to ascertain whether the grand jury testimony is consistent with that given by the witness before the court; or

(B) to disclose the grand jury testimony of any witness charged with perjury.

(*l*) Grand Jurors as Petit Jurors. —

(1) Grand Jurors Serving as Petit Jurors. — Except as provided in Rule 6(l)(2), the grand jurors may act as petit jurors in civil or criminal cases when not engaged in grand jury business.

(2) Grand Jurors Barred as Petit Jurors in Certain Cases. — No grand juror may sit as a petit juror for any cause involving a defendant in any criminal cause heard by the grand jury of which he or she is a member.

Advisory Commission Comments. This rule substantially reflects existing law, including the provision allowing concurrent grand juries. The voting power of the grand jury foreperson is made explicit. The judge's charge to the grand jury "shall instruct it concerning its powers and duties and expound the law to it as the judge shall deem proper."

Witness immunity provided in Rule 6(j)(5) and (6) requires comment. The first provision provides that: "A person refusing to testify before the grand jury may be compelled to testify by the court on motion of the district attorney general and upon a grant of immunity from prosecution for any offense in relation to which the person has been ordered to testify." This rule is triggered by the refusal of a witness to testify before a grand jury.

The second says: "No witness shall be indicted for any offense in relation to which the district attorney general has compelled the witness to testify before the grand jury." Note that the rule says "the district attorney general has compelled the witness to testify" rather than "has testified."

Rule 6(j)(5) carries the subtitle "Compelling Witnesses to Testify." It provides a tool whereby one can be required to give up an asserted Fifth Amendment right, but not until the witness is explicitly given a grant of immunity from prosecution (not just indictment, so one already indicted could be so compelled) for any offense in relation to which the witness has been ordered to testify.

Rule 6(j)(6) is subtitled "Immunity of Certain Witnesses from Prosecution" and expressly limits the immunity to indictment for offenses about which the witness was compelled to testify by the district attorney general. This rule grants immunity only to those witnesses compelled to testify by the district attorney general, or the district attorney general's assistant or agent, by virtue of subpoena or order of the judge. The commission does not desire to depart from the scope of the immunity given under T.C.A. § 40-1623 [now repealed], and the cases decided thereunder.

The commission views the immunity rules as being limited strictly to the instances addressed by them. Rule 6(j)(5) is triggered only where there is a Fifth Amendment or other refusal of a witness to testify and an explicit court order to do so; Rule 6(j)(6) is triggered only when the district attorney general compels the witness to testify.

T.C.A. §§ 40-12-104 – 40-12-107 provide a procedure designed to give citizens free access to the local grand jury. Under this statute, persons applying to testify before the grand jury are not immune from prosecution based upon or related to their testimony, except under express grant of immunity by the grand jury. The statute expressly states that it is supplemental to existing law.

Cross-References. Application to testify by person having knowledge of offense, T.C.A. §§ 40-12-104 — 40-12-107.

Grant of immunity to investigative grand jury witness, T.C.A. § 40-12-215.

Immunity of certain witnesses, T.C.A. § 40-12-106.

Notice of grand jury meeting to be posted by court clerk, T.C.A. § 40-12-105.

Qualifications of juror, T.C.A. § 22-1-101.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 3-6-1, 3-6-2, 3-6-4, 3-6-6, 3-6-7, 3-16-2, 6-3-3.

Tennessee Jurisprudence. 1 Tenn. Juris, Abatement, Survival and Revival, § 15; 8 Tenn. Juris., Criminal Procedure, § 26; 14 Tenn. Juris., Grand Jury, §§ 3-9; 17 Tenn. Juris., Larceny, § 7; 18 Tenn. Juris., Mobs, Riots, § 2; 25 Tenn. Juris., Witnesses, §§ 2, 3, 53.

Law Reviews. Should Tennessee Bury the Dead Man Statute As Arkansas Has? (W. Dent Gitchel), 18 Mem. St. U.L. Rev. 195 (1989).

The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure, VI. Hearing of Appeals (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 86.

Attorney General Opinions. Removal of oath of secrecy, OAG 90-06 (1/16/90).

Authority of judge and presence of non-jury members, OAG 95-106 (10/19/95).

Procedure where failure to appear in municipal court with general sessions jurisdiction charged, OAG 99-096 (4/27/99).

There is no conflict in the same person acting as both the grand jury foreperson and the security officer for the general sessions court in the same county, OAG 05-162 (10/20/05).

NOTES TO DECISIONS

Analysis

1. Vacancies.
2. Role of Prosecutor.
3. Recording of Testimony.
4. Appearance by Police Officer.
5. Discriminatory Selection.
6. Unsworn Witness.
7. Terms of Forepersons.
8. Immunity of Witnesses.
9. Presence of Other Individuals When the Question is Taken.
10. Use of Grand Jury Testimony at Trial.

1. Vacancies.

Absence of grand jury foreman from court was good cause for his removal, relief or excuse from office and for appointment of a substitute. State v. Gautney, 607 S.W.2d 907, 1980 Tenn. Crim. App. LEXIS 326 (Tenn. Crim. App. 1980).

2. Role of Prosecutor.

Prosecuting attorneys have no authority to appear before the grand jury in session for any purpose other than the giving of legal advice. Tiller v. State, 600 S.W.2d 709, 1980 Tenn. LEXIS 464 (Tenn. 1980), superseded by statute as stated in, State v. Gonzales, 638 S.W.2d 841, 1982 Tenn. Crim. App. LEXIS 452 (Tenn. Crim. App. 1982).

Under a former statute that was identical to Tenn. R. Crim. P. 6(h)(1) of this rule, the court ruled that there was no basis for expanding the ordinary meaning of the common words "giving legal advice" to include the examination of witnesses before the jury, a function which is ordinarily understood to be quite distinct from the giving of legal advice; thus, nothing authorized the attendance of the prosecuting attorney before the grand jury for the examination of witnesses. Tiller v. State, 600 S.W.2d 709, 1980 Tenn. LEXIS 464 (Tenn. 1980), superseded by statute as stated in, State v. Gonzales, 638 S.W.2d 841, 1982 Tenn. Crim. App. LEXIS 452 (Tenn. Crim. App. 1982).

The district attorney general is not authorized to record or have recorded upon his behalf the testimony of any witnesses appearing before the grand jury. Tiller v. State, 600 S.W.2d 709, 1980 Tenn. LEXIS 464 (Tenn. 1980), superseded by statute as stated in, State v. Gonzales, 638 S.W.2d 841, 1982 Tenn. Crim. App. LEXIS 452 (Tenn. Crim. App. 1982).

A district attorney general may appear before the grand jury to give substantive evidence. State v. Gonzales, 638 S.W.2d 841, 1982 Tenn. Crim. App. LEXIS 452 (Tenn. Crim. App. 1982).

Prosecutorial abuse of the grand jury process occurs when the dominant purpose of a grand jury proceeding is to investigate a defendant for an offense for which he or she has already been indicted. State v. Mangrum, 403 S.W.3d 152, 2013 Tenn. LEXIS 312 (Tenn. Mar. 27, 2013).

Trial court properly denied an already indicted defendant's motion to quash a subpoena requiring a witness to testify before a reconvened grand jury, as she failed to rebut the presumption that the prosecutor had a legitimate dominant purpose for issuing the subpoena, to allow the grand jury to act on the witness's testimony, and not to discover information of which the prosecutor was already aware. State v. Mangrum, 403 S.W.3d 152, 2013 Tenn. LEXIS 312 (Tenn. Mar. 27, 2013).

3. Recording of Testimony.

Tenn. R. Crim. P. 16(a)(1) permits the discovery of the testimony of a defendant before the grand jury, and therefore it is proper for the grand jury, but not the district attorney general, to record or have recorded the testimony of witnesses appearing before the body, provided that the injunction of secrecy contained in Tenn. R. Crim. P. 6(k) is strictly adhered to. Tiller v. State, 600 S.W.2d 709, 1980 Tenn. LEXIS 464 (Tenn. 1980), superseded by statute as stated in, State v. Gonzales, 638 S.W.2d 841, 1982 Tenn. Crim. App. LEXIS 452 (Tenn. Crim. App. 1982).

4. Appearance by Police Officer.

Although no one may prevent a person from appearing before a grand jury, and indeed it is his duty to do so if he has evidence of a crime, court held that police officer's appearance before a grand jury in violation of orders was not the reason that he was suspended indefinitely, for the real issue was whether the officer was subject to obedience to orders of his superiors; in essence, what was demanded of him was that he handle his investigation in accordance with official channels and police policies and procedures, and in cooperation with the detective division. Watts v. Civil Service Board, 606 S.W.2d 274, 1980 Tenn. LEXIS 501 (Tenn. 1980), cert. denied, Watts v. Civil Service Bd., 450 U.S. 983, 101 S. Ct. 1519, 67 L. Ed. 2d 818, 1981 U.S. LEXIS 1234 (1981).

5. Discriminatory Selection.

Where during the five years prior to the return of the indictment in the case on appeal, only five individuals had held the office of county grand jury foreman and of these five, one was a woman, given the relatively small number of appointments, the failure to appoint more women was not prima facie the result of systematic discrimination based on gender. State v. Beal, 614 S.W.2d 77, 1981 Tenn. Crim. App. LEXIS 325 (Tenn. Crim. App. 1981).

Appellant only proved two prongs of the three-pronged test for equal protection violation in grand jury foreman selection with the claims that black persons are members of a group recognizable as a distinct class capable of being singled out for different treatment, and that the jury selection method was subject to the abuse; however, appellant failed to prove that blacks have been unrepresented as forepersons in comparison to the proportion of blacks in the county population where there had been only three foremen since 1947. State v. Hailey, 658 S.W.2d 547, 1983 Tenn. Crim. App. LEXIS 411 (Tenn. Crim. App. 1983).

6. Unsworn Witness.

Evidence given to the grand jury by an unsworn witness will support an indictment. State v. Gonzales, 638 S.W.2d 841, 1982 Tenn. Crim. App. LEXIS 452 (Tenn. Crim. App. 1982).

7. Terms of Forepersons.

Tenn. R. Crim. P. 6 contains no limit on the number of two-year terms for which a foreperson may be reappointed. State v. Hailey, 658 S.W.2d 547, 1983 Tenn. Crim. App. LEXIS 411 (Tenn. Crim. App. 1983).

8. Immunity of Witnesses.

Tenn. R. Crim. P. 6(j)(7) (now Tenn. R. Crim. P. 6(j)(6)) immunizes a witness from indictment for offenses related to the testimony given by the witness testifying under subpoena or by order of the judge before a regular grand jury. State v. McCollum, 904 S.W.2d 114, 1995 Tenn. LEXIS 398 (Tenn. 1995).

9. Presence of Other Individuals When the Question is Taken.

Presence of a non-participating, newly appointed grand jury foreman who was attempting to become familiar with the operation of a grand jury during their proceedings does not violate the prohibition against the presence of the district attorney or any other officer. State v. Farmer, 927 S.W.2d 582, 1996 Tenn. Crim. App. LEXIS 5 (Tenn. Crim. App. 1996).

10. Use of Grand Jury Testimony at Trial.

Where a victim's daughter testified before a reconvened grand jury after defendant had already been indicted for murder, given the fact that defendant's husband was indicted as an accessory after the fact as a consequence of the second grand jury proceeding, the trial court did not err by denying defendant's motion to suppress the daughter's trial testimony and to dismiss the indictments. State v. Mangrum, 403 S.W.3d 152, 2013 Tenn. LEXIS 312 (Tenn. Mar. 27, 2013).

Rule 7. Indictments, Presentments, and Informations. —

(a) General Provision. — The definition, form, use, return, endorsements, content, and procedure relating to indictments, presentments, and criminal informations are as provided by law.

(b) Amending Indictments, Presentments and Informations. —

(1) With Defendant's Consent. — With the defendant's consent, the court may amend an indictment, presentment, or information.

(2) Without Defendant's Consent. — Without the defendant's consent and before jeopardy attaches, the court may permit such an amendment if no

additional or different offense is charged and no substantial right of the defendant is prejudiced.

(c) BILL OF PARTICULARS. — On defendant's motion, the court may direct the district attorney general to file a bill of particulars so as to adequately identify the offense charged.

Advisory Commission Comments. The criminal information has been used in state cases under the provisions of § 40-3-101, but because the Constitution of Tennessee, Art. 1, § 14, provides that no person shall be put to answer any criminal charge but by presentment, indictment or impeachment, its use is limited to those cases in which there is an agreement by the defendant to be bound by its use.

Subdivision (a) simply adopts the existing law, and leaves it subject to whatever changes and construction that may be made.

The first sentence of (b) deals with permissive amendments and follows existing statutory law per T.C.A. § 40-1713 [now repealed], while the second sentence permits some amendments in the face of the defendant's objection, as originally proposed by the Law Revision Commission in § 40-9-105 of its proposed code. The same constitutional provision set out at the beginning of this comment constitutes the basis for a caveat as to the extent to which nonconsensual amendments may constitutionally be made without resubmitting the matter to the grand jury.

Subdivision (c) provides for a bill of particulars when needed by the defendant to know precisely what he or she is charged with. This provision is to be construed to serve that singular purpose, and is not meant to be used for purposes of broad discovery.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 3-7-1 — 3-7-3, 3-16-1.

Tennessee Jurisprudence. 21 Tenn. Juris., Receiving Stolen Goods, § 3; 25 Tenn. Juris., Witnesses, § 53.

Law Reviews. Amending the Indictment: Substance Over Form (David L. Raybin), 39 Tenn. B.J. 14 (2003).

NOTES TO DECISIONS

ANALYSIS

1. Amendment.
2. Consent.
3. Bill of Particulars.

1. Amendment.

Where a review of the indictment indicated that on its face the instrument clearly charged all of the elements of robbery under T.C.A. § 39-2-501 [repealed] and thus the inclusion of a reference to T.C.A. § 39-2-104 [repealed] was likely merely an unintentional drafting error, amendment to replace reference to § 39-2-104 [repealed] with § 39-2-501 [repealed] did not charge an "additional or different offense" and did not "prejudice the substantial rights of the defendant." State v. Beal, 614 S.W.2d 77, 1981 Tenn. Crim. App. LEXIS 325 (Tenn. Crim. App. 1981).

The addition of the word "deliberately" to an indictment for first-degree murder did not charge a different offense. State v. Goodman, 643 S.W.2d 375, 1982 Tenn. Crim. App. LEXIS 469 (Tenn. Crim. App. 1982).

Where by nonconsensual amendment to indictment, appellant's name was added to that section of charging instrument which alleged the felonious intent necessary to transform criminal trespass into first-degree burglary, and thus charged appellant with a different offense than that alleged in the original indictment, the trial court erred in overruling his objection to the state's motion to amend. State v. Sherman, 656 S.W.2d 47, 1983 Tenn. Crim. App. LEXIS 349 (Tenn. Crim. App. 1983).

Amendment of indictment, before jury was sworn and over defendant's objection, was proper where it was for the purpose of correcting the date of the alleged offense and the amendment did not change the class X classification of the offense. State v. Sexton, 656 S.W.2d 898, 1983 Tenn. Crim. App. LEXIS 408 (Tenn. Crim. App. 1983).

Amending the complaint to insert a typographical omission which was an unnecessary amendment was an exception to the rule that amendments are not allowed over objection once jeopardy has attached. State v. Lane, 673 S.W.2d 874, 1983 Tenn. Crim. App. LEXIS 440 (Tenn. Crim. App. 1983) (omission of full date).

A nonconsensual amendment, before the jury was sworn, which changed the name of the company victimized was allowable; no additional or different offense was charged and no substantial rights of the defendant were prejudiced. State v. McClennon, 669 S.W.2d 705, 1984 Tenn. Crim. App. LEXIS 2638 (Tenn. Crim. App. 1984).

No additional or different offense was charged by amendment correcting name of court. State v. Beech, 744 S.W.2d 585, 1987 Tenn. Crim. App. LEXIS 2321 (Tenn. Crim. App. 1987).

Where the original indictment as returned by the grand jury tracked the statutory elements of first degree burglary but did not specify the particular felony the defendant intended to commit once inside the residence, the trial judge properly permitted the state to amend the indictment to allege that the defendant intended to commit larceny. State v. Burkley, 804 S.W.2d 458, 1990 Tenn. Crim. App. LEXIS 476 (Tenn. Crim. App. 1990).

A defendant is not charged with a new crime when the date in the indictment is merely corrected in order for the original charge to stand. State v. Kennedy, 10 S.W.3d 280, 1999 Tenn. Crim. App. LEXIS 569 (Tenn. Crim. App. 1999).

An indictment may be amended pursuant to Tenn. R. Crim. P. 7(b) where an oral or written motion to amend the indictment is made and where the defendant's oral or written consent to the motion is clear from the record. State v. Stokes, 24 S.W.3d 303, 2000 Tenn. LEXIS 382 (Tenn. 2000).

Under T.R.A.P. 3(b), a defendant who pleaded guilty may appeal the issue of whether or not the trial court had subject matter jurisdiction because jurisdictional defects were not waived by the plea; however, the trial court properly had subject matter jurisdiction, the indictments were orally amended during the guilty plea proceedings, and the judgments indicated agreed amendments to the indictments, such that none of the indictments was void on its face and as a result, no jurisdictional issue was present and defendants waived all other nonjurisdictional defects and constitutional irregularities by their pleas of guilty. State v. Yoreck, 133 S.W.3d 606, 2004 Tenn. LEXIS 330 (Tenn. 2004).

In defendant's drug case, although the trial court erred in permitting the state to amend the indictment after jeopardy attached to delete, the words "and, or deliver," the error was harmless. Defendant was clearly provided with ample notice of the offense charged, including the facts constituting the offense, the name of defendant, the date of the alleged offense, the amount and type of substance sold, and the statute violated. State v. Lindsey, 208 S.W.3d 432, 2006 Tenn. Crim. App. LEXIS 328 (Tenn. Crim. App. 2006), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 731 (Tenn. Aug. 21, 2006), dismissed, Lindsey v. Parker, — F. Supp. 2d —, 2013 U.S. Dist. LEXIS 102475 (E.D. Tenn. July 23, 2013).

Because the inmate affirmatively requested a jury instruction on the offense of aggravated assault, even though he was in error in believing that it was a lesser-included offense of attempted first-degree murder, he effectively agreed to amend the indictment to include aggravated assault; therefore, the trial court had jurisdiction to convict the inmate of aggravated assault, his conviction was not void, and he was not entitled to habeas corpus relief. Demonbreun v. Bell, 226 S.W.3d 321, 2007 Tenn. LEXIS 452 (Tenn. May 8, 2007), rehearing denied, — S.W.3d —, 2007 Tenn. LEXIS 529 (Tenn. May 25, 2007).

Indictment for aggravated assault was effectively amended to include reckless endangerment as a charged offense because prior conversations between the trial court and counsel seeking consideration of reckless endangerment, defense counsel's raising and referencing reckless endangerment at closing argument, and defense counsel's submission of case law on reckless endangerment to aid the court in its determination all supported the court's conclusion that defendant actively sought the court's consideration of reckless endangerment. State v. Myers, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 286 (Tenn. Crim. App. Apr. 17, 2018), rev'd, 581 S.W.3d 173, 2019 Tenn. LEXIS 297 (Tenn. Aug. 5, 2019).

Because defendant elected to wait until after the jury was sworn to object to the form of the indictment, any confusing or imprecise language could have been amended with his consent. State v. Wallace, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 388 (Tenn. Crim. App. May 17, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 579 (Tenn. Sept. 13, 2018), cert. denied, Wallace v. Tennessee, 202 L. Ed. 2d 647, 139 S. Ct. 928, — U.S. —, 2019 U.S. LEXIS 662 (U.S. Jan. 14, 2019).

Court of Criminal Appeals erred, on remand, in concluding that defendant effectively amended the indictment charging him with aggravated assault by using or displaying a deadly weapon to intentionally or knowingly causing a code inspector to reasonably fear imminent bodily injury by use or display of a deadly weapon because the trial court considered an improper lesser offense in the absence of a proper amendment and did not follow the procedure for amending an indictment, counsel's actions amounted to mere acquiescence rather than an affirmative request for the trial court to consider felony reckless endangerment as a lesser offense, and defendant adequately preserved his objection by filing a motion for judgment of acquittal. State v. Myers, 581 S.W.3d 173, 2019 Tenn. LEXIS 297 (Tenn. Aug. 5, 2019).

Because defendant's trial preparation was not prejudiced, the trial court did not abuse its discretion by denying defendant's motion for a continuance after the indictment was amended without defendant's consent to charge a different theory of aggravated robbery in that jeopardy had not yet attached, no substantial right of defendant was prejudiced as the trial court did not infringe upon defendant's right to prepare an adequate defense, and defendant was on notice for the offenses and the particular misconduct for which defendant was charged. State v. Merrilees, — S.W.3d —, 2020 Tenn.

Crim. App. LEXIS 91 (Tenn. Crim. App. Feb. 14, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 376 (Tenn. June 3, 2020).

Trial counsel was not ineffective for failing to raise the amendment of the indictment as an issue in a motion for new trial because defendant consented to the amendment of the time period alleged in the indictment for aggravated sexual battery and especially aggravated sexual exploitation of a minor, and, more importantly, defendant could not show how defendant was prejudiced by the amendment. Wilson v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 806 (Tenn. Crim. App. Dec. 22, 2020).

2. Consent.

A defendant's acquiescence to a jury instruction based on an incorrect belief that an offense is a lesser included offense is insufficient to transform an erroneous jury instruction into a valid amendment of an indictment by that defendant's consent. State v. Stokes, 24 S.W.3d 303, 2000 Tenn. LEXIS 382 (Tenn. 2000).

Petitioner's due process rights were not violated when the trial court amended the indictment to amend the year of the date of the offense because the state made an oral motion to amend the indictment and petitioner consented. Bayman v. State, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 420 (Tenn. Crim. App. July 12, 2019).

3. Bill of Particulars.

A bill of particulars is not meant to be used for the purpose of broad discovery. State v. Wiseman, 643 S.W.2d 354, 1982 Tenn. Crim. App. LEXIS 468 (Tenn. Crim. App. 1982).

Refusal to grant bill of particulars as to time and place of offense was error. State v. Hicks, 666 S.W.2d 54, 1984 Tenn. LEXIS 755 (Tenn. 1984).

The prosecution may not satisfy its burdens under Tenn. Const., art. I, § 9, U.S. Const., amend. 6, and Tenn. R. Crim. P. 7(c), simply by alleging in a bill of particulars that it is unable to give specific dates on which the offenses occurred. State v. Byrd, 820 S.W.2d 739, 1991 Tenn. LEXIS 455 (Tenn. 1991).

If the state is unable to give even an approximate time of the alleged offense by means of descriptive reference, a conviction may nevertheless be affirmed if, in the course of the trial, the defendant's defense was not hampered by the lack of specificity. A conviction must be reversed if trial testimony establishes that the state possessed additional information that could have helped pinpoint the nature, time, or place of the offense, and withheld that information from the defendant. State v. Byrd, 820 S.W.2d 739, 1991 Tenn. LEXIS 455 (Tenn. 1991).

A bill of particulars is not intended to be a means of learning the state's evidence and theories, and where the defendant was trying to compel the state to commit itself to a particular theory of the case, the trial court did not abuse its discretion in denying a bill of particulars. State v. Stephenson, 878 S.W.2d 530, 1994 Tenn. LEXIS 143 (Tenn. 1994), rehearing denied, — S.W.2d —, 1994 Tenn. LEXIS 203 (Tenn. June 20, 1994), overruled, State v. Mitchell, 137 S.W.3d 630, 2003 Tenn. Crim. App. LEXIS 670 (Tenn. Crim. App. 2003).

Trial court properly denied the defendant's motion to compel additional information as to what acts constituted substantial assistance in the commission of a felony because the defendant was not unprepared to refute the state's evidence where her defense derived primarily from the her testimony regarding her delaying the police entry into her apartment and she was able to attack the state's theory. State v. Green, 995 S.W.2d 591, 1998 Tenn. Crim. App. LEXIS 1079 (Tenn. Crim. App. 1998).

While a bill of particulars certainly will not save an otherwise invalid indictment, it can serve to narrow a general indictment and provide a defendant with enough information about the charge to allow the defendant to prepare a defense and avoid prejudicial surprise at trial. State v. Hammonds, 30 S.W.3d 294, 2000 Tenn. LEXIS 547 (Tenn. 2000).

Although the state did not allege that defendant was guilty under a theory of criminal responsibility by assisting co-defendant's neglect of her child either in the indictment or bill of particulars, the state was not precluded from pursuing theories of criminal liability that were not mentioned in the bill of particulars, so long as such theories of liability did not exceed the scope of indictment. State v. Sherman, 266 S.W.3d 395, 2008 Tenn. LEXIS 538 (Tenn. Aug. 15, 2008).

Because criminal responsibility was not eliminated as a possible theory of guilt by the bill of particulars, granting defendant's motion to dismiss child neglect charge was improper. State v. Sherman, 266 S.W.3d 395, 2008 Tenn. LEXIS 538 (Tenn. Aug. 15, 2008).

Counsel testified that he talked with the state and received discovery materials before trial, and thus he knew what the state's evidence was going to be and what the victim was going to say at trial; petitioner offered no explanation as to how trial counsel's failure to file a motion for a bill of particulars impaired his defense, and thus he failed to demonstrate that he was entitled to post-conviction relief. Sanchez v. State, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 200 (Tenn. Crim. App. Mar. 27, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 334 (Tenn. July 17, 2019).

Indictment stating an incorrect mens rea for indecent exposure was not invalid because (1) the indictment stated the correct statute and information on the crime's elements, giving sufficient notice of the crime and mens rea, and (2) defendant did not seek more specific information. State v. Johnson, — S.W.3d —, 2019

Tenn. Crim. App. LEXIS 422 (Tenn. Crim. App. July 15, 2019).

Defendant waived the issue of whether the trial court erred by not ordering the State of Tennessee to provide a bill of particulars because the issue was not raised again in the trial court, after defendant's motion was taken under advisement, until defendant's motion for new trial was filed. Moreover, the discovery materials provided to defendant before trial established that the offenses occurred over a weekend in the month of October and it could not be concluded that defendant was prejudiced by the failure to furnish a bill of particulars. State v. Gleason, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 78 (Tenn. Crim. App. Feb. 10, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 350 (Tenn. Aug. 10, 2020).

Trial court did not err in denying the motion for acquittal based on lack of notice because defendant never moved for a bill of particulars to determine what evidence would be the subject of the tampering with evidence charge; at trial, defense counsel explicitly stated that he were not misled into believing that a vehicle would be the subject of the tampering charge, and defense counsel conceded that he merely assumed the vehicle was the focus of the charge. State v. Manning, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 615 (Tenn. Crim. App. Sept. 17, 2020).

Defendant's claim that the State failed to answer his motion for a bill of particulars and therefore his motion for new trial should have been granted lacked merit because the record revealed that the State did file a bill of particulars in which it narrowed the timeframe of the incident from ten months to one month. State v. Phillips, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 746 (Tenn. Crim. App. Nov. 20, 2020).

Rule 8. Joinder of Offenses and Defendants. —

(a) Mandatory Joinder of Offenses.

(1) Criteria for Mandatory Joinder. — Two or more offenses shall be joined in the same indictment, presentment, or information, with each offense stated in a separate count, or the offenses consolidated pursuant to Rule 13, if the offenses are:

(A) based on the same conduct or arise from the same criminal episode;

(B) within the jurisdiction of a single court; and

(C) known to the appropriate prosecuting official at the time of the return of the indictment(s), presentment(s), or information(s).

(2) Failure to Join Such Offenses. — A defendant shall not be subject to separate trials for multiple offenses falling within Rule 8(a)(1) unless they are severed pursuant to Rule 14.

(b) Permissive Joinder of Offenses. — Two or more offenses may be joined in the same indictment, presentment, or information, with each offense stated in a separate count, or consolidated pursuant to Rule 13, if:

(1) the offenses constitute parts of a common scheme or plan; or

(2) they are of the same or similar character.

(c) Joinder of Defendants. — An indictment, presentment, or information may charge two or more defendants:

(1) if each of the defendants is charged with accountability for each offense included;

(2) if each of the defendants is charged with conspiracy, and some of the defendants are also charged with one or more offenses alleged to be in furtherance of the conspiracy; or

(3) even if conspiracy is not charged and all of the defendants are not charged in each count, if the several offenses charged:

(A) were part of a common scheme or plan; or

(B) were so closely connected in time, place, and occasion that it would be difficult to separate proof of one charge from proof of the others.

Advisory Commission Comments. Compulsory joinder of offenses against a single defendant is covered in section (a). This rule is designed to encourage the disposition in a

single trial of multiple offenses arising from the same conduct and from the same criminal episode, and should therefore promote efficiency and economy. Where such joinder of offenses might give rise to an injustice, Rule 14(b)(2) allows the trial court to relax the rule.

The commission wishes to make clear that section (a) is meant to stop the practice by some prosecuting attorneys of "saving back" one or more charges arising from the same conduct or from the same criminal episode. Such other charges are barred from future prosecution if known to the appropriate prosecuting official at the time that the other prosecution is commenced, but deliberately not presented to a grand jury. "Appropriate prosecuting official" shall be so construed as to achieve the purpose of this rule, which is the prevention of a deliberate and willful "saving back" of known charges for future prosecution. The refusal of the grand jury to act upon such other charges would not be a violation of this joinder rule so as to bar future prosecution of such charges.

Permissive joinder of offenses, addressed in section (b), allows even unrelated offenses to be joined in the same indictment or presentment, when they are offenses of the same or similar character. These charges may be severed by the defendant as a matter of right under Rule 14(b), unless the offenses are part of a common scheme or plan and the evidence of one would be admissible upon the trial of the others, since a severance in such cases would accomplish nothing in the way of insulating the defendant from the evidence of all of the separate offenses.

Permissive joinder of defendants, addressed in section (c), is aimed at achieving improved judicial economy and efficiency. Severance of defendants is addressed in Rule 14(c).

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 3-13-1, 3-44-1.

Tennessee Jurisprudence. 8 Tenn. Juris., Criminal Procedure, § 25; 16 Tenn. Juris., Intoxicating Liquors, § 15; 17 Tenn. Juris., Larceny, § 7.

Law Reviews. The Law of Continuances (Donald F. Paine), 36 Tenn. B.J. 19 (2000).

NOTES TO DECISIONS

Analysis

1. Procedure for Joinder.
2. Elements of Common Scheme.
3. Same Conduct.
4. Evidence Inextricably Connected With Offenses.
5. Presumption of Conspiracy or Common Scheme.
6. Subsequent Indictments.
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8. Independently Motivated Occurrences.
9. Single Criminal Episode.
10. Joinder of Codefendants.
11. Election of Offenses.
12. Standard of Review.
13. Error.
14. —Not Harmless.
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16. Prejudicial Joinder.
17. Objection to Pretrial Consolidation.
18. Open-Ended Indictment.
19. Joinder of Offenses.
20. Separate Transactions.

1. Procedure for Joinder.

Before two or more offenses may properly be joined in the same indictment, Tenn. R. Crim. P. 14(b)(1) requires that the trial court find that the offenses are a part of a common scheme or plan, and comply with the procedural requirements of Tenn. Rule Evid. 404(b). State v. Hoyt, 928 S.W.2d 935, 1995 Tenn. Crim. App. LEXIS 965 (Tenn. Crim. App. 1995), overruled in part, Spicer v. State, 12 S.W.3d 438, 2000 Tenn. LEXIS 57 (Tenn. 2000).

When a defendant objects to the state of Tennessee's pretrial motion to consolidate offenses, the trial court must conduct a hearing and consider the motion under the severance provisions of Tenn. R. Crim. P. 14(b)(1), not the provisions of Tenn. R. Crim. P. 8(b). State v. Garrett, 331 S.W.3d 392, 2011 Tenn. LEXIS 7 (Tenn. Jan. 24, 2011).

2. Elements of Common Scheme.

In order to be "parts of a common scheme or plan" as contemplated by Tenn. R. Crim. P. 8(b) and Tenn. R. Crim. P. 14(b)(1), two or more sets of offenses must be so similar in modus operandi and occur within such a relatively close proximity of time and location to each other that there can be little doubt that the offenses were committed by the same person(s). State v. Peacock, 638 S.W.2d 837, 1982 Tenn. Crim. App. LEXIS 386 (Tenn. Crim. App. 1982); State v. Wooden, 658 S.W.2d 553, 1983 Tenn. Crim. App. LEXIS 412 (Tenn. Crim. App. 1983); State v. Edwards, 868 S.W.2d 682, 1993 Tenn. Crim. App. LEXIS 228 (Tenn. Crim. App. 1993).

Where attacks on victims were similar in type of victim, time and place of attack, manner of entry into premises, and manner and style of sexual abuse, court concluded offenses were so similar in modus operandi and occurred within such close proximity of time and location as to satisfy requirements for joinder under Tenn. R. Crim. P. 8(b), and it was not error to allow charges to stand against defendant eventually convicted of second degree burglary, aggravated rape, aggravated assault and aggravated sexual battery. State v. Wooden, 658 S.W.2d 553, 1983 Tenn. Crim. App. LEXIS 412 (Tenn. Crim. App. 1983).

Denial of severance of charges was proper where five victims were white females between

21 and 24 years of age; attacks took place in apartment complexes or duplexes within two mile radius and all were on first floor; victims were asleep and were alone or appeared to be alone at time of attack; incidents involved burglary before rape; assailant instructed victims to be quiet; rubbed victim's breasts; digitally penetrated victims; and, where not interrupted, attempted or completed vaginal intercourse. State v. Edwards, 868 S.W.2d 682, 1993 Tenn. Crim. App. LEXIS 228 (Tenn. Crim. App. 1993).

It was appropriate to consolidate cases which alleged offenses of sexual battery against sisters in the same household, with the same persons present and under similar circumstances. State v. Schaller, 975 S.W.2d 313, 1997 Tenn. Crim. App. LEXIS 1130 (Tenn. Crim. App. 1997).

Alleged sexual offenses against the younger victim occurred during "sleep overs" while defendant was charged with the care of the younger victim, and the younger victim testified at a hearing that she did not remember any offenses committed against her in defendant's apartment when the older victim, defendant's daughter, was not present; thus, the trial court did not err in finding that defendant's conduct constituted a continuing plan or scheme to commit sexual offenses against the two minor victims and in denying defendant's motion to sever the consolidated offenses. State v. Osborne, 251 S.W.3d 1, 2007 Tenn. Crim. App. LEXIS 689 (Tenn. Crim. App. Aug. 28, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 59 (Tenn. Jan. 28, 2008).

3. Same Conduct.

The term "same conduct" refers to a single action which may be divisible into distinct offenses. State v. Dunning, 762 S.W.2d 142, 1988 Tenn. Crim. App. LEXIS 387 (Tenn. Crim. App. 1988).

Charges of rape of a child under T.C.A. § 39-13-522 were improperly severed from charges of aggravated sexual battery of a child under thirteen years of age under T.C.A. § 39-13-504(a)(4) because the rape counts met the criteria for mandatory joinder under Tenn. R. Crim. P. 8(a)(1)(A); the severance of the offenses was not necessary pursuant to Tenn. R. Crim. P. 14(b)(2)(A) because that state's reasons for moving to sever the offenses were insufficient, and the state did not explain why a limiting instruction to the jury would not have preserved a fair determination of defendant's guilt or innocence of each offense. State v. Schiefelbein, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 138 (Tenn. Crim. App. Feb. 8, 2007), modified, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 213 (Tenn. Crim. App. Mar. 7, 2007).

Two minor victims were direct witnesses to the sexual offenses committed by defendant against the other, and the offenses committed against each victim were substantially similar to the offenses committed against the other victim; each of the victims' testimony as to the crimes against the other was relevant under Tenn. R. Evid. 404(b) to rebut the theory that someone other than defendant had committed the alleged offenses, and the probative value of the evidence was not outweighed by the danger of unfair prejudice. State v. Osborne, 251 S.W.3d 1, 2007 Tenn. Crim. App. LEXIS 689 (Tenn. Crim. App. Aug. 28, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 59 (Tenn. Jan. 28, 2008).

Trial court allowed the state to proceed jointly as to those counts of the indictment involving alleged sexual offenses committed against the two minor victims at the same time because the offenses occurred either simultaneously or closely related in time and circumstances, they were clearly part of the same criminal transaction, and the evidence of one offense would be admissible at the separate trials of the others; accordingly, the trial court did not err in denying defendant's motion to sever those counts. State v. Osborne, 251 S.W.3d 1, 2007 Tenn. Crim. App. LEXIS 689 (Tenn. Crim. App. Aug. 28, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 59 (Tenn. Jan. 28, 2008).

4. Evidence Inextricably Connected With Offenses.

Trial court did not err in joining two first-degree murder counts with an aggravated assault count; joinder of the assault count with the murder counts was mandated because the assault occurred during an investigation pertaining to the murder and evidence pertaining thereto would necessarily require proof pertaining to the murder. State v. Shepherd, 902 S.W.2d 895, 1995 Tenn. LEXIS 269 (Tenn. 1995).

In a criminally negligent homicide and reckless endangerment case, a court did not err by denying defendant's motion to sever the offenses, where the crimes of criminally negligent homicide and felony reckless endangerment required the finder of fact to determine whether the conduct of defendant constituted a gross deviation from the standard of care that an ordinary person would have exercised under all the circumstances as viewed from the accused person's standpoint; therefore, the absence of evidence of the surrounding circumstances would have resulted in jury confusion as to material issues in the case. State v. Goodwin, 143 S.W.3d 771, 2004 Tenn. LEXIS 552 (Tenn. 2004), rehearing denied, — S.W.3d —, 2004 Tenn. LEXIS 696 (Tenn. 2004).

5. Presumption of Conspiracy or Common Scheme.

Fact that a person is charged with receiving stolen property does not create a presumption of conspiracy or a common scheme or plan with the person who stole the property which would

require joinder of defendants. State v. Monday, 620 S.W.2d 538, 1981 Tenn. Crim. App. LEXIS 365 (Tenn. Crim. App. 1981).

6. Subsequent Indictments.

The court does not perceive that any evil results from subsequent indictments being returned against a defendant charging him with additional offenses which are based on the same conduct or which arise from the same criminal episode upon which prior indictments have been returned; when the defendant has not been tried on any of the offenses at the time the subsequent indictments are returned. King v. State, 717 S.W.2d 306, 1986 Tenn. Crim. App. LEXIS 2367 (Tenn. Crim. App. 1986).

Where defendant's convictions on three counts of first-degree felony murder were reversed and remanded for proceedings on lesser included offenses, reindictment on second-degree murder charges was not proper because second-degree murder is not a lesser included offense of felony murder. State v. Gilliam, 901 S.W.2d 385, 1995 Tenn. Crim. App. LEXIS 216 (Tenn. Crim. App. 1995).

Trial court properly dismissed a second indictment against defendant for aggravated gambling promotion since both the first and second indictments arose from the same criminal episode, both alleged offenses were known to the appropriate prosecuting officials at the time of the first indictment, and both alleged offenses were within the jurisdiction of the same court. State v. Baird, 88 S.W.3d 617, 2001 Tenn. Crim. App. LEXIS 848 (Tenn. Crim. App. 2001).

7. Unrelated Charges.

Failure of court to sever unrelated charges of furnishing alcohol to a minor and aggravated rape denied defendant a fair trial. State v. Myers, 764 S.W.2d 214, 1988 Tenn. Crim. App. LEXIS 584 (Tenn. Crim. App. 1988).

The connection between two cases involving an armed robbery of a convenience store and a separate robbery-murder of a student was too tenuous to support joinder or consolidation, and the trial judge erred in ordering consolidation under Tenn. R. Crim. P. 8(a) and 8(b), and Tenn. R. Crim. P. 14(b)(1). State v. Adams, 859 S.W.2d 359, 1992 Tenn. Crim. App. LEXIS 829 (Tenn. Crim. App. 1992).

Court of criminal appeals erred in relying on Tenn. R. Crim. P. 8(a)(2) to dismiss an aggravated robbery charge because the two charges against defendant, aggravated robbery, T.C.A. § 39-13-402(a), and initiating a false police report, T.C.A. § 39-16-502, were not part of the same criminal episode since they did not occur simultaneously or in close sequence and did not occur in the same place or in closely situated places; defendant initiated the false police report twelve hours after he allegedly robbed the victim, and the proof of the aggravated robbery did not necessarily involve, and was not inextricably connected to, the proof of initiation of a false report to a law enforcement officer. State v. Johnson, 342 S.W.3d 468, 2011 Tenn. LEXIS 456 (Tenn. May 26, 2011).

8. Independently Motivated Occurrences.

The separate acts of selling cocaine to different officers from two distinct law enforcement investigations on different days are not a single action but a series of independently motivated occurrences. State v. Dunning, 762 S.W.2d 142, 1988 Tenn. Crim. App. LEXIS 387 (Tenn. Crim. App. 1988).

9. Single Criminal Episode.

Criteria for a "single criminal episode" found in the ABA Standards for Criminal Justice is consistent with Tenn. R. Crim. P. 8(a)(1)(A) and it should be adopted; for Tenn. R. Crim. P. 8(a)(1)(A) to apply, the acts to be included in the same criminal episode must occur simultaneously or in close sequence and must occur in the same place or in closely situated places. A break in the action may be sufficient to interrupt the temporal proximity required for a single criminal episode to exist. State v. Johnson, 342 S.W.3d 468, 2011 Tenn. LEXIS 456 (Tenn. May 26, 2011).

In order for a single criminal episode to exist, the proof of one offense necessarily involves proof of the others; this means that the proof of one offense must be "inextricably connected" with the proof of the other, or that the proof of one offense forms a substantial portion of the proof of the other offense, and while the offenses need not be based solely on the same facts, requiring a substantial interrelationship between the evidence required to prove each of several offenses properly focuses the trial court's inquiry on the degree to which the defendant is harassed and judicial resources wasted by successive prosecutions. State v. Johnson, 342 S.W.3d 468, 2011 Tenn. LEXIS 456 (Tenn. May 26, 2011).

Trial court properly allowed the indictments to be consolidated and joined for trial because defendant's possession of sexually explicit images of children constituted part of the same conduct or criminal episode as the distribution of sexually explicit images of children, he used the same cell phone for both offenses, they were committed during the same time period, and an election was not necessary since the State offered proof of only one act of distribution. State v. Norton, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 149 (Tenn. Crim. App. Mar. 8, 2019).

Defendant's offenses of sex offenses and assault were not required to be joined because it appeared from the indictment that the sexual offenses were charged as spanning a period of days, whereas the assaultive offenses took place on one day, and the victim's testimony and the dates in the indictment indicated a break in the action between the sexual offenses

and the assault such that the offenses did not constitute one criminal episode. State v. Jeffries, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 637 (Tenn. Crim. App. Oct. 10, 2019).

10. Joinder of Codefendants.

A strong showing of prejudice is required before a severance will be granted on grounds of disparity of evidence between codefendants, and this requirement is not established simply because much of the evidence presented at trial is applicable only to codefendants. Tenn. R. Crim. P. 8(b) contemplates that evidence may be admitted against one or more defendants which is not necessarily applicable to other defendants. Black v. State, 794 S.W.2d 752, 1990 Tenn. Crim. App. LEXIS 291 (Tenn. Crim. App. 1990).

Separate trials for defendants accused of murder and conspiracy were unnecessary, where the record demonstrated that the guilt or innocence of each defendant could be fairly determined. State v. Gaylor, 862 S.W.2d 546, 1992 Tenn. Crim. App. LEXIS 748 (Tenn. Crim. App. 1992), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 234 (Tenn. June 7, 1993).

11. Election of Offenses.

The state is not required to elect on which count it will proceed when separate offenses are charged in separate counts of the same indictment and all of the offenses arise from the same conduct or from the same criminal episode; the state must elect when one count of an indictment charges only one offense and multiple and separate offenses charged in the count are shown in evidence. State v. Beard, 818 S.W.2d 376, 1991 Tenn. Crim. App. LEXIS 527 (Tenn. Crim. App. 1991).

Where defendant was indicted for possession of a controlled substance and intent to sell a controlled substance it was not necessary for the trial judge to require the state to elect on which of the counts it would proceed where it was mandatory that state include both counts in the same indictment. State v. Beard, 818 S.W.2d 376, 1991 Tenn. Crim. App. LEXIS 527 (Tenn. Crim. App. 1991).

When an indictment alleges that sexual offenses have occurred over a period of time against a single victim, the state may introduce other evidence at trial of unlawful sexual contact between the defendant and the victim occurring during the time alleged in the original indictment; however, the state is required to make an election at the close of its proof-in-chief as to the particular offense or offenses for which it is seeking a conviction. Spicer v. State, 12 S.W.3d 438, 2000 Tenn. LEXIS 57 (Tenn. 2000).

The election requirement serves several important functions, including the fact that it enables the trial judge to review the weight of the evidence in its role as thirteenth juror and that it enables an appellate court to review the legal sufficiency of the evidence. Spicer v. State, 12 S.W.3d 438, 2000 Tenn. LEXIS 57 (Tenn. 2000).

12. Standard of Review.

Absent a showing of prejudice, a reviewing court may not overturn the trial court's exercise of discretion on the issue of severance. State v. Gaylor, 862 S.W.2d 546, 1992 Tenn. Crim. App. LEXIS 748 (Tenn. Crim. App. 1992), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 234 (Tenn. June 7, 1993).

Decisions to consolidate or sever offenses pursuant to Tenn. R. Crim. P. 8(b) and Tenn. R. Crim. P. 14(b)(1) are to be reviewed for an abuse of discretion. State v. Shirley, 6 S.W.3d 243, 1999 Tenn. LEXIS 575 (Tenn. 1999).

13. Error.

14. —Not Harmless.

Trial court abused its discretion in denying motion to sever because robberies did not share a distinct or unique modus operandi, and this abuse of discretion affected the outcome of the trial; thus, defendant's convictions and sentences were vacated. State v. Shirley, 6 S.W.3d 243, 1999 Tenn. LEXIS 575 (Tenn. 1999).

In an aggravated child abuse case, where defendant struck his stepson on two separate dates with a braided heavy-duty extension cord, the trial court abused its discretion in consolidating the indictments, as the two offenses did not constitute parts of a common scheme or plan, because the evidence relating to the method employed to commit the offenses was markedly different, and the evidence of each offense was not relevant to any material issue in the trial of the other offense. That error, in conjunction with the erroneous admission of evidence of other uncharged crimes, wrongs, or acts of abuse, appeared to have affected the jury's verdict, because the evidence supporting the convictions was legally sufficient but not overwhelming. State v. Toliver, 117 S.W.3d 216, 2003 Tenn. LEXIS 857 (Tenn. 2003).

Trial court erred by denying defendant's motion to sever his first-degree murder charge from offenses concerning a second victim because the evidence presented at the severance hearings failed to establish that the offenses were part of a common scheme or plan, as they involved separate acts against different victims the occurred at different times by different means. The error was not harmless because the failure to sever the offenses allowed the State to bolster its proof of the murder charge, for which the proof was not overwhelming, with evidence of the other offenses and more probably than not affected the verdict. State v. Brown, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 220 (Tenn. Crim. App. Apr. 8, 2019), appeal denied,

— S.W.3d —, 2019 Tenn. LEXIS 387 (Tenn. Aug. 15, 2019).

15. —Harmless.

Where the evidence of guilt adduced against the defendant in both armed robbery and felony murder cases was abundant and legally sufficient, and the result would have been the same were the cases tried before different juries, error in joining unrelated cases was harmless. State v. Adams, 859 S.W.2d 359, 1992 Tenn. Crim. App. LEXIS 829 (Tenn. Crim. App. 1992).

16. Prejudicial Joinder.

Even though two counts of rape involving two different victims showed a common plan or scheme, joinder would unduly prejudice defendant at trial because evidence of multiple sexual offenses would be admissible under each count and the "taint" of such evidence introduced under one count would bolster the second joined offense and vice versa. State v. Hoyt, 928 S.W.2d 935, 1995 Tenn. Crim. App. LEXIS 965 (Tenn. Crim. App. 1995), overruled in part, Spicer v. State, 12 S.W.3d 438, 2000 Tenn. LEXIS 57 (Tenn. 2000).

Joinder of a count of aggravated sexual rape and two counts of rape involving two other victims was improper because the circumstances surrounding the sexual battery offense were dissimilar from the rape offenses so that the former was not part of a common plan or scheme, and evidence elicited in support of the sexual battery count would not be admissible in separate trials for the rape counts. State v. Hoyt, 928 S.W.2d 935, 1995 Tenn. Crim. App. LEXIS 965 (Tenn. Crim. App. 1995), overruled in part, Spicer v. State, 12 S.W.3d 438, 2000 Tenn. LEXIS 57 (Tenn. 2000).

Where defendant was charged in connection with four robberies, trial court improperly consolidated the four charges for trial under Tenn. R. Crim. P. 8(b); the multiple charges and testimony inevitably hung in the backdrop as each particular offense was presented to the jury, and it was unlikely that the jury examined each charge on its own proof. State v. Dotson, 254 S.W.3d 378, 2008 Tenn. LEXIS 277 (Tenn. Apr. 28, 2008).

Because defendant voluntarily stipulated to the qualifying felony for possession of a firearm while having a prior conviction for a felony involving the use or attempted use of force, violence, or a deadly weapon, he failed to show he was prejudiced by mandatory joinder of the aggravated assault and interfering with a 911 call counts. State v. Hill, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 243 (Tenn. Crim. App. Apr. 15, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 539 (Tenn. Sept. 16, 2020).

17. Objection to Pretrial Consolidation.

When a defendant objects to a pretrial consolidation motion by the state, the trial court must consider the motion by the severance provisions of Tenn. R. Crim. P. 14(b)(1), not whether the offenses meet the "same or similar character" standard contemplated by Tenn. R. Crim. P. 8(b). Spicer v. State, 12 S.W.3d 438, 2000 Tenn. LEXIS 57 (Tenn. 2000).

18. Open-Ended Indictment.

Courts should look to the evidence presented at the consolidation or severance hearing to determine whether multiple offenses in an open-dated indictment were properly consolidated prior to trial. To the extent that State v. Hoyt, 928 S.W.2d 935, 1995 Tenn. Crim. App. LEXIS 965 (Tenn. Crim. App. 1995), overruled in part, Spicer v. State, 12 S.W.3d 438, 2000 Tenn. LEXIS 57 (Tenn. 2000) can be read to permit appellate review of severance issues based only upon the offenses actually elected at the close of the evidence, it is overruled. Spicer v. State, 12 S.W.3d 438, 2000 Tenn. LEXIS 57 (Tenn. 2000).

19. Joinder of Offenses.

Joinder of offenses that occurred two days apart was proper because the shootings were part of a common scheme of plan, having occurred at the same location and having been committed as part of an ongoing feud between the inmate and a victim. Campbell v. State, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 715 (Tenn. Crim. App. Nov. 8, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 247 (Tenn. Apr. 16, 2020).

Trial court did not err by declining the sever the homicide charges from the unlawful possession of a firearm by a convicted felon charge because the offenses were subject to mandatory joinder as they arose from the same conduct and defendant chose to stipulate to his criminal record which mitigated any prejudicial effect that substantive evidence of his convictions would have had. State v. Johnson, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 736 (Tenn. Crim. App. Nov. 14, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 168 (Tenn. Apr. 1, 2020).

Defense counsel was not ineffective for failing to file a motion to sever the child neglect, aggravated child abuse, and felony murder counts against defendant for separate trials because the cases were mandatorily joined as the incidents were part of a single continuing episode of multiple abuse of the infant victim over the course of days. Demeza v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 707 (Tenn. Crim. App. Oct. 30, 2020).

20. Separate Transactions.

Trial court did not err in denying defendant's Motion to Dismiss Indictments where defendant argued that the indictments were subject to mandatory joinder because, in each of the cases, defendant was charged with selling and delivering cocaine to a confidential informant and while the identity of the informant was the

same in each case, the offenses involved separate transactions on different dates. State v. Mays, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 473 (Tenn. Crim. App. Apr. 10, 2020).

Rule 9. Capias or Summons on an Indictment or Presentment. — (a) ISSUANCE. — After the grand jury returns an indictment or presentment, the clerk shall issue a capias or a criminal summons for each defendant named in the indictment or presentment:

(1) who is not in actual custody;

(2) who has not been released on recognizance or bail; or

(3) whose bail has been declared forfeited.

The clerk shall issue a criminal summons (instead of a capias) after an indictment or presentment and for any subsequent process when so requested by the district attorney general or directed by the court.

(b) FORM AND CONTENT. —

(1) CAPIAS. — The capias shall:

(A) be in the same form as an arrest warrant;

(B) be signed by the clerk;

(C) describe the offense charged; and

(D) command that the defendant be arrested and brought before the court in which the charge is pending.

(2) SUMMONS. — The criminal summons shall be in the same form as the capias except that it shall require the defendant to appear before the court at a stated time and place, and shall give the defendant notice that the failure to appear as ordered may constitute contempt of court.

(c) DELIVERY FOR SERVICE. — The clerk shall deliver the capias or criminal summons to the sheriff or other person authorized by law to execute or serve it.

(d) EXECUTION; RETURN. —

(1) EXECUTION. — A capias or criminal summons shall be executed and served as provided in Rule 4(e).

(2) RETURN. — The peace officer executing a capias shall make a return to the court. On or before the return day, the person to whom a criminal summons was delivered for service shall make the return. At the request of the district attorney general, any unexecuted capias shall be returned and cancelled.

(e) REISSUANCE. — At the request of the district attorney general made while the indictment is pending, or on the court's own initiative, the court may direct the clerk to deliver to the sheriff or other authorized person for execution or service a capias that was returned unexecuted and was not canceled, a criminal summons that was returned unanswered, or a duplicate of either.

(f) FAILURE TO APPEAR. — The court shall issue a capias to a defendant—other than a corporation, limited liability company, or limited liability partnership —who fails to appear in response to a criminal summons. If a corporation, limited liability company, or limited liability partnership does not appear after being summoned, the court having jurisdiction to try the offense for which the summons was issued shall enter a not guilty plea and may proceed to trial and judgment without further process.

Advisory Commission Comments. This rule is patterned after the proposals of the Law Revision Commission in § 40-9-107 and § 40-9-110 of their proposed code.

No provision is made for process following a prosecution commenced by a criminal information, because under Art. 1, § 14 of our Constitution and § 40-3-101, a threshold waiver and agreement by the accused would be required and hence process would not be needed.

This rule provides that the district attorney general or the trial judge may direct that the clerk issue a criminal summons rather than a capias.

IV. ARRAIGNMENT AND PRETRIAL.

Rule 10. Arraignment. —

(a) General. — Before any person is tried for the commission of an offense, the person shall be called into open court and arraigned, except as provided in Rule 43.

(b) Procedure. — The arraignment shall consist of the following:

(1) ensuring that the defendant has a copy of the indictment, presentment, or information before called upon to plead;

(2) reading the indictment, presentment, or information to the defendant or stating to the defendant the substance of the charge; and then

(3) asking the defendant to plead to the indictment, presentment, or information.

(c) Record. — The arraignment shall be entered on the record.

(d) Jointly Charged Defendants. — Defendants who are jointly charged may be arraigned separately or together in the court's discretion.

Advisory Commission Comments. This rule creates a formal arraignment procedure in Tennessee. The rule applies only to Circuit or Criminal Courts or other criminal courts of record.

The accused must be given a copy of the indictment or presentment before being called upon to plead. A uniform procedure is provided applicable to all cases.

Textbooks. Tennessee Jurisprudence. 8 Tenn. Juris., Criminal Procedure, §§ 21, 23, 28.

Law Reviews. The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure, VI. Hearing of Appeals (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 86.

NOTES TO DECISIONS

Analysis

1. Waiver.
2. Presence of Counsel.

1. Waiver.

Defendant's failure to adequately brief certain issues by failing to include appropriate references to the record resulted in waiver of such issues. State v. Killebrew, 760 S.W.2d 228, 1988 Tenn. Crim. App. LEXIS 478 (Tenn. Crim. App. 1988).

2. Presence of Counsel.

The fact that counsel is not appointed at arraignment is not per se a violation of an accused's sixth amendment rights. When, however, the accused has waived a constitutional right or made an incriminating statement absent the assistance of counsel, actual prejudice may follow; under those circumstances, the arraignment stage would be "critical" and the presence of counsel required. State v. Street, 768 S.W.2d 703, 1988 Tenn. Crim. App. LEXIS 615 (Tenn. Crim. App. 1988).

Rule 11. Pleas. —

(a) Plea Alternatives. —

(1) In General. — A defendant may plead not guilty, guilty, or nolo contendere. The court shall enter a plea of not guilty if a defendant refuses to plead or if a defendant corporation, limited liability company, or limited liability partnership fails to appear.

(2) NOLO CONTENDERE. — A defendant may plead nolo contendere only with the consent of the court. Before accepting a plea of nolo contendere, the court shall consider the views of the parties and the interest of the public in the effective administration of justice.

(3) CONDITIONAL PLEA. — A defendant may enter a conditional plea of guilty or nolo contendere in accordance with Rule 37(b).

(b) CONSIDERING AND ACCEPTING A GUILTY OR NOLO CONTENDERE PLEA. —

(1) ADVISING AND QUESTIONING THE DEFENDANT. — Before accepting a guilty or nolo contendere plea, the court shall address the defendant personally in open court and inform the defendant of, and determine that he or she understands, the following:

(A) The nature of the charge to which the plea is offered;

(B) the maximum possible penalty and any mandatory minimum penalty;

(C) if the defendant is not represented by an attorney, the right to be represented by counsel–and if necessary have the court appoint counsel–at trial and every other stage of the proceeding;

(D) the right to plead not guilty or, having already so pleaded, to persist in that plea;

(E) the right to a jury trial;

(F) the right to confront and cross-examine adverse witnesses;

(G) the right to be protected from compelled self-incrimination;

(H) if the defendant pleads guilty or nolo contendere, the defendant waives the right to a trial and there will not be a further trial of any kind except as to sentence;

(I) if the defendant pleads guilty or nolo contendere, the court may ask the defendant questions about the offense to which he or she has pleaded. If the defendant answers these questions under oath, on the record, and in the presence of counsel, the answers may later be used against the defendant in a prosecution for perjury or aggravated perjury;

(J) if the defendant pleads guilty or nolo contendere, it may have an effect upon the defendant's immigration or naturalization status, and, if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the immigration consequences of a plea; and

(K) if the defendant pleads guilty or nolo contendere to an offense for which he or she will receive an additional sentence of community supervision for life, the fact that he or she will receive the additional sentence, and, if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the community supervision for life sentence and its consequences.

(2) INSURING THAT PLEA IS VOLUNTARY. — Before accepting a plea of guilty or nolo contendere, the court shall address the defendant personally in open court and determine that the plea is voluntary and is not the result of force, threats, or promises (other than promises in a plea agreement). The court shall also inquire whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the district attorney general and the defendant or the defendant's attorney.

(3) Determining Factual Basis for Plea. — Before entering judgment on a guilty plea, the court shall determine that there is a factual basis for the plea.

(c) Plea Agreement Procedure. —

(1) In General. — The district attorney general and the defendant's attorney, or the defendant when acting pro se, may discuss and reach a plea agreement. The court shall not participate in these discussions. If the defendant pleads guilty or nolo contendere to a charged offense or a lesser or related offense, the plea agreement may specify that the district attorney general will:

(A) move for dismissal of other charges;

(B) recommend, or agree not to oppose the defendant's request for, a particular sentence, with the understanding that such recommendation or request is not binding on the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

(2) Disclosing a Plea Agreement. —

(A) Open Court. — The parties shall disclose the plea agreement in open court on the record, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(B) Timing of Disclosure. — Except for good cause shown, the parties shall notify the court of a plea agreement at the arraignment or at such other time before trial as the court orders.

(3) Judicial Consideration of a Plea Agreement. —

(A) Rule 11(c)(1)(A) or (C) Agreement. — If the agreement is of the type specified in Rule 11(c) (1)(A) or (C), the court may accept or reject the agreement pursuant to Rule 11(c)(4) or (5), or may defer its decision until it has had an opportunity to consider the presentence report.

(B) Rule 11(c)(1)(B) Agreement. — If the agreement is of the type specified in Rule 11(c)(1)(B), the court shall advise the defendant that the defendant has no right to withdraw the plea if the court does not accept the recommendation or request.

(4) Accepting a Plea Agreement. — If the court accepts the plea agreement, the court shall advise the defendant that it will embody in the judgment and sentence the disposition provided in the plea agreement.

(5) Rejecting a Plea Agreement. — If the court rejects the plea agreement, the court shall do the following on the record and in open court (or, for good cause, in camera):

(A) advise the defendant personally that the court is not bound by the plea agreement;

(B) inform the parties that the court rejects the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than provided in the plea agreement.

(d) Inadmissibility of Pleas, Offers of Pleas, and Related Statements. — The admissibility of a plea, plea discussion, or any related statement is governed by Tennessee Rule of Evidence 410.

(e) Record of Proceedings and Written Plea. — There shall be a verbatim record of the proceedings at which the defendant enters a plea. If there is a plea of guilty or nolo contendere, the record shall include the inquiries and advice to the defendant required under Rule 11(b) and (c). The plea of guilty or nolo contendere shall be reduced to writing and signed by the defendant. [As amended by order filed January 2, 2007, effective July 1, 2007; by order filed December 21, 2010, effective July 1, 2011; and by order filed January 2, 2015, effective July 1, 2015.]

Advisory Commission Comments. This rule is substantially the same as the federal rule. Entry by the court of a not guilty plea for one refusing to plead or standing mute is included in section (a). In addition, Rule 11 establishes a plea of nolo contendere, under limitations set out in section (a).

Although the rules do not require a plea of not guilty by reason of insanity, notice of the defendant's intention to defend on the basis of mental incompetency at the time of the offense is required under Rule 12.2. *See also* T.C.A. §§ 40-18-117 and 33-7-303.

The matters of specific advice to the defendant and explicit procedures for insuring on the record that pleas of guilty and nolo contendere are voluntarily and understandingly made are designed to produce finality in the proceedings. In addition to the matters specified in section (b)(1), Tennessee law requires that the defendant be further advised, "if applicable, that a different or additional punishment may result by reason of his prior convictions or other factors which may be established in the present action after the entry of his plea." *Mackey v. State*, 553 S.W.2d 337, 341 (Tenn. 1977). And, in addition to the matters specified in subdivision (b)(1), the *Mackey* decision requires the trial court to warn the defendant "further, that upon the sentencing hearing, evidence of any prior convictions may be presented to the judge or jury for their consideration in determining punishment."

As does the current federal rule, section (c) recognizes and approves the practice of plea negotiation and agreement, and brings that process into the light of the open courtroom. Although subdivision (c)(1) purports to list possible alternative plea "bargains," it is not contemplated that this list be taken as exclusive. Common to state practice (but not to federal practice) are guilty pleas entered in exchange for reduction of the charge to a lesser-included offense, recommendation by the prosecutor that any sentence be suspended and the defendant placed on probation, etc.

The provision in subdivision (c)(2)(B) specifically permits the trial judge to impose reasonable pretrial time limits on the court's consideration of plea agreements, a practice which will allow maximum efficiency in the docketing of cases proceeding to trial on pleas of not guilty.

It should be noted in connection with the record requirements of section (e) that the Mackey opinion, supra, requires additionally an inquiry by the court "into the defendant's understanding of his entering a plea of guilty."

The commission feels that uniformity of procedure with the federal courts in procedural matters such as those contemplated under Rules 11 and 12 is beneficial to the public and to the legal profession.

The provisions of Rule 11(c) are similar to the Federal Rules of Criminal Procedure. Rule 11(c)(1) contains the plea bargaining options. A (c)(1)(A) and a (c)(1)(C) agreement are binding on the court only in the sense that the plea is contingent on the agreement as stated. The court may accept the plea agreement under (c)(3) or it may reject the plea agreement under circumstances set forth in (c)(4). As per prior law, acceptance or rejection of the plea may be deferred until consideration of a presentence report. This is essentially the procedure contemplated by T.C.A. § 40-35-203(b).

When the court rejects the plea agreement, the defendant is given the opportunity to withdraw the plea under (c)(5). When the court rejects the plea agreement but the defendant does not withdraw a guilty plea, T.C.A. § 40-35-203 gives the defendant the right to a sentencing hearing and presentence report.

The above discussion is relevant for pleas contingent on a specific sentence. Rule 11(c)(3)(B) addresses those agreements which are not plea contingent. These types of agreements are (c)(1)(B) agreements which are clearly not binding on the court. The important distinction is that where the court does not follow the agreement the defendant may not withdraw the plea. The essence of Rule 11(c)(3)(B) is for the court to so advise the defendant at the time of the plea.

The type of plea agreements have greatly expanded in recent years because judges now impose non-capital sentences. Consequently, it is important for the lawyers to have a clear understanding as to those aspects of the agreement which are plea contingent and those that are not. The defendant must also have an understanding so that the plea is knowing.

A simple example should illustrate the type of contingent and noncontingent agreements contemplated. The state may agree that in

exchange for a plea to burglary the state will recommend four years and that at the time of the sentencing hearing the state will recommend probation but the latter is a nonbinding recommendation. Two separate agreements have thus been made. The first, the four years, is a (c)(1)(C) agreement. The defendant's plea is wholly contingent on getting exactly four years. The sentence is not binding on the court but the alternative to rejection of the sentence agreement is a potential withdrawal of the plea. The second agreement, the recommendation of probation, is, under this example, a (c)(1)(B) agreement. The plea is contingent only on the state's recommendation of probation and not on probation actually being granted. If the court denies probation the defendant cannot withdraw the plea.

Advisory Commission Comments [2007]. Prior subsection (b)(1)(I) provided that a defendant may be subject to prosecution for "perjury or false statement." False statement is no longer an offense in Tennessee, and aggravated perjury is a new offense enacted in 1989. Thus, the subsection was amended to "perjury or aggravated perjury."

Tenn. Code Ann. § 40-1-109 requires a written guilty plea for misdemeanors. The amendment to subsection (e) conforms the rule to the statute but expands the concept so that all guilty or nolo contendere pleas are written. This has long been the practice in general sessions and criminal courts.

Advisory Commission Comments [2011]. Subsection (b)(1)(J) was added to address the United States Supreme Court's holding in *Padilla v. Kentucky*, ___ U.S. ___ (2010).

Advisory Commission Comments [2015]. Subdivision (b)(1) was amended to add paragraph (K) to conform the rule to the requirements of case law. "Because the mandatory lifetime supervision requirement is an additional part of a defendant's sentence, the trial court is constitutionally required to inform the defendant of the supervision requirement as part of the plea colloquy." *Ward v. State*, 315 S.W.3d 461,474 (Tenn. 2010). See also *State v. Nagele*, 353 S.W.3d 112 (Tenn. 2011) (defendant allowed to withdraw guilty plea because trial court did not inform defendant of lifetime community supervision requirement and State failed to establish error was harmless beyond a reasonable doubt because defense counsel's advice to defendant about the requirement was ambiguous); *Calvert v. State*, 342 S.W.3d 477, 491 (Tenn. 2011) (defense counsel's failure to inform defendant about lifetime supervision requirement is deficient performance and defendant will be entitled to post-conviction relief if he establishes "by clear and convincing evidence a reasonable probability that, but for defense counsel's failure to inform him of the mandatory lifetime community supervision aspect of his sentence, he would have declined to plead guilty").

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 2, 2007, was ratified and approved by 2007 House Resolution 15 and Senate Resolution 10. The order promulgating the 2007 amendment of this rule provided that it take effect July 1, 2007.

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated December 21, 2010, was ratified and approved by 2011 House Resolution 36 and Senate Resolution 14. The order promulgating the 2011 amendment of this rule provided that it take effect July 1, 2011.

The amendment of rule 11, which amended subdivision (b)(1) and added subdivision (K) and added the 2015 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated January 2, 2015, was ratified and approved by 2015 House Resolution 4 and Senate Resolution 12. The order promulgating the amendment of this rule provided that it take effect on July 1, 2015.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), No. 3-11-10.

Tennessee Jurisprudence. 8 Tenn. Juris., Criminal Procedure, §§ 23, 26; 10 Tenn. Juris., Double Jeopardy, § 3.

Law Reviews. Guidelines for Juvenile Court Practice (Andrew J. Shookhoff), 19 Tenn. B.J. 5 (1983).

Relevance: The Tennessee Balancing Act (Robert Banks, Jr., Melissa Maravich), 57 Tenn. L. Rev. 33 (1989).

Some Comparisons Between the New Tennessee Rules of Evidence and the Federal Rules of Evidence Part I (Robert Banks, Jr.), 20 Mem. St. U.L. Rev. 283 (1990).

Attorney General Opinions. Restitution under plea agreement exceeding monetary grade of offense, OAG 98-037 (2/9/98).

Verbatim recording of guilty plea proceedings in general sessions court, OAG 98-048 (2/23/98).

Effect of failure to record guilty plea proceedings, OAG 98-0144 (8/11/98).

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1. Guilty Pleas.

2. —In General.

There is no absolute right to plead guilty; strict standards apply before a plea may be accepted in the courts of this state, and even if the offered plea meets the constitutional test, the trial court is not bound to accept it. State v. Williams, 851 S.W.2d 828, 1992 Tenn. Crim. App. LEXIS 548 (Tenn. Crim. App. 1992), appeal denied, — S.W.2d —, 1992 Tenn. LEXIS 594 (Tenn. Oct. 26, 1992).

In order for a reviewing court to find plain abuse of authority sufficient to set aside a judge's rejection of a guilty plea, it must appear that no substantial evidence supports the conclusion of the trial judge. State v. Williams, 851 S.W.2d 828, 1992 Tenn. Crim. App. LEXIS 548 (Tenn. Crim. App. 1992), appeal denied, — S.W.2d —, 1992 Tenn. LEXIS 594 (Tenn. Oct. 26, 1992).

When an accused announces that he desires to accept a plea bargain agreement and plead guilty, the trial court must ask a sufficient number of questions to ensure that the accused is voluntarily entering the guilty plea. Parham v. State, 885 S.W.2d 375, 1994 Tenn. Crim. App. LEXIS 329 (Tenn. Crim. App. 1994).

A reviewing court may look to any relevant evidence in the record to determine the voluntariness of the plea. Hicks v. State, 983 S.W.2d 240, 1998 Tenn. Crim. App. LEXIS 416 (Tenn. Crim. App. 1998), review or rehearing denied, — S.W.3d —, 1998 Tenn. LEXIS 653 (Tenn. 1998).

3. —Factual Basis for Plea.

The requirement that the record show a factual basis for the plea exists to insure that the defendant's guilty plea is made with his understanding that his admitted conduct actually constitutes the offense with which he is charged or a lesser one; thus, upon a record showing that a guilty plea was voluntarily and understandingly made, the guilty plea, by itself was sufficient to support a conviction. State v. Lord, 894 S.W.2d 312, 1994 Tenn. Crim. App. LEXIS 733 (Tenn. Crim. App. 1994).

The existence of a factual basis may be shown by numerous sources in the record, whether it be a prosecutor's statement of the evidence, live testimony or otherwise. State v. Lord, 894 S.W.2d 312, 1994 Tenn. Crim. App. LEXIS 733 (Tenn. Crim. App. 1994).

Where defendant testified at a post-conviction hearing that he was guilty of the charged offenses, and it was shown that he was very familiar with criminal proceedings and was represented by competent counsel, he was not entitled to relief based on his allegation that the trial court failed to establish a factual basis for his guilty pleas. Powers v. State, 942 S.W.2d 551, 1996 Tenn. Crim. App. LEXIS 590 (Tenn. Crim. App. 1996).

4. Necessity of Transcript.

A transcript of the guilty plea hearing is necessary to determine if the appellants' pleas of guilty were entered in accordance with the mandates of Tenn. R. Crim. P. 11. Van Hoose v. State, 634 S.W.2d 618, 1981 Tenn. Crim. App. LEXIS 432 (Tenn. Crim. App. 1982).

5. Adequacy of Transcript.

When the transcript is inadequate to establish that a plea passes constitutional muster, or otherwise does not comport with the applicable law, the burden shifts to the state to prove that the defendant voluntarily, understandingly and knowingly entered the pleas. Chamberlain v. State, 815 S.W.2d 534, 1990 Tenn. Crim. App. LEXIS 525 (Tenn. Crim. App. 1990).

Transcript of guilty plea proceedings and the documents executed by the defendant did not affirmatively "disclose that the ... [defendant] voluntarily and understandingly entered his pleas of guilty," as mandated by Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274, 1969 U.S. LEXIS 1434 (1969), superseded by statute as stated in, Aguirre-Mata v. State, 125 S.W.3d 473, 2003 Tex. Crim. App. LEXIS 87 (2003), superseded by statute as stated in, Wood v. Dretke, — U.S. —, — S. Ct. —, — L. Ed. 2d —, 2004 U.S. Dist. LEXIS 11087 (2004); State v. Mackey, 553 S.W.2d 337, 1977 Tenn. LEXIS 579 (Tenn. 1977), superseded by

statute as stated in, State v. Chastain, 871 S.W.2d 661, 1994 Tenn. LEXIS 26 (Tenn. 1994), superseded by statute as stated in, State v. Wilson, 31 S.W.3d 189, 2000 Tenn. LEXIS 519 (Tenn. 2000), and Tenn. R. Crim. P. 11. Chamberlain v. State, 815 S.W.2d 534, 1990 Tenn. Crim. App. LEXIS 525 (Tenn. Crim. App. 1990).

6. Nature of Violation.

Violations of Tenn. R. Crim. P. 11 are not necessarily constitutional in nature and subject to collateral attack. State v. Miller, 634 S.W.2d 615, 1981 Tenn. Crim. App. LEXIS 431 (Tenn. Crim. App. 1981).

Violations of the holdings in State v. Mackey, 553 S.W.2d 337, 1977 Tenn. LEXIS 579 (Tenn. 1977), superseded by statute as stated in, State v. Chastain, 871 S.W.2d 661, 1994 Tenn. LEXIS 26 (Tenn. 1994), superseded by statute as stated in, State v. Wilson, 31 S.W.3d 189, 2000 Tenn. LEXIS 519 (Tenn. 2000), requiring trial judges to advise defendants of the consequences of guilty pleas, that exceed the requirements of Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274, 1969 U.S. LEXIS 1434 (1969), superseded by statute as stated in, Aguirre-Mata v. State, 125 S.W.3d 473, 2003 Tex. Crim. App. LEXIS 87 (2003), superseded by statute as stated in, Wood v. Dretke, — U.S. —, — S. Ct. —, — L. Ed. 2d —, 2004 U.S. Dist. LEXIS 11087 (2004), which requires guilty pleas to be made knowingly and voluntarily, are not constitutional violations and are not available except on direct appeal. State v. Frazier, 784 S.W.2d 927, 1990 Tenn. LEXIS 54 (Tenn. 1990).

7. Double Jeopardy.

Jeopardy does not attach at a hearing on a guilty plea until the plea is unconditionally accepted. State v. Todd, 654 S.W.2d 379, 1983 Tenn. LEXIS 687 (Tenn. 1983).

Where a court agreed to reduce a charge in order to facilitate a guilty plea, but the plea was never accepted because no agreement on punishment could be reached, trial on the original, greater charge was not prohibited by the double jeopardy clause. State v. Todd, 654 S.W.2d 379, 1983 Tenn. LEXIS 687 (Tenn. 1983).

8. Compliance with Procedures.

Trial judges, in accepting pleas of guilty in criminal cases, are required to comply substantially with the procedure prescribed. State v. Newsome, 778 S.W.2d 34, 1989 Tenn. LEXIS 452 (Tenn. 1989).

The failure of trial judge to comply with the procedure prescribed for accepting pleas of guilty in criminal cases will be reviewed under the harmless error standard, which, applied, is whether the noncompliance was or was not harmless to the defendant beyond a reasonable doubt. State v. Newsome, 778 S.W.2d 34, 1989 Tenn. LEXIS 452 (Tenn. 1989).

Failure of trial judge to explain the privilege against compulsory self-incrimination to defendant prior to accepting defendant's guilty pleas did not render defendant's convictions constitutionally infirm where the transcript of the sentencing hearing established that the defendant voluntarily, understandingly and knowingly entered the guilty pleas. Clark v. State, 800 S.W.2d 500, 1990 Tenn. Crim. App. LEXIS 521 (Tenn. Crim. App. 1990).

Where the attorneys who represented the defendant explained to the defendant in detail the evidence the state would introduce if he opted to go to trial, and his constitutional rights to a jury trial, confront and cross-examine the state's witnesses, and the privilege against self-incrimination, it was clear beyond a shadow of a doubt that defendant understood and appreciated his constitutional rights, and was aware entry of a plea of guilty would result in a waiver of those rights; and consequently, the trial court's failure to explain his rights was harmless beyond a reasonable doubt. Villars v. State, 833 S.W.2d 98, 1991 Tenn. Crim. App. LEXIS 956 (Tenn. Crim. App. 1991), rehearing denied, Villers v. State, — S.W.2d —, 1992 Tenn. Crim. App. LEXIS 81 (Tenn. Crim. App. 1992).

In order to guarantee that a guilty plea is voluntary and not the product of ignorance, incomprehension, coercion, terror, inducements, or threats, the trial court must insure that a defendant who pleads guilty has knowledge of his rights and understands that he is waiving those rights by pleading guilty. State v. Montgomery, 840 S.W.2d 900, 1992 Tenn. LEXIS 573 (Tenn. 1992).

Trial court did not abuse its discretion by refusing to accept defendant's guilty plea, as he waited until after a jury was sworn to attempt to plead guilty. State v. Hawkins, 519 S.W.3d 1, 2017 Tenn. LEXIS 272 (Tenn. May 1, 2017).

Trial court's omission regarding the maximum penalty for the aggravated robbery charges did not result in petitioner's entering an unknowing and involuntary guilty plea, and therefore the postconviction court properly denied petitioner relief, because petitioner acknowledged several times during the postconviction hearing that he knew at the time he entered his guilty pleas that the sentencing range was 12 to 20 years, and trial counsel testified that he informed petitioner that he faced a sentence of 12 to 20 years for each aggravated robbery charge. Nabi v. State, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 274 (Tenn. Crim. App. Apr. 30, 2019).

9. Substantial Compliance.

Trial court substantially complied with this rule because the record showed that petitioner was highly intelligent with multiple postsecondary degrees, he had a criminal history that indicated his familiarity with criminal proceedings, he spent two days working with different

attorneys to resolve his case, counsel explained the terms of the State's plea offer and their unwillingness to settle the case otherwise, and post-conviction court found that petitioner pleaded guilty because he was tired of being in jail and he thought he would be released that day if he proceeded with a guilty plea and a sentencing hearing. Wadri v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 797 (Tenn. Crim. App. Dec. 15, 2020).

10. Violation Not Shown.

The record did not show that the trial court participated in any plea negotiations in violation of Tenn. R. Crim. P. 11. State v. Benson, 645 S.W.2d 423, 1983 Tenn. Crim. App. LEXIS 379 (Tenn. Crim. App. 1983).

In defendant's murder case, a court did not err in a group plea allocution where, during the plea hearing, the court questioned defendant and the co-defendants both individually and as a group, and when the answers of any of defendants differed, each was named in the transcript, and his or her answer followed; in addition, during each occasion in which defendant testified, she demonstrated the ability to understand statements made to her and questions asked of her and was able to effectively communicate with those questioning her, and defense counsel testified that defendant was able to assist him in her case. Howell v. State, 185 S.W.3d 319, 2006 Tenn. LEXIS 190 (Tenn. 2006).

11. Advice to Defendant.

Failure to be advised that this and prior convictions could be used to form the basis of a subsequent habitual criminal charge did not operate to make defendant's prior guilty pleas involuntary, because such advice was not required by Tenn. R. Crim. P. 11(c) or by the advice criteria enunciated in State v. Mackey, 553 S.W.2d 337, 1977 Tenn. LEXIS 579 (Tenn. 1977), superseded by statute as stated in, State v. Chastain, 871 S.W.2d 661, 1994 Tenn. LEXIS 26 (Tenn. 1994), superseded by statute as stated in, State v. Wilson, 31 S.W.3d 189, 2000 Tenn. LEXIS 519 (Tenn. 2000). State v. Evans, 669 S.W.2d 708, 1984 Tenn. Crim. App. LEXIS 2721 (Tenn. Crim. App. 1984).

Tenn. R. Crim. P. 11 does not contain all of the mandates of State v. Mackey, 553 S.W.2d 337, 1977 Tenn. LEXIS 579 (Tenn. 1977), superseded by statute as stated in, State v. Chastain, 871 S.W.2d 661, 1994 Tenn. LEXIS 26 (Tenn. 1994), superseded by statute as stated in, State v. Wilson, 31 S.W.3d 189, 2000 Tenn. LEXIS 519 (Tenn. 2000) which must be fully complied with as a prerequisite to the acceptance of a guilty plea. Rounsaville v. Evatt, 733 S.W.2d 506, 1987 Tenn. LEXIS 1065 (Tenn. 1987).

Before the trial judge can accept the defendant's plea, the trial judge is required to explain the rights and information set forth in Tenn. R. Crim. P. 11(c) adequately, and he is required to make sure that the defendant understands same; and the trial judge must also determine whether there is a factual basis for the offenses to which the defendant is pleading guilty, question the defendant to determine whether he is entering the plea freely and voluntarily, and he must further determine whether the defendant understands and appreciates the effect of the plea he is entering. Chamberlain v. State, 815 S.W.2d 534, 1990 Tenn. Crim. App. LEXIS 525 (Tenn. Crim. App. 1990).

Where the record failed to establish that the guilty pleas accepted by the trial court were knowing and voluntary, the defendant was entitled to have convictions vacated, as the trial court failed to advise the defendant of his right against compulsory self-incrimination specified under Tenn. R. Crim. P. 11(c)(3). State v. Montgomery, 840 S.W.2d 900, 1992 Tenn. LEXIS 573 (Tenn. 1992).

Defendant's inability to understand the concepts of "best interests" and "Alford plea", and his inability to follow the discussion between counsel and the bench, did not render counsel's assistance ineffective nor defendant's guilty plea involuntary. Hicks v. State, 983 S.W.2d 240, 1998 Tenn. Crim. App. LEXIS 416 (Tenn. Crim. App. 1998), review or rehearing denied, — S.W.3d —, 1998 Tenn. LEXIS 653 (Tenn. 1998).

Plea was not unknowing and involuntary under Due Process Clause; trial court's failure to comply with this rule was harmless beyond reasonable doubt because petitioner was aware his guilty plea would result in his deportation and could adversely affect his ability to return legally to United States. Garcia v. State, 425 S.W.3d 248, 2013 Tenn. LEXIS 1012 (Tenn. Dec. 23, 2013).

12. —Subsequent Use of Conviction.

Any court accepting a plea of guilty is required to make it clear to the defendant that the resulting judgment of conviction may be used in a subsequent proceeding to enhance the punishment for subsequent offenses. State v. Newsome, 778 S.W.2d 34, 1989 Tenn. LEXIS 452 (Tenn. 1989).

Where court, in accepting a plea of guilty, has failed to make it clear to the defendant that the resulting judgment of conviction may be used in a subsequent proceeding to enhance the punishment for subsequent offenses, the standard of review is whether the trial court's omission was or was not harmless to this defendant beyond a reasonable doubt. State v. Newsome, 778 S.W.2d 34, 1989 Tenn. LEXIS 452 (Tenn. 1989).

13. —Use of Defendant's Statements.

Where defendant enters a plea of guilty and the trial judge fails to advise the defendant in accordance with the fifth requirement of State

v. Mackey, 553 S.W.2d 337, 1977 Tenn. LEXIS 579 (Tenn. 1977), superseded by statute as stated in, State v. Chastain, 871 S.W.2d 661, 1994 Tenn. LEXIS 26 (Tenn. 1994), superseded by statute as stated in, State v. Wilson, 31 S.W.3d 189, 2000 Tenn. LEXIS 519 (Tenn. 2000) that his responses to the court or the attorney general at his guilty plea submission may be used against him later in a prosecution for perjury or false statement, the standard of appellate review is whether the trial court's omission was or was not harmless to the defendant beyond a reasonable doubt. State v. Newsome, 778 S.W.2d 34, 1989 Tenn. LEXIS 452 (Tenn. 1989).

Record demonstrated that defendant in capital murder case knowingly and voluntarily entered plea of guilty, and the evidence did not preponderate against the findings of the post-conviction court regarding conflicting testimony as to whether defendant's trial counsel fully advised defendant concerning the ramification of his guilty plea, especially in regard to the issue of suppression of defendant's confession. Bates v. State, 973 S.W.2d 615, 1997 Tenn. Crim. App. LEXIS 574 (Tenn. Crim. App. 1997), rehearing denied, — S.W.2d —, 1997 Tenn. Crim. App. LEXIS 680 (Tenn. Crim. App. July 23, 1997), cert. denied, Bates v. Tennessee, 524 U.S. 907, 118 S. Ct. 2067, 141 L. Ed. 2d 144, 1998 U.S. LEXIS 3634 (1998).

14. —Right Against Self-Incrimination.

Even though the trial court did not advise the petitioner of the right against self-incrimination, where the guilty plea accepted by the trial court was knowing and voluntary the petitioner was not entitled to have the conviction vacated. Johnson v. State, 834 S.W.2d 922, 1992 Tenn. LEXIS 365 (Tenn. 1992).

Under Tenn. R. Crim. P. 11(c)(3) (now Tenn. R. Crim. P. 11(b)(1)), when a defendant makes a charge supported by the evidence that the trial court failed to advise him of his right against self-incrimination, the burden of proof shifts to the state. State v. Montgomery, 840 S.W.2d 900, 1992 Tenn. LEXIS 573 (Tenn. 1992).

15. Rejection of Guilty Plea.

The trial court did not abuse its discretion in rejecting defendant's guilty plea, where the defendant maintained his innocence and that he chose to enter a plea of guilt in this case only because his lawyer suggested it. State v. Williams, 851 S.W.2d 828, 1992 Tenn. Crim. App. LEXIS 548 (Tenn. Crim. App. 1992), appeal denied, — S.W.2d —, 1992 Tenn. LEXIS 594 (Tenn. Oct. 26, 1992).

16. Nolo Contendere.

There is no statute or rule of criminal procedure that prohibits the use of a conviction on a plea of nolo contendere to enhance punishment. State v. Teague, 680 S.W.2d 785, 1984 Tenn. LEXIS 948 (Tenn. 1984), cert. denied, Teague v. Tennessee, 473 U.S. 911, 105 S. Ct. 3538, 87 L. Ed. 2d 662, 1985 U.S. LEXIS 2535 (1985); Teague v. Tennessee, 493 U.S. 874, 110 S. Ct. 210, 107 L. Ed. 2d 163, 1989 U.S. LEXIS 4239 (1989).

Wherever there is presented material evidence to the civil service merit board of the misconduct charged, the mere knowledge alone of the additional fact that the employee had entered a nolo contendere plea, in violation of Tenn. R. Crim. P. 11(e)(6) (now Tenn. R. Crim. 11(d)), in the criminal courts, cannot be used as a shield against appropriate action by administrative agencies and civil service merit boards. Whitmore v. Civil Service Merit Bd., 673 S.W.2d 535, 1984 Tenn. App. LEXIS 3404 (Tenn. Ct. App. 1984).

The standard for determining the competency of an accused to stand trial, i.e. the capacity to understand the nature and object of the proceedings, consult with counsel, and assist in the preparation of his or her defense, is the same standard to be applied in determining the competency of an accused to plea guilty or nolo contendere. A person who has been found competent to stand trial has the requisite mental competency to waive his or her rights and enter a plea of guilty or nolo contendere. Berndt v. State, 733 S.W.2d 119, 1987 Tenn. Crim. App. LEXIS 2475 (Tenn. Crim. App. 1987).

Trial court's corrective order filed two days after the original order, and entered before the defendant filed his notice of appeal, complied with *Preston* and properly reserved defendant's certified question of law for appeal. State v. Armstrong, 126 S.W.3d 908, 2003 Tenn. LEXIS 68 (Tenn. 2003).

Tennessee Supreme Court overrules State v. Gillman, 2006 Tenn. Crim. App. LEXIS 818, that a sex offender placed on probation, including sex offender treatment, must be given actual, definite notice that his probation may be revoked if he refuses to admit during treatment that he engaged in the underlying criminal conduct, regardless of the plea entered; defendant pleaded nolo contendere and had at least implied notice that he would need to acknowledge he had engaged in criminal conduct, and actual, definite notice was not required. State v. Albright, 564 S.W.3d 809, 2018 Tenn. LEXIS 743 (Tenn. Dec. 11, 2018), cert. denied, Albright v. Tennessee, 204 L. Ed. 2d 1134, 139 S. Ct. 2746, — U.S. —, 2019 U.S. LEXIS 4239 (U.S. June 24, 2019).

If due process does not require a defendant pleading guilty to a sex offense to be informed about the requirements of the Sexual Offender and Violent Sexual Offender Registration, Verification, and Tracking Act and the potential penalties for failing to comply with the Act, it makes no sense to require a trial court to inform a defendant pleading guilty or nolo contendere to a sex offense that failing to com-

ply with the requirements of his required sex offender therapy may lead to the revocation of his probation. State v. Albright, 564 S.W.3d 809, 2018 Tenn. LEXIS 743 (Tenn. Dec. 11, 2018), cert. denied, Albright v. Tennessee, 204 L. Ed. 2d 1134, 139 S. Ct. 2746, — U.S. —, 2019 U.S. LEXIS 4239 (U.S. June 24, 2019).

Although defendant did not verbally admit at his plea hearing to the underlying facts that resulted in the charge of soliciting a minor, his plea of nolo contendere had the same effect as a plea of guilty insofar as the prosecution and his disposition were concerned; a defendant pleading nolo contendere to a sex offense may nonetheless be mandated to participate in sex offender treatment which may require admissions to the conduct underlying the conviction(s). State v. Albright, 564 S.W.3d 809, 2018 Tenn. LEXIS 743 (Tenn. Dec. 11, 2018), cert. denied, Albright v. Tennessee, 204 L. Ed. 2d 1134, 139 S. Ct. 2746, — U.S. —, 2019 U.S. LEXIS 4239 (U.S. June 24, 2019).

17. Retaining Right to Appeal.

Where a plea agreement stated that the defendant retained his right to "appeal legal issues," this did not mean all legal issues but rather those reserved in the plea agreement. To hold otherwise would have exceeded the legal bounds of former Tenn. R. Crim. P. 37(b)(2)(i) or T.R.A.P. 3(b). State v. Shults, 684 S.W.2d 108, 1984 Tenn. Crim. App. LEXIS 2983 (Tenn. Crim. App. 1984).

Defendant did not have the right to appeal after entering a valid plea of guilty and being sentenced pursuant to the terms of a plea bargain agreement. State v. McKissack, 917 S.W.2d 714, 1995 Tenn. Crim. App. LEXIS 941 (Tenn. Crim. App. 1995).

18. Plea Bargaining Procedure.

The trial judge's order that the state reinstate its prior plea bargain offer, after ordering a new trial based on ineffective assistance of counsel, was a departure from the accepted and usual course of judicial proceedings under T.R.A.P. 10(a)(1). State v. Turner, 713 S.W.2d 327, 1986 Tenn. Crim. App. LEXIS 2572 (Tenn. Crim. App. 1986), cert. denied, Turner v. Tennessee, 479 U.S. 933, 107 S. Ct. 407, 93 L. Ed. 2d 360, 1986 U.S. LEXIS 4535 (1986).

There is no connection between the plea bargaining procedures prescribed in Tenn. R. Crim. P. 11 and the correction or reduction of sentence provisions of Tenn. R. Crim. P. 35. The respective trial judges set sentencing hearings in each of these cases in accordance with T.C.A. § 40-35-203. State v. Hodges, 815 S.W.2d 151, 1991 Tenn. LEXIS 321 (Tenn. 1991); State v. McDonald, 893 S.W.2d 945, 1994 Tenn. Crim. App. LEXIS 431 (Tenn. Crim. App. 1994).

There is no obligation on the part of the state to offer any benefit or advantage to the defendant by reason of entering a guilty plea. Aside from any agreement which may exist between the state and a defendant in reference to the entry of a guilty plea, the ultimate decision to accept or reject any such plea is to be made by the trial court and, if so accepted and received by the court, the final determination on the extent of the punishment to be meted out is the province of the trial court. State v. Hodges, 815 S.W.2d 151, 1991 Tenn. LEXIS 321 (Tenn. 1991).

Defendant, who had received a specific sentence under a plea bargain agreement, was not entitled to a reduction of sentence where he could not show post-sentencing information or developments that warranted such action. State v. McDonald, 893 S.W.2d 945, 1994 Tenn. Crim. App. LEXIS 431 (Tenn. Crim. App. 1994).

Plea bargaining is a matter entirely within the discretion of the district attorney general and the doctrine of separation of powers prevents a trial court from requiring the state to make a particular plea bargain offer. Thus, the trial court erred in ordering the state to extend to one defendant the same plea bargain provided to his three codefendants. State v. Head, 971 S.W.2d 49, 1997 Tenn. Crim. App. LEXIS 795 (Tenn. Crim. App. 1997).

The administration of *Miranda* warnings is insufficient to inform the defendant of the defendant's rights pursuant to Tenn. R. Crim. P. 11(e)(6) and to Tenn. R. Evid. 410. State v. Hinton, 42 S.W.3d 113, 2000 Tenn. Crim. App. LEXIS 544 (Tenn. Crim. App. 2000), review or rehearing denied, — S.W.3d —, 2001 Tenn. LEXIS 126 (Tenn. 2001).

Tenn. R. Crim. P. 11(e)(6) (now Tenn. R. Crim. P. 11(d)) is not limited to statements made to prosecuting attorneys. State v. Hinton, 42 S.W.3d 113, 2000 Tenn. Crim. App. LEXIS 544 (Tenn. Crim. App. 2000), review or rehearing denied, — S.W.3d —, 2001 Tenn. LEXIS 126 (Tenn. 2001).

Trial judge did not participate in plea discussions in violation of Tenn. R. Crim. P. 11(e) (now Tenn. R. Crim. P. 11(c)) by telling defendant's elbow counsel that he would be inclined to grant concurrent sentences, but that he could not make a definitive determination until after the sentencing hearing. State v. McCary, 119 S.W.3d 226, 2003 Tenn. Crim. App. LEXIS 17 (Tenn. Crim. App. 2003), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 674 (Tenn. July 7, 2003).

In defendant's murder case, defendant's guilty plea, made pursuant to a package plea deal, was intelligent, knowing, and voluntary where defendant was motivated to enter the plea in part by her desire to save her four adult co-defendants from the death penalty and her desire to avoid the torment of a trial, particularly for her family; furthermore, the evidence was overwhelming and horrible, and defendant deliberately and knowingly participated in every aspect of the killings. Howell v. State, 185

S.W.3d 319, 2006 Tenn. LEXIS 190 (Tenn. 2006).

By asking defendant whether he understood each of the mandates in this case law and rule as well as whether he was knowingly and voluntarily waiving rights and pleading guilty, the trial court expressed the sense of the substance of the required advice. Lane v. State, 316 S.W.3d 555, 2010 Tenn. LEXIS 653 (Tenn. July 14, 2010).

19. Rejection of Agreement.

Trial judge acted within his authority in rejecting a plea agreement where he felt that the facts of the case, even when mitigating circumstances were considered, should be decided by a jury. State v. Hines, 919 S.W.2d 573, 1995 Tenn. LEXIS 503 (Tenn. 1995), cert. denied, Hines v. Tennessee, 519 U.S. 847, 117 S. Ct. 133, 136 L. Ed. 2d 82, 1996 U.S. LEXIS 5179 (1996).

The trial court did not err in rejecting a plea agreement wherein defendant did not acknowledge guilt (*Alford* plea) in a case involving a sex offense against a child where, given the nature of the crime, the court believed that defendant's acknowledgment of guilt was an important consideration in evaluating the agreement. VanArsdall v. State, 919 S.W.2d 626, 1995 Tenn. Crim. App. LEXIS 704 (Tenn. Crim. App. 1995).

20. Appeal of Guilty Plea.

If a person has entered a plea of guilty under Tenn. R. Crim. P. 11, a motion for a new trial cannot be made, but the right to appeal may be preserved. Failing to preserve an appeal from a plea of guilty generally forecloses any direct attack upon such a plea. State v. McClintock, 732 S.W.2d 268, 1987 Tenn. LEXIS 1063 (Tenn. 1987), superseded by statute as stated in, State v. Alonso, — S.W.2d —, 1991 Tenn. Crim. App. LEXIS 784 (Tenn. Crim. App. Sept. 24, 1991).

The issue of waiver for failure to raise violations of the holdings in Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274, 1969 U.S. LEXIS 1434 (1969), superseded by statute as stated in, Aguirre-Mata v. State, 125 S.W.3d 473, 2003 Tex. Crim. App. LEXIS 87 (2003), superseded by statute as stated in, Wood v. Dretke, — U.S. —, — S. Ct. —, — L. Ed. 2d —, 2004 U.S. Dist. LEXIS 11087 (2004), which requires guilty pleas to be made knowingly and voluntarily, is not available to the state. State v. Frazier, 784 S.W.2d 927, 1990 Tenn. LEXIS 54 (Tenn. 1990).

21. Sentencing.

As referenced in T.C.A. § 40-35-501(i)(3), T.C.A.§ 39-13-523 provides that defendants convicted of rape of a child are ineligible to receive the benefit of sentence reduction credits and have to serve their entire sentences undiminished by credits of up to 15 percent; the transcript of petitioner's guilty plea hearing showed the parties acknowledged their expectations that petitioner would receive the benefit of the 15 percent sentence reduction credit provisions, and indeed, the judgment reflected that; thus, the judgments did not contain mere clerical errors and the judgments were void, entitling petitioner to the issuance of a writ of habeas corpus and a remand to assure that there existed a factual basis for his pleas. Coleman v. Morgan, 159 S.W.3d 887, 2004 Tenn. Crim. App. LEXIS 695 (Tenn. Crim. App. 2004), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 1182 (Tenn. Dec. 20, 2004).

Former inmate was entitled to have a clerical error corrected to reflect the imposition of a shorter sentence because the trial court violated Tenn. R. Crim. P. 11(c) by imposing a sentence exceeding that agreed to in the former inmate's plea bargain. State v. Brown, 479 S.W.3d 200, 2015 Tenn. LEXIS 933 (Tenn. Dec. 2, 2015).

Court of criminal appeals erred in reversing the trial court's decision on defendant's reduction of sentence motion, and in reinstating the initial aggregate 31-year sentence because, where a defendant pleaded guilty without an agreement as to sentencing, a defendant was not required to present post-sentencing information or developments warranting a reduction of sentence to prevail on a reduction of sentence motion; thus, the trial court did not apply an incorrect legal standard or abuse its discretion in any other way when it determined, upon reflection, that the initial aggregate sentence was excessive and granted defendant's reduction of sentence motion. State v. Patterson, 564 S.W.3d 423, 2018 Tenn. LEXIS 735 (Tenn. Dec. 10, 2018).

Defendant is only required to provide post-sentencing information or developments warranting a reduction of the initial sentence if defendant's reduction of sentence motion seeks reduction of a specific sentence imposed in exchange for a guilty plea. State v. Patterson, 564 S.W.3d 423, 2018 Tenn. LEXIS 735 (Tenn. Dec. 10, 2018).

22. Judicial Diversion.

Although defendant appeared to be statutorily "qualified" for judicial diversion because prior diversions in other states did not serve to disqualify a defendant from judicial diversion under T.C.A. § 40-35-313, judicial diversion was not included in the plea agreement, and therefore trial court lacked authority to alter the plea agreement; when the trial court accepted the plea agreement pursuant to Tenn. R. Crim. P. 11(e)(1)(C) (now Tenn. R. Crim. P. 11(c)(1)(C)), such agreement represented the full and complete agreement between parties and could not be altered by the trial court to include judicial diversion. State v. Soller, 181 S.W.3d 645, 2005 Tenn. LEXIS 1045 (Tenn. 2005).

When a trial court accepts a plea agreement pursuant to Tenn. R. Crim. P. 11(e)(1)(C) (now Tenn. R. Crim. P. 11(c)(1)(C)), such agreement represents the full and complete agreement between the parties and cannot be altered by the trial court to include judicial diversion; thus, the trial court may entertain the issue of judicial diversion only when the court rejects the agreement or when such an option is reflected in the 11(e)(1)(C) (now Tenn. R. Crim. P. 11(c)(1)(C)) plea agreement. State v. Soller, 181 S.W.3d 645, 2005 Tenn. LEXIS 1045 (Tenn. 2005).

23. Writ of Error Coram Nobis.

Petitioner did not forfeit the procedural remedy of writ of error coram nobis based on newly discovered evidence by entering best interest guilty pleas because the writ, as codified in T.C.A. § 40-26-105(b), could be used to challenge a conviction based upon a guilty plea, rather than a bench trial or a trial by jury. Wlodarz v. State, 361 S.W.3d 490, 2012 Tenn. LEXIS 137 (Tenn. Feb. 23, 2012), overruled, Frazier v. State, 495 S.W.3d 246, 2016 Tenn. LEXIS 406 (Tenn. July 7, 2016), overruled, Hatton v. State, — S.W.3d —, 2016 Tenn. Crim. App. LEXIS 556 (Tenn. Crim. App. Aug. 1, 2016), overruled, Brown v. State, — S.W.3d —, 2016 Tenn. Crim. App. LEXIS 752 (Tenn. Crim. App. Sept. 30, 2016), overruled, Scott v. State, — S.W.3d —, 2017 Tenn. Crim. App. LEXIS 397 (Tenn. Crim. App. May 16, 2017), overruled, Higgs v. State, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 332 (Tenn. Crim. App. Apr. 30, 2018), overruled, McKennie v. State, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 737 (Tenn. Crim. App. Sept. 28, 2018).

Precise nature of the proceedings surrounding guilty pleas required by Tenn. R. Crim. P. 11 demonstrate that trial courts should carefully address factual and legal issues before entering a judgment of conviction because while these proceedings may not include some of the components traditionally associated with litigation, they fall within the broad interpretations of "trial"; because the waiver of fundamental constitutional rights is implicated when an accused enters a plea of guilty," it is inappropriate to trivialize a guilty plea proceeding by holding that it does not constitute a "trial." Wlodarz v. State, 361 S.W.3d 490, 2012 Tenn. LEXIS 137 (Tenn. Feb. 23, 2012), overruled, Frazier v. State, 495 S.W.3d 246, 2016 Tenn. LEXIS 406 (Tenn. July 7, 2016), overruled, Hatton v. State, — S.W.3d —, 2016 Tenn. Crim. App. LEXIS 556 (Tenn. Crim. App. Aug. 1, 2016), overruled, Brown v. State, — S.W.3d —, 2016 Tenn. Crim. App. LEXIS 752 (Tenn. Crim. App. Sept. 30, 2016), overruled, Scott v. State, — S.W.3d —, 2017 Tenn. Crim. App. LEXIS 397 (Tenn. Crim. App. May 16, 2017), overruled, Higgs v. State, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 332 (Tenn. Crim. App. Apr. 30, 2018), overruled, McKennie v. State, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 737 (Tenn. Crim. App. Sept. 28, 2018).

Supreme court overturns the majority's decision in Wlodarz v. State, 361 S.W.3d 490, 2012 Tenn. LEXIS 137 (Tenn. 2012) and holds that a guilty plea may not be collaterally attacked pursuant to the coram nobis statute; the coram nobis statute is not available as a procedural mechanism for collaterally attacking a guilty plea, and the supreme court overturns Wlodarz and any other Tennessee cases holding otherwise. Frazier v. State, 495 S.W.3d 246, 2016 Tenn. LEXIS 406 (Tenn. July 7, 2016), cert. denied, Frazier v. Tennessee, 198 L. Ed. 2d 237, 137 S. Ct. 2163, — U.S. —, 2017 U.S. LEXIS 3355 (U.S. May 22, 2017).

One cannot simultaneously participate in a trial and waive one's right to a trial, but rather, applying the plain and ordinary meanings to the words "trial" and "guilty plea" results in the conclusion that the two proceedings are mutually exclusive; thus, criminal defendants who plead "not guilty" are tried, and conversely, criminal defendants who plead "guilty" are not. Frazier v. State, 495 S.W.3d 246, 2016 Tenn. LEXIS 406 (Tenn. July 7, 2016), cert. denied, Frazier v. Tennessee, 198 L. Ed. 2d 237, 137 S. Ct. 2163, — U.S. —, 2017 U.S. LEXIS 3355 (U.S. May 22, 2017).

In addition to being non-adversarial, guilty plea hearings do not typically involve "evidence," however, a defendant is not entitled to relief under the coram nobis statute unless he or she demonstrates that he or she was without fault in failing to present certain evidence at the proper time; this prerequisite to coram nobis relief set forth in the statute reinforces the coram nobis statute's limitation to convictions that resulted from trials rather than from guilty pleas. Frazier v. State, 495 S.W.3d 246, 2016 Tenn. LEXIS 406 (Tenn. July 7, 2016), cert. denied, Frazier v. Tennessee, 198 L. Ed. 2d 237, 137 S. Ct. 2163, — U.S. —, 2017 U.S. LEXIS 3355 (U.S. May 22, 2017).

Petitioner sought to collaterally attack his guilty plea through the use of the error coram nobis statute, but he was not entitled to relief because the statute setting forth the remedy of error coram nobis in criminal matters did not encompass its application to guilty pleas. Frazier v. State, 495 S.W.3d 246, 2016 Tenn. LEXIS 406 (Tenn. July 7, 2016), cert. denied, Frazier v. Tennessee, 198 L. Ed. 2d 237, 137 S. Ct. 2163, — U.S. —, 2017 U.S. LEXIS 3355 (U.S. May 22, 2017).

24. Knowing, Intelligent, and Voluntary.

Defendant failed to establish that defendant's guilty plea was not knowingly and voluntarily entered because defendant did not allege that the trial court failed to give any of the required warnings. Furthermore, the post-conviction court found that defendant dis-

cussed the plea agreement with trial counsel and that defendant understood the terms of the plea agreement. Dorsey v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 182 (Tenn. Crim. App. Mar. 13, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 446 (Tenn. July 17, 2020).

In a petition for post-conviction relief, defendant's guilty plea was entered knowingly and voluntarily as the guilty plea colloquy showed that the trial court engaged defendant in an extensive series of questions to ensure that he understood the rights he was waiving by entering the guilty plea; and the post-conviction court determined that defendant was being untruthful in his assertion that the location where he was to serve his sentence was a material part of his guilty plea. Aldridge v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 648 (Tenn. Crim. App. Sept. 29, 2020).

Defendant's petition for post-conviction relief was properly denied because defendant failed to show that his guilty plea was not knowingly, voluntarily, and intelligently made with the effective assistance of counsel as he stated that he was not forced to enter his plea and that no one had promised him anything; and he admitted that he never told the trial court at the guilty plea submission hearing that he felt pressured to accept the plea. Griffin v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 762 (Tenn. Crim. App. Nov. 30, 2020).

25. Certified Question.

After entering a conditional guilty plea, defendant properly reserved his issues for appeal in the certified question, because although defendant's certified question would have benefitted from the incorporation of more fact-specific references, the substance of the question nevertheless satisfied the jurisdictional requirements and the issue of whether the state violated the anti-shuttling provisions of the Interstate Agreement on Detainers was properly before the court. State v. Springer, 406 S.W.3d 526, 2013 Tenn. LEXIS 499 (Tenn. June 24, 2013).

26. Ineffective Assistance.

Petitioner failed to establish by clear and convincing evidence that counsel was ineffective, and thus petitioner was not entitled to post-conviction relief. counsel fully explored the potential defenses to the State's case, his investigation prior to entry of the guilty plea was reasonable, and petitioner was sufficiently advised of this during the guilty plea colloquy. Connor v. State, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 729 (Tenn. Crim. App. Sept. 27, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 111 (Tenn. Feb. 20, 2019).

Post-conviction court properly denied defendant's motion for relief because he failed to show that trial counsel rendered deficient performance by failing to adequately consult with him prior to defendant entering the guilty pleas or that his guilty plea was not knowingly, voluntarily, and intelligently made, since defendant specifically told the trial court that trial counsel had done a good job, provided him with discovery, and discussed the nature and terms of the plea agreement with him. Degroat v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 331 (Tenn. Crim. App. May 11, 2020).

Post-conviction court properly denied defendant's petition for relief because he failed to show that his trial counsel was ineffective where counsel visited with defendant between 17 and 19 times in the jail, and wrote at least six letters to him discussing the contents of discovery and answering defendant's questions, counsel also provided defendant with adequate information regarding trial strategy and the potential consequences of going to trial, provided defendant with discovery on two occasions, which they reviewed on multiple occasions, and reviewed all of the evidence in defendant's case so that defendant could make an "informed decision" to accept the plea offer from the State. Balfour v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 513 (Tenn. Crim. App. July 27, 2020).

Rule 12. Pleadings and Motions Before Trial; Defenses and Objections. —

(a) Pleadings and Motions. — Pleadings in criminal proceedings are the indictment, presentment, and information, and the pleas of not guilty, guilty, and nolo contendere. All other pleas, demurrers, and motions to quash are abolished; defenses and objections raised before trial that could have been raised by one or more of them are now raised only by motion to dismiss or to grant appropriate relief, as provided in these rules. Motions may be oral or written, at the discretion of the judge.

(b) Pretrial Motions. —

(1) Motions That May Be Made Before Trial. — A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue

(2) Motions That Must Be Made Before Trial. — The following must be raised before trial:

(A) a motion alleging a defect in the institution of the prosecution;

(B) a motion alleging a defect in the indictment, presentment, or information–but at any time while the case is pending, the court may hear a claim that the indictment, presentment, or information fails to show jurisdiction in the court or to charge an offense;

(C) a motion to suppress evidence;

(D) a Rule 16 request for discovery; and

(E) a Rule 14 motion to sever or consolidate charges or defendants.

(c) Motion Date. — Unless otherwise provided by local rule, the court may–at the arraignment or as soon afterward as practicable–set a deadline for the parties to make pretrial motions or requests and may also schedule a motion hearing.

(d) Notice by the State of the Intention to Use Evidence. —

(1) At the State's Discretion. — At the arraignment or as soon afterward as practicable, the state may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(2)(C).

(2) At the Defendant's Request. — At the arraignment or as soon afterward as practicable, in order to afford an opportunity to move to suppress evidence the defendant may request notice of the state's intent to use (in its evidence in chief at trial) any evidence that the defendant may be entitled to discover under Rule 16, subject to any relevant limitations prescribed in Rule 16.

(e) Ruling on Motion. — The court shall decide each pretrial motion before trial unless it finds good cause to defer a ruling until trial or after a verdict. The court shall not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court shall state its essential findings on the record.

(f) Effect of Failure to Raise Defenses or Objections. — Unless the court grants relief for good cause, a party waives any defense, objection, or request by failing to comply with:

(1) rules requiring such matters to be raised pretrial;

(2) any deadline set by the court under Rule 12(c); or

(3) any deadline extension granted by the court.

(g) Records. — A verbatim record shall be made of all proceedings at the motion hearing, including any findings of fact and conclusions of law that are made orally.

(h) Effect of Decision on Motion. —

(1) Confinement. — If the court grants a motion based on a defect in the institution of the prosecution or in the indictment, presentment, or information, it may also order that the defendant be continued in custody or that the defendant's bail be continued for a specified time pending the filing of a new indictment or information.

(2) Statute of Limitations. — Nothing in this rule affects the provisions of any statute of limitations.

Advisory Commission Comments. This rule conforms to its federal counterpart and applies only in criminal courts of record.

The verbatim record referred to in section (g) means that the proceedings must be electronically (or in some other way) preserved, and does not necessarily mean that a written transcript must be prepared before it is needed for purposes of appeal or otherwise.

The state is also permitted to make appropriate pretrial motions under this rule.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 3-7-2, 3-12-2 — 3-12-4, 3-12-7, 3-12-8, 3-12-11 — 3-12-15, 3-16-1, 3-16-2, 3-18-1, 3-26.2-1, 3-26.2-3.

Tennessee Jurisprudence. 1 Tenn. Juris., Abatement, Survival and Revival, §§ 15, 19; 8 Tenn. Juris., Criminal Procedure, §§ 23-27; 10 Tenn. Juris., Double Jeopardy, §§ 3, 12-16; 11 Tenn. Juris., Evidence, § 80; 14 Tenn. Juris., Grand Jury, §§ 3, 7; 18 Tenn. Juris., Limitations of Actions, §§ 18, 52; 22 Tenn. Juris., Searches and Seizures, §§ 2, 33.

Law Reviews. Post-Conviction Relief in Tennessee — Fourteen Years of Judicial Administration Under the Post-Conviction Procedure Act (Gary L. Anderson), 48 Tenn. L. Rev. 605.

Tennessee's Death Penalty: An Overview of the Procedural Safeguards, 31 U. Mem. L. Rev. 779 (2001).

Attorney General Opinions. While a case is pending before the grand jury, the general sessions court retains jurisdiction over the defendant and the warrant charges, except that its authority to determine bail matters ends after the case is bound over; the criminal court or circuit court, has authority to determine the conditions of bail "at any time prior to conviction," including during the period that the matter is pending before the grand jury, OAG 05-009 (1/20/05).

NOTES TO DECISIONS

Analysis

1. Purpose of Rule.
2. Construction with Other Statutes.
3. Time to Make and Decide Motions.
4. —Motion to Suppress In-Court Identification.
5. —Effect on Appeal.
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8. Time of Raising Defenses.
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11. Lack of Subject-Matter Jurisdiction.
12. Statute of Limitations.
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1. Purpose of Rule.

The purpose of Tenn. R. Crim. P. 12 is not only to avoid the unnecessary interruption and inefficiency in conducting jury trials caused by needlessly removing the jury from the courtroom for protracted suppression hearings, but also to ensure the right of the state to an appeal of an adverse ruling by the trial judge without placing the defendant twice in jeopardy. State v. Randolph, 692 S.W.2d 37, 1985 Tenn. Crim. App. LEXIS 3331 (Tenn. Crim. App. 1985).

Tenn. R. Crim. P. 12(f) was meant to alleviate exactly the type of "sandbagging" technique employed by defense counsel, whom rather than properly filing a pretrial motion to dismiss the indictment, elected not to raise the issue until after the jury was sworn and jeopardy had attached. State v. Nixon, 977 S.W.2d 119, 1997 Tenn. Crim. App. LEXIS 1202 (Tenn. Crim. App. 1997).

2. Construction with Other Statutes.

T.C.A. § 37-1-159(d) provides that a juvenile defendant may appeal from the order of the criminal court accepting jurisdiction only following a conviction on the merits of the charge; however, that statute in no way excuses a defendant's obligation to comply with Tenn. R. Crim. P. 12(b)(1) and (2) (now Tenn. R. Crim. P. 12(b)(2)(A) and (B)), which require that defenses and objections based on defects in the institution of the prosecution or in the indictment must be raised prior to trial. State v. Hale, 833 S.W.2d 65, 1992 Tenn. LEXIS 430 (Tenn. 1992).

Included within the class of defects which must be raised prior to trial or they will be waived are defects in an indictment that go to matters of form rather than substance. These statutory requirements include, in part, the failure of the district attorney to sign the indictment, the identity of the person charged, the time at which the offense was committed, and the place of the offense. (See T.C.A. §§ 40-13-203, 40-13-207, 40-13-208). State v. Nixon, 977 S.W.2d 119, 1997 Tenn. Crim. App. LEXIS 1202 (Tenn. Crim. App. 1997).

The omission of the defendants' names in the body of the indictment, which violates the requirement in T.C.A. § 40-13-203 that an indictment must describe the accused in such a direct or certain manner as to identify him as the person charged, neither relates to subject matter jurisdiction nor failure to allege an offense; therefore, the defendants, by failing to object to the defect prior to trial, have waived the issue. State v. Nixon, 977 S.W.2d 119, 1997 Tenn.

Crim. App. LEXIS 1202 (Tenn. Crim. App. 1997).

3. Time to Make and Decide Motions.

Tenn. R. Crim. P. 12 rule contemplates that such motions be passed upon before trial unless there is good cause to defer it. Bolton v. State, 591 S.W.2d 446, 1979 Tenn. Crim. App. LEXIS 292 (Tenn. Crim. App. 1979).

The prevention of disruption of juries on issues that should be decided pretrial is the reason for Tenn. R. Crim. P. 12. State v. Davidson, 606 S.W.2d 293, 1980 Tenn. Crim. App. LEXIS 298 (Tenn. Crim. App. 1980).

Tenn. R. Crim. P. 12 requires motions to suppress to be made and determined before trial unless good cause is shown for deferment. State v. Wilson, 611 S.W.2d 843, 1980 Tenn. Crim. App. LEXIS 339 (Tenn. Crim. App. 1980).

"Prior to trial" as used in Tenn. R. Crim. P. 12(b)(3) (now Tenn. R. Crim. P. 12(b)(2)(C)) means sometime earlier than the day of the trial. State v. Hamilton, 628 S.W.2d 742, 1981 Tenn. Crim. App. LEXIS 412 (Tenn. Crim. App. 1981).

The requirement that questions be raised "prior to trial" means sometime earlier than the day of the trial. State v. Kinner, 701 S.W.2d 224, 1985 Tenn. Crim. App. LEXIS 3169 (Tenn. Crim. App. 1985); State v. Roberts, 755 S.W.2d 833, 1988 Tenn. Crim. App. LEXIS 172 (Tenn. Crim. App. 1988), rehearing denied, 755 S.W.2d 833, 1988 Tenn. Crim. App. LEXIS 384 (Tenn. Crim. App. 1988).

A defendant waives any right to contest the admissibility of evidence where a written motion to suppress is not filed and heard in proceedings prior to the day of trial. State v. Eldridge, 749 S.W.2d 756, 1988 Tenn. Crim. App. LEXIS 119 (Tenn. Crim. App. 1988).

The phrase "before trial," as used in Tenn. R. Crim. P. 12, means sometime earlier than the day the trial is to commence. State v. Aucoin, 756 S.W.2d 705, 1988 Tenn. Crim. App. LEXIS 330 (Tenn. Crim. App. 1988), cert. denied, Aucoin v. Tennessee, 489 U.S. 1084, 109 S. Ct. 1541, 103 L. Ed. 2d 845, 1989 U.S. LEXIS 1352 (1989).

Objection to trial judge's failure to administer an oath is not the kind of suppression motion required to be made prior to trial. Mere fact that counsel made objection after witness had testified does not constitute a waiver. State v. Pilkey, 776 S.W.2d 943, 1989 Tenn. LEXIS 395 (Tenn. 1989), rehearing denied, — S.W.2d —, 1989 Tenn. LEXIS 426 (1989), cert. denied, Pilkey v. Tennessee, 494 U.S. 1032, 110 S. Ct. 1483, 108 L. Ed. 2d 619, 1990 U.S. LEXIS 1318 (1990), cert. denied, Tennessee v. Pilkey, 494 U.S. 1046, 110 S. Ct. 1510, 108 L. Ed. 2d 646, 1990 U.S. LEXIS 1305 (1990), cert. denied, In re Disbarment of Marcone, 108 L. Ed. 2d 967, 110 S. Ct. 1839, 494 U.S. 1092, 1990 U.S. LEXIS 1998 (1990).

Tenn. R. Crim. P. 12 recognizes two categories of defects, i.e., those which may be challenged at any time and those which must be challenged prior to trial. State v. Nixon, 977 S.W.2d 119, 1997 Tenn. Crim. App. LEXIS 1202 (Tenn. Crim. App. 1997).

Defects which may be challenged at any during the pendency of the proceedings include objections which challenge lack of jurisdiction in the court and those objections contending that the indictment failed to charge an offense. State v. Nixon, 977 S.W.2d 119, 1997 Tenn. Crim. App. LEXIS 1202 (Tenn. Crim. App. 1997).

Although the trial court erred in concluding that the indictment failed to state an offense, it did not err in addressing the issue after defendant's trial began; the question of whether an indictment charged an offense is not a matter which is required to be raised before the trial begins. State v. Wallace, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 388 (Tenn. Crim. App. May 17, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 579 (Tenn. Sept. 13, 2018), cert. denied, Wallace v. Tennessee, 202 L. Ed. 2d 647, 139 S. Ct. 928, — U.S. —, 2019 U.S. LEXIS 662 (U.S. Jan. 14, 2019).

4. —Motion to Suppress In-Court Identification.

Motion to suppress in-court identification was considered as a motion to suppress evidence, which should be made pretrial under Tenn. R. Crim. P. 12, and in the event such is not made, the trial court is not required to conduct an out-of-jury hearing during trial unless counsel can show by specificity in his motion to suppress the identification a substantial likelihood of a constitutional violation. State v. Davidson, 606 S.W.2d 293, 1980 Tenn. Crim. App. LEXIS 298 (Tenn. Crim. App. 1980).

5. —Effect on Appeal.

Where motion to suppress evidence was first made after the jury was selected and sworn, the overruling of such motion on its merits was affirmed by the court on appeal, but the reviewing court suggested that the motion should have been overruled for failure to file a pretrial motion in compliance with Tenn. R. Crim. P. 12. Feagins v. State, 596 S.W.2d 108, 1979 Tenn. Crim. App. LEXIS 314 (Tenn. Crim. App. 1979).

Failure to raise motion to suppress identification pretrial does not foreclose consideration of such motion for the first time on appeal, because improper identification may violate constitutional rights and it is difficult to hold such a violation not substantial. State v. Davidson, 606 S.W.2d 293, 1980 Tenn. Crim. App. LEXIS 298 (Tenn. Crim. App. 1980).

On appeal from his drug convictions, defendant's argument that the warrant failed to comply with Tenn. R. Crim. P. 41(c) because the

judge failed to hand deliver the search warrant to the executing officer was raised for the first time on appeal and was therefore waived, Tenn. R. Crim. P. 12(b). State v. Hayes, 337 S.W.3d 235, 2010 Tenn. Crim. App. LEXIS 684 (Tenn. Crim. App. Aug. 18, 2010), appeal denied, — S.W.3d —, 2011 Tenn. LEXIS 152 (Tenn. Feb. 17, 2011).

Defendant waived the issue of the state of Tennessee's use of defendant's statements and defendant's adult child's statement to law enforcement on the basis that the investigator did not electronically record the interviews and the statements because defendant did not file a motion to suppress the statements prior to trial or object to the state's use of the statements on this basis at trial. Because defendant did not allege that the use of the statements amounted to plain error, the appellate court declined to review the issue for plain error. State v. Waggoner, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 595 (Tenn. Crim. App. Sept. 24, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 126 (Tenn. Feb. 19, 2020).

6. Consideration of Motion to Dismiss.

As the former motion to quash and plea in abatement are clearly combined in the present motion to dismiss, it is equally clear that the consideration by the trial court of extraneous evidence beyond the face of the presentment is proper. State v. Thorpe, 614 S.W.2d 60, 1980 Tenn. Crim. App. LEXIS 350 (Tenn. Crim. App. 1980).

Under T.C.A. §§ 39-13-301 and 39-13-302(a), removal or confinement is not "unlawful" if it is accomplished with the consent of a "parent," and thus defendant, the minor child's father, could not be prosecuted under T.C.A. § 39-13-305(a)(2) of especially aggravated kidnapping because the indictment failed to allege that defendant removed or confined the child by force, threat, or fraud, and the removal or confinement was not accomplished without the consent of a parent because defendant was the child's father, and T.C.A. § 36-2-304 did not control the resolution of this issue even though defendant and the child's mother were never married; because defendant's motion to dismiss this count, filed pursuant to Tenn. R. Crim. P. 12(b), required the interpretation of the statute and the application of that interpretation to stipulated, undisputed facts, the matter was capable of resolution without determination of the general issue of defendant's guilt or innocence, and the dismissal of the count against defendant was proper. State v. Goodman, 90 S.W.3d 557, 2002 Tenn. LEXIS 547 (Tenn. 2002).

In a child neglect case alleging failure to seek medical treatment for the child, trial court improperly granted defendant's motion to dismiss the child neglect charge before trial was held because: (1) Only relevant undisputed facts were that defendant was not the biological parent of the child, not her legal guardian, and not married to the co-defendant, her mother, which was not enough information to warrant a dismissal of the indictment; (2) State could present other circumstances that might establish duty on the part of defendant arising out of in loco parentis relationship; and (3) State might be able to establish that defendant failed to perform a statutory duty to provide adequate medical care for the child. State v. Sherman, 266 S.W.3d 395, 2008 Tenn. LEXIS 538 (Tenn. Aug. 15, 2008).

Because criminal responsibility was not eliminated as a possible theory of guilt by the bill of particulars, granting defendant's motion to dismiss child neglect charge was improper. State v. Sherman, 266 S.W.3d 395, 2008 Tenn. LEXIS 538 (Tenn. Aug. 15, 2008).

Trial court erred in dismissing the charge against defendant of vehicular assault because the grand jury's failure to charge defendant with the lesser-included offense of driving under the influence (DUI) did not operate to bar the charge of vehicular assault by intoxication. The grand jury's decision to return a no true bill on the DUI could not be interpreted as a judgment on the legal sufficiency of the evidence underlying that, or any other, charge presented. State v. Welch, 586 S.W.3d 399, 2019 Tenn. Crim. App. LEXIS 326 (Tenn. Crim. App. May 23, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 485 (Tenn. Sept. 18, 2019).

Criminal court exercised criminal, not civil, jurisdiction when it granted defendant's pretrial motion to dismiss indictments because the indictments were pleadings in criminal proceedings and charged defendant with Class E felony criminal offenses, and the order was a permissible adjudication of his motion to dismiss; defendant remained classified as a sexual offender until the Tennessee Bureau of Investigation received his request for termination of the registration requirements. State v. Allen, 593 S.W.3d 145, 2020 Tenn. LEXIS 15 (Tenn. Jan. 29, 2020).

7. Effect of Failure to Raise Defenses or Objections.

Failure to timely present a motion to suppress evidence or testimony relating to pretrial identification procedures constitutes a waiver, in the absence of "cause shown" for the failure. State v. McCray, 614 S.W.2d 90, 1981 Tenn. Crim. App. LEXIS 328 (Tenn. Crim. App. 1981); State v. Burton, 751 S.W.2d 440, 1988 Tenn. Crim. App. LEXIS 124 (Tenn. Crim. App. 1988).

The waiver provision of Tenn. R. Crim. P. 12 applies to issues embracing the constitutionality of statutes as well as the constitutional rights of the accused. State v. Rhoden, 739 S.W.2d 6, 1987 Tenn. Crim. App. LEXIS 2562 (Tenn. Crim. App. 1987).

Where appellant failed to comply with the timetable set by the court when he filed motion

to suppress blood alcohol test, issue with respect to the test was waived. State v. Braden, 874 S.W.2d 624, 1993 Tenn. Crim. App. LEXIS 561 (Tenn. Crim. App. 1993).

8. Time of Raising Defenses.

Defense of statute of limitations in a criminal trial must be raised prior to trial or it is untimely. State v. Hill, 623 S.W.2d 293, 1981 Tenn. Crim. App. LEXIS 398 (Tenn. Crim. App. 1981).

Tenn. R. Crim. P. 12 rule does not require an advanced notice of a defense of entrapment. State v. Moore, 631 S.W.2d 456, 1982 Tenn. Crim. App. LEXIS 416 (Tenn. Crim. App. 1982).

Defendant's allegations of conflict of interest in the district attorney general's office should have been made by motion under Tenn. R. Crim. P. 12 prior to trial, and by failing to raise the defense, defendant waived the issue. State v. Locust, 914 S.W.2d 554, 1995 Tenn. Crim. App. LEXIS 461 (Tenn. Crim. App. 1995).

Defendant received proper notice of the criminal contempt charges against him, where defendant knew that he was the individual who signed the second amended response, and it was clear that at least part of the basis for the alleged criminal contempt was the allegedly false statements made in the second amended response signed by defendant. Therefore, defendant clearly had notice that the basis for the claimed criminal contempt was his allegedly false statements, and if defendant had made the exact same false statements with the same obstructive effect in litigation that did not involve his sheriff's department, his statements would be no less contemptuous; it was entirely immaterial that the document containing the false statements happened to be a response to a Tennessee Public Records Act request. Moody v. Hutchison, 159 S.W.3d 15, 2004 Tenn. App. LEXIS 331 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 1102 (Tenn. Dec. 6, 2004).

9. Constitutional Claims.

Tenn. R. Crim. P. 12 is applicable when a violation of a constitutional right is claimed. State v. Foote, 631 S.W.2d 470, 1982 Tenn. Crim. App. LEXIS 417 (Tenn. Crim. App. 1982).

Given that the Tennessee courts allow constitutional challenges at any time, Tenn. R. Crim. P. 12(b) does not bar a constitutional challenge to a state statute which has not been challenged first in a pretrial motion, and petitioner's failure to comply with this rule did not constitute an independent and adequate state law ground barring federal habeas review. Rhoden v. Morgan, 846 F. Supp. 598, 1994 U.S. Dist. LEXIS 3241 (M.D. Tenn. 1994).

10. Motion to Suppress.

When the allegations contained in a motion to suppress entitle the accused to an evidentiary hearing, the accused has the initial burden of proving by a preponderance of the evidence that: (1) He has a legitimate expectation of privacy in the place of property from which the items sought to be suppressed were seized; (2) The identity of the items he seeks to suppress as evidence; and (3) The items were seized without a warrant. Once the accused establishes these prerequisites, the burden then shifts to the prosecution, and since warrantless searches and seizures are presumed to be unreasonable, the prosecution has the burden of establishing by a preponderance of the evidence the search and resulting seizure were justified pursuant to one of the recognized exceptions to the warrant requirement. State v. Burton, 751 S.W.2d 440, 1988 Tenn. Crim. App. LEXIS 124 (Tenn. Crim. App. 1988).

Where the trial court had allowed defendant to file a first motion to suppress past the deadline of local rule and then allowed her to amend the motion three months later, it was not error to refuse to hear a subsequently filed second motion. State v. Putt, 955 S.W.2d 640, 1997 Tenn. Crim. App. LEXIS 49 (Tenn. Crim. App. 1997).

Because the burden of establishing a foundation for the admissibility of a breath-alcohol test lies with the prosecution, a defendant may challenge its admissibility either before or during the trial. State v. Cook, 9 S.W.3d 98, 1999 Tenn. LEXIS 682 (Tenn. 1999).

Defendant's traffic stop was not based upon reasonable suspicion, as there was no evidence of pronounced weaving or hard swerving. The evidence in the case had to be suppressed, because defendant's consent to search his vehicle was not sufficiently attenuated from his unlawful detention, as the lapse of time between the illegal detention and defendant's consent was negligible; because the officer immediately began questioning defendant after telling him he was free to leave; and because the officer had no reasonable basis to detain defendant once her suspicion that he was intoxicated was quelled two minutes into the traffic stop. State v. Garcia, 123 S.W.3d 335, 2003 Tenn. LEXIS 856 (Tenn. 2003), cert. denied, Tennessee v. Garcia, 541 U.S. 974, 124 S. Ct. 1883, 158 L. Ed. 2d 469, 2004 U.S. LEXIS 2592 (2004).

Sixth Amendment did not entitle a defendant to participate, through counsel, in the determination of the existence of probable cause for the issuance of a warrant to seize a sample of defendant's blood. The ex parte search warrant proceeding did not diminish the defendant's right to a fair trial; defendant was permitted to, and did in fact, file a motion to suppress the evidence pursuant to Tenn. R. Crim. P. 41(f) and Tenn. R. Crim. P. 12(b). State v. Blye, 130 S.W.3d 776, 2004 Tenn. LEXIS 131 (Tenn. 2004), cert. denied, Blye v. Tennessee, 125 S. Ct. 289, 160 L. Ed. 2d 74, 543 U.S. 845, 2004 U.S. LEXIS 6027 (U.S. 2004).

When a police officer activated the blue lights on his patrol car behind the defendant's vehicle which was already stopped and idling in the street, a seizure occurred within the meaning of the fourth amendment and Tenn. Const. art. I, § 7; the officer did not have reasonable suspicion to seize the defendant, and therefore, all of the evidence obtained from the stop was suppressed. State v. Williams, 185 S.W.3d 311, 2006 Tenn. LEXIS 181 (Tenn. 2006).

Defendant waived his claim that his confession should have been suppressed because he was intoxicated, the officers coerced his statement, the officers did not inform him that an attorney hired by his father was present at the sheriff's office, and that he had invoked his right to counsel by failing to raise it as a ground in his first motion to suppress. State v. Stephenson, 195 S.W.3d 574, 2006 Tenn. LEXIS 454 (Tenn. 2006).

Defendant's written statement was not rendered involuntary by actions of investigating officers because while investigating officers did not comply with requirements of T.C.A. § 40-7-106, the statutory violation did not warrant suppression of the statement when defendant's request to make a phone call came after he had already made his verbal confession to the investigating officers, and their denial of his request until after he provided a statement in writing, given the totality of the circumstances, did not render that written statement the product of police coercion. State v. Downey, 259 S.W.3d 723, 2008 Tenn. LEXIS 536 (Tenn. Aug. 15, 2008).

Defendant's written statement was not rendered involuntary by actions of investigating officer because officer's statement that the written confession could not hurt defendant did not negate the *Miranda* warning or require suppression when the record failed to establish that police exercised any compelling influence over defendant or that his statements were induced by promises of leniency; defendant had already confessed to the crimes, and it was only before the written statement that discussion of cooperation and leniency took place. State v. Downey, 259 S.W.3d 723, 2008 Tenn. LEXIS 536 (Tenn. Aug. 15, 2008).

In defendant's trial for the murder of his wife, defendant's motion to suppress was properly denied, and his statement to the police was properly introduced into evidence because, under the totality of the circumstances, defendant's statement was voluntary where defendant was advised of his *Miranda* rights twice during the day, he was allowed to roam freely after being taken to the police station and was allowed to use his cellular phone and to have visitors, there was not an ongoing interrogation between his initial statement and the polygraph examination, defendant was not deprived of food or sleep, and the 12 hours that he spent at the police station were relatively short for a case of that nature. Although the appellate court was concerned that the officers took defendant's clothing and provided him with a jail uniform to wear, defendant had opportunity to request that someone bring clothes to him, and a police officer asked if he could bring defendant clothes when he left to return to defendant's home, the scene of the murder; defendant had phone conversations with various family members from whom he could have also requested clothing, and when friends of defendant left the police station, they were going to get clothes for defendant. State v. Brock, 327 S.W.3d 645, 2009 Tenn. Crim. App. LEXIS 496 (Tenn. Crim. App. June 29, 2009), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 56 (Tenn. Jan. 25, 2010), cert. denied, Brock v. Tennessee, , 562 U.S. 850, 131 S. Ct. 101, 178 L. Ed. 2d 64, 2010 U.S. LEXIS 5883 (U.S. 2010).

Because the state did not object to the late-filed motion in limine, and the trial court considered the issue on the merits, the court of criminal appeals treated the pretrial hearing as if defendant followed the proper procedure for a motion to suppress. State v. Foster, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 222 (Tenn. Crim. App. Apr. 9, 2019).

11. Lack of Subject-Matter Jurisdiction.

The question of whether the trial court had subject-matter jurisdiction may be noticed at any time during the pendency of the proceedings and is not waived by the failure to raise this defense prior to trial. State v. Seagraves, 837 S.W.2d 615, 1992 Tenn. Crim. App. LEXIS 146 (Tenn. Crim. App. 1992).

A no contest plea or plea of guilty does not waive a challenge to the court's jurisdiction. State v. Carter, 988 S.W.2d 145, 1999 Tenn. LEXIS 61 (Tenn. 1999).

12. Statute of Limitations.

Once the defense of the statute of limitations is properly raised, the trial court must make a determination regarding this defense before trial unless such a determination will involve a determination of the "general issue"; where the charges are based on fraud and concealment and the state argues that the statute of limitations was tolled by the defendants' concealment, these issues are too closely intertwined to be decided by the court in a pretrial hearing and must be left to the jury. State v. Vickers, 970 S.W.2d 444, 1998 Tenn. LEXIS 353 (Tenn. 1998).

13. Defective Indictments.

A valid indictment is an essential jurisdictional element without which there can be no prosecution. Wyatt v. State, 24 S.W.3d 319, 2000 Tenn. LEXIS 431 (Tenn. 2000).

An indictment that is so defective as to fail to vest jurisdiction in the trial court may be challenged at any stage of the proceedings, including in a habeas corpus petition. Wyatt v. State,

24 S.W.3d 319, 2000 Tenn. LEXIS 431 (Tenn. 2000).

Indictment for attempted murder satisfied minimum statutory and constitutional requirements. Constitutional provisions require that an indictment provide: (1) Notice to the accused of the offense charged; (2) The court with an adequate ground upon which a proper judgment may be entered; and (3) The defendant with protection against double jeopardy. Wyatt v. State, 24 S.W.3d 319, 2000 Tenn. LEXIS 431 (Tenn. 2000).

Defendant received proper notice of the criminal contempt charges against him where defendant knew that he was the individual who signed the second amended response, and it was clear that at least part of the basis for the alleged criminal contempt was the allegedly false statements made in the second amended response signed by defendant. Therefore, defendant clearly had notice that the basis for the claimed criminal contempt was his allegedly false statements, and if defendant had made the exact same false statements with the same obstructive effect in litigation which did not involve his sheriff's department, his statements would be no less contemptuous; it was entirely immaterial that the document containing the false statements happened to be a response to a Tennessee Public Records Act request. Moody v. Hutchison, 159 S.W.3d 15, 2004 Tenn. App. LEXIS 331 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 1102 (Tenn. Dec. 6, 2004).

In defendant's drug case, the court did not err by denying defendant's motion to dismiss the indictment where, although the trial court erred in permitting the state to amend the indictment after jeopardy attached to delete the words "and, or deliver," the error was harmless. Defendant was clearly provided with ample notice of the offense charged, including the facts constituting the offense, the name of defendant, the date of the alleged offense, the amount and type of substance sold, and the statute violated. State v. Lindsey, 208 S.W.3d 432, 2006 Tenn. Crim. App. LEXIS 328 (Tenn. Crim. App. 2006), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 731 (Tenn. Aug. 21, 2006), dismissed, Lindsey v. Parker, — F. Supp. 2d —, 2013 U.S. Dist. LEXIS 102475 (E.D. Tenn. July 23, 2013).

Because the indictment charged driving under the influence (DUI) by driving while under the influence of an intoxicant, any deficiency of the indictment to charge DUI per se would not be fatal, in and of itself, to the indictment's showing of jurisdiction or charging of the offense of DUI; therefore, defendant's objection to the verbiage of the DUI per se allegations was the type of objection which subsection (b)(2)(B) required to be raised before the trial. State v. Wallace, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 388 (Tenn. Crim. App. May 17, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 579 (Tenn. Sept. 13, 2018), cert. denied, Wallace v. Tennessee, 202 L. Ed. 2d 647, 139 S. Ct. 928, — U.S. —, 2019 U.S. LEXIS 662 (U.S. Jan. 14, 2019).

Because defendant elected to wait until after the jury was sworn to object to the form of the indictment, any confusing or imprecise language could have been amended with his consent. State v. Wallace, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 388 (Tenn. Crim. App. May 17, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 579 (Tenn. Sept. 13, 2018), cert. denied, Wallace v. Tennessee, 202 L. Ed. 2d 647, 139 S. Ct. 928, — U.S. —, 2019 U.S. LEXIS 662 (U.S. Jan. 14, 2019).

Because the indictment charged the offense of driving under the influence (DUI) by at least one means, it was not subject to dismissal for failure to state an offense; no issue was raised with respect to the adequacy of the indictment in charging DUI while under the influence of an intoxicant, and no flaws in the indictment in that regard were apparent. State v. Wallace, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 388 (Tenn. Crim. App. May 17, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 579 (Tenn. Sept. 13, 2018), cert. denied, Wallace v. Tennessee, 202 L. Ed. 2d 647, 139 S. Ct. 928, — U.S. —, 2019 U.S. LEXIS 662 (U.S. Jan. 14, 2019).

Defendant waived an appellate objection to a superseding presentment because defendant did not object before the trial court or raise the issue in a new trial motion. State v. Lane, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 600 (Tenn. Crim. App. Sept. 20, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 111 (Tenn. Feb. 19, 2020).

14. No Factual Findings Made on the Record.

In ruling on defendant's motion to suppress evidence from a traffic stop, the trial court did not make specific findings of fact under Tenn. R. Crim. P. 12(e), but rather found that under either party's version of the facts, the evidence should be suppressed; in the interest of judicial economy, the appellate court reviewed the trial court's grant of the motion to suppress under both factual scenarios. State v. Williams, 185 S.W.3d 311, 2006 Tenn. LEXIS 181 (Tenn. 2006).

15. Waiver of Challenge to Defect.

Defendant waived any objection to the grand jury foreman's status as a felon by failing to raise the issue prior to trial. State v. Lopez, 440 S.W.3d 601, 2014 Tenn. Crim. App. LEXIS 156 (Tenn. Crim. App. Feb. 24, 2014), appeal denied, — S.W.3d —, 2014 Tenn. LEXIS 492 (Tenn. June 20, 2014).

Defendant's argument that defendant's right to an impartial jury was violated due to the racial composition of the jury was waived be-

cause defendant did not timely assert the argument. Defendant first raised the issue regarding the racial composition of the jury in a motion for a new trial, while the hearing on motion for a new trial consisted only of oral argument, and no proof, including proof regarding the racial composition of the community or jury, was introduced. State v. Rollins, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 180 (Tenn. Crim. App. Mar. 12, 2020).

Defendant waived the issue of the trial court's failure to sever the offenses alleged against defendant for an alleged home invasion in the morning from the offenses alleged against defendant for an alleged return in the afternoon because defendant failed to raise the issue in the trial court. Furthermore, the trial court did not commit plain error because the evidence of both sets of crimes demonstrated a larger, continuing plan or conspiracy between defendant and co-defendant to take the money the victim. State v. Anderson, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 76 (Tenn. Crim. App. Mar. 5, 2021).

16. Alibi Defense.

Trial court erred when it excluded defendant's testimony that defendant was living in Kentucky during the time period when rape of a child and aggravated sexual battery offenses occurred in Tennessee—on the ground that defendant failed to give the state of Tennessee the notice required for alibi evidence—because the testimony was not alibi evidence as it did not create a physical impossibility of defendant's guilt in that the testimony did not exclude the possibility that defendant drove to Tennessee and had sexual contact with the victim. State v. Gomez, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 117 (Tenn. Crim. App. Feb. 22, 2019).

Rule 12.1. Notice of Alibi. —

(a) State's Request and Defendant's Notice. —

(1) State's Request for Notice of Alibi Defense. — A district attorney general who desires disclosure of a potential alibi defense shall serve the defendant with a written request to be notified of an intention to offer an alibi defense. The request shall state the time, date, and place at which the alleged offense was committed.

(2) Defendant's Notice in Response. — On written request of the district attorney general under Rule 12.1(a)(1), the defendant intending to offer an alibi defense shall serve on the district attorney general a written notice of this intention.

(A) Content. — The defendant's notice shall state:

(i) the specific place or places at which the defendant claims to have been at the time of the alleged offense; and

(ii) the name and address of each alibi witness on whom the defendant intends to rely.

(B) Timing. — Unless the court directs otherwise, the defendant shall serve such notice within ten days of the state's request.

(b) State's Response to Defendant's Notice. —

(1) Disclosure. — If the defendant serves a notice pursuant to Rule 12.1(a)(2), the district attorney general shall disclose in writing to the defendant the name and address of:

(A) each witness on whom the state intends to rely to establish the defendant's presence at the scene of the alleged offense; and

(B) each witness on whom the state intends to rely to rebut testimony of any of the defendant's alibi witnesses.

(2) Timing. — Unless the court directs otherwise, the district attorney general shall serve this notice within ten days after receiving defendant's notice of alibi but in no event less than ten days before trial.

(c) Continuing Duty to Disclose. — If before or during trial either party learns of the existence of an additional witness who should have been included in the information furnished under Rule 12.1(a)(2)(A) or 12.1(b)(1), that party

shall promptly notify the other party of the name and address, if known, of such additional witness.

(d) Failure to Comply. — If a party fails to comply with this rule, the court may exclude the testimony of any undisclosed witness offered by such party as to the defendant's absence from or presence at the scene of the alleged offense. This rule does not limit the defendant's right to testify.

(e) Good Cause Exceptions. — For good cause shown, the court may grant an exception to any of the requirements of this rule.

(f) Inadmissibility of Withdrawn Alibi. — The following is not admissible in any civil or criminal proceeding against a defendant who gave alibi notice under Rule 12.1(a)(2):

(1) evidence of an intention to rely on an alibi defense, later withdrawn; or

(2) evidence of statements made in connection with that intention.

Advisory Commission Comments. This rule conforms to the federal rule, and is part of the discovery package.

Rule 12.1 discovery is triggered by the written demand of the district attorney general. Note also that the state must reciprocate by furnishing the names of its witnesses who are expected to contradict the alibi witnesses.

Of significance to the trial judges is the provision of section (e): For good cause shown, the court may grant an exception to the requirements of this rule. The court should always state on the record the reason(s) for such a ruling.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 3-12.1-1 — 3-12.1-4.

NOTES TO DECISIONS

Analysis

1. Inadmissibility of Withdrawn Alibi.
2. Definition of Alibi.
3. Failure to Comply with Notice Provision.

1. Inadmissibility of Withdrawn Alibi.

Trial court committed prejudicial error in allowing inquiry into the defense of alibi after the defense of alibi was withdrawn at trial; the seriousness of this error was compounded when the state was allowed in closing argument to adversarially make use of the defendant's withdrawal of the alibi defense. State v. Meeks, 876 S.W.2d 121, 1993 Tenn. Crim. App. LEXIS 787 (Tenn. Crim. App. 1993).

2. Definition of Alibi.

"Alibi" means a defense based on the physical impossibility of a defendant's guilt by placing the defendant in a location other than the scene of the crime at the relevant time. State v. Looper, 118 S.W.3d 386, 2003 Tenn. Crim. App. LEXIS 83 (Tenn. Crim. App. 2003), cert. denied, Looper v. Tennessee, 540 U.S. 1060, 124 S. Ct. 836, 157 L. Ed. 2d 717, 2003 U.S. LEXIS 8789 (2003), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 675 (Tenn. 2003).

3. Failure to Comply with Notice Provision.

Court, in defendant's murder case, did not err by excluding testimony of alibi witnesses, where defendant failed to disclose the witnesses, and instead, sprung the witnesses on the prosecution in order to gain a tactical advantage. State v. Looper, 118 S.W.3d 386, 2003 Tenn. Crim. App. LEXIS 83 (Tenn. Crim. App. 2003), cert. denied, Looper v. Tennessee, 540 U.S. 1060, 124 S. Ct. 836, 157 L. Ed. 2d 717, 2003 U.S. LEXIS 8789 (2003), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 675 (Tenn. 2003).

Rule 12.2. Notice of Insanity Defense or Expert Testimony of Defendant's Mental Condition and Discovery and Disclosure of Evidence in Pretrial Competency Hearings. —

(a) Defense of Insanity. —

(1) Notice of Insanity Defense. — A defendant who intends to assert a defense of insanity at the time of the alleged crime shall so notify the district attorney general in writing and file a copy of the notice with the clerk.

(2) Timing. — Notice shall be given within the time provided for the filing of pretrial motions or at such later time as the court may direct. The court may, for cause shown, allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.

(3) Failure to File Notice. — A defendant who fails to comply with the requirements of Rule 12.2(a)(1) may not raise an insanity defense.

(b) Expert Testimony of Defendant's Mental Condition. —

(1) Notice of Expert Testimony. — A defendant who intends to introduce expert testimony relating to a mental disease or defect or any other mental condition of the defendant bearing on the issue of his or her guilt shall so notify the district attorney general in writing and file a copy of the notice with the clerk.

(2) Timing. — Notice described in Rule 12.2(b)(1) shall be filed within the time provided for the filing of pretrial motions or at such later time as the court may direct. The court may, for cause shown, allow the defendant to file the notice late, grant additional trial-preparation time, or make other appropriate orders.

(c) Mental Examination of Patient. —

(1) Authority to Order Mental Examination. — On motion of the district attorney general, the court may order the defendant to submit to a mental examination by a psychiatrist or other expert designated in the court order.

(2) Inadmissibility of Statements During Examination. — No statement made by the defendant in the course of any examination conducted under this rule (whether conducted with or without the defendant's consent), no testimony by the expert based on such statement, and no other fruits of the statement are admissible in evidence against the defendant in any criminal proceeding, except for impeachment purposes or on an issue concerning a mental condition on which the defendant has introduced testimony.

(d) Failure to Provide Notice of Expert Testimony or to Submit to Mental Examination. — If a defendant fails to give notice under Rule 12.2(b) or does not submit to an examination ordered under Rule 12.2(c), the court may exclude the testimony of any expert witness offered by the defendant on the issue of the defendant's mental condition.

(e) Inadmissibility of Withdrawn Intention. — Evidence of an intention as to which notice was given under Rule 12.2(a) or (b), later withdrawn, is not admissible in any civil or criminal proceeding against the person who gave notice of the intention.

(f) Reports of Competency Examinations. — Prior to any hearing on competency to stand trial, the parties shall permit the opposite party, on request, to inspect and copy or photograph any results or reports of psychiatric, psychological, or mental examinations and of scientific tests or experiments made in connection with evaluating the defendant's competency to stand trial, or copies thereof, if:

(1) the item is within the party's possession, custody, or control; and

(2) the party intends to introduce any part of the item as evidence in the party's case-in-chief at the competency hearing; or

(3) the party intends to call as a witness at the competency hearing the person who prepared the report, and the results or reports relate to the witness' testimony. This provision does not limit the State's duty to disclose such information under other appropriate rules or the duty to produce

exculpatory evidence. Disclosure under this provision shall occur at least 21 days prior to a hearing, on competency to stand trial unless the court finds that a shorter time is essential in the interests of justice so as not to unduly delay the trial. The court may also make such orders as are necessary to compel disclosure or make other appropriate orders.

(g) INADMISSIBILITY OF DEFENDANT'S STATEMENTS DURING COMPETENCY EXAMINATION. — No statement made by the defendant in the course of any examination relating to his or her competency to stand trial (whether conducted with or without the defendant's consent), no testimony by any expert based on such statement, and no other fruits of the statement are admissible in evidence against the defendant in any competency hearing or criminal proceeding except for impeachment purposes or an issue concerning a mental condition on which the defendant has introduced evidence of incompetency or evidence requiring notice under Tenn. R. Crim. P. 12.2(b). [As amended by order entered December 14, 2009, effective July 1, 2010.]

Advisory Commission Comments. Like Rule 12.1, Rule 12.2 is a part of the discovery package, and conforms to the somewhat similar federal rule.

The burden is upon the defendant to give notice of any defense based upon mental condition, without a triggering request from the state.

Rule 12.2(b) imposes a notice requirement on the defendant when expert witnesses are to testify as to the defendant's mental state. The commission approves the federal advisory committee notes which indicate that lack of notice about the defendant's mental state may seriously disadvantage the district attorney general in preparing possible rebuttal proof.

Rule 12.2(c) allows examination by other experts and not just a psychiatrist. Further, the exclusion of use of the defendant's statement in a state requested examination is expanded to sentencing as well as guilt. However, this is not intended to preclude impeachment of the defendant under traditional impeachment rules.

Advisory Commission Comments [2010]. New subsections (f) and (g) are taken from the temporary procedures in *State v. Harrison*, 270 S.W.3d 21 (Tenn. 2008). Competency to stand trial is an issue which should be raised at the earliest practical time. In most instances 21 days is sufficient time for expert and document disclosure, particularly where the hearing has been scheduled well in advance of trial. Occasionally a finding of competency may be subject to change such as where the defendant's mental state is fragile or the defendant's medication is altered. In such cases the court might need to revisit the competency issue; therefore another competency hearing might need to be conducted on the morning of trial. So as not to unduly delay the trial, the court might shorten the time for disclosure or require immediate disclosure as the circumstances of the case dictate. Note that *State v. Reid*, 98 1 S.W.2d 166 (Tenn. 1998) may impose additional notice requirements for which advance disclosure may be required.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated December 14, 2009, was ratified and approved by 2010 Senate Resolution 179 and 2010 House Resolution 235. The order promulgating the amendment of this rule provided that it take effect July 1, 2010.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 3-12.2-1 — 3-12.2-6.

Tennessee Jurisprudence. 18 Tenn. Juris., Mentally Ill and Other Incompetents, §§ 17, 20.

Law Reviews. Paine on Procedure: Expert Opinion and the Insanity Defense (Donald F. Paine), 49 Tenn. B.J. 27 (2013).

The Prevalence and Use of Criminal Defenses: A Preliminary Study (Neil P. Cohen, Michael G. Johnson, Tracy B. Henley), 60 Tenn. L. Rev. 957 (1993).

NOTES TO DECISIONS

ANALYSIS

1. Rights of Defendant.
2. More Than Single Interview Permitted.
3. Disclosure to Prosecution.

1. Rights of Defendant.

When the restrictions in Tenn. R. Crim. P. 12.2 regarding court ordered mental examinations are properly followed, the proceedings do not violate the right against self-incrimination

or right to counsel. State v. Martin, 950 S.W.2d 20, 1997 Tenn. LEXIS 315 (Tenn. 1997).

Requiring a capital defendant to submit to a psychiatric examination by a state selected mental health expert is constitutionally permissible if the defendant has the assistance of counsel when the decision to raise an insanity defense is made. State v. Reid, 981 S.W.2d 166, 1998 Tenn. LEXIS 695 (Tenn. 1998).

2. More Than Single Interview Permitted.

Based on the evidence of what is necessary to secure a complete mental examination, a trial court may require that a defendant submit to more than a single interview. State v. Huskey, 964 S.W.2d 892, 1998 Tenn. LEXIS 119 (Tenn. 1998), rehearing denied, — S.W.2d —, 1998 Tenn. LEXIS 287 (Tenn. May 18, 1998), rehearing denied, 969 S.W.2d 917, 1998 Tenn. LEXIS 358 (Tenn. 1998), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 127 (Tenn. Feb. 18, 2003).

3. Disclosure to Prosecution.

The provisions of Tenn. R. Crim. P. 16(b)(1)(B), requiring the disclosure of the results of mental examinations and tests by a defendant only if the defendant intends to introduce evidence or call a particular witness at trial, do not apply to the disclosure of the results of a mental examination ordered under this rule. State v. Huskey, 964 S.W.2d 892, 1998 Tenn. LEXIS 119 (Tenn. 1998), rehearing denied, — S.W.2d —, 1998 Tenn. LEXIS 287 (Tenn. May 18, 1998), rehearing denied, 969 S.W.2d 917, 1998 Tenn. LEXIS 358 (Tenn. 1998), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 127 (Tenn. Feb. 18, 2003).

Although Tenn. R. Crim. P. 12.2 and Tenn. R. Crim. P. 16 do not address the various interests implicated regarding whether a defendant must give pretrial notice of his intent to introduce expert testimony as to his mental condition at the sentencing phase of a capital trial and whether such defendant must undergo an examination by the state's mental health expert, the inapplicability of these rules does not mandate the conclusion that the trial courts have no legal authority to impose notice, evaluation, and discovery requirements. State v. Reid, 981 S.W.2d 166, 1998 Tenn. LEXIS 695 (Tenn. 1998).

Rule 12.3. Notice of Intent to Seek Increased Sentence. —

(a) Noncapital Cases. — If the district attorney general intends to seek an enhanced punishment as a multiple, persistent, or career offender, the district attorney general shall file notice of this intention not less than ten (10) days before trial. If the notice is untimely, the trial judge shall grant the defendant, on motion, a reasonable continuance of the trial.

(b) Capital Cases. —

(1) Timing. — When the indictment or presentment charges a capital offense and the district attorney general intends to ask for the death penalty, he or she shall file notice of this intention not less than thirty (30) days before trial. If the notice is untimely, the trial judge shall grant the defendant, on motion, a reasonable continuance of the trial.

(2) Content. — The notice shall specify that the state intends to seek the death penalty and shall specify the aggravating circumstances the state intends to rely on at the sentence hearing. The state may specify by referring to the statutory citation of the aggravating circumstance.

(c) Manner of Giving Notice. — Notice under Rule 12.3(a) or (b) shall be in writing, filed with the court, and served on counsel. If the notice refers to a prior conviction or other sensitive matters, the court may permit the notice to be filed under seal.

Advisory Commission Comments. This rule implements the notice provisions of the Tennessee Criminal Sentencing Reform Act of 1989.

Subdivision (a) requires that written notice under T.C.A. § 40-35-202(a) be filed not less than ten (10) days before trial. This time limitation will allow defense lawyers an opportunity to plan their trial strategy or engage in appropriate plea negotiations. Nevertheless, since the notice requirement is based on a defendant's prior record, this record may only come to light shortly before trial. Under this and related circumstances, it would be unfair for the state to proceed to trial unable to establish proof at the sentencing hearing. Consequently, the state may provide notice in less than ten (10) days but the defendant is entitled to a continuance to rechart a course of action. If the defendant does not request a continuance, the written notice shall be valid.

Subdivision (b) requires that the state give notice in capital cases. While perhaps not constitutionally required, it has been the recommended procedure. *State v. Berry*, 592 S.W.2d 553 (Tenn. 1980). It is also helpful to know prior to jury selection if the state will ask for the death penalty. Jury selection procedures will obviously be affected by notice of a capital offense, see *Witherspoon v. Illinois*, 391 U.S. 510 (1968). Moreover, the number of challenges will also vary, see Rule 24(e), as well as the number of allowed appointed counsel, see Rule 13, Section 3, Rules of the Tennessee Supreme Court. The time limitation under this subdivision is thirty (30) days although there is a safeguard as in the case of notice under subdivision (a).

Subdivision (c) provides that notices may be under seal, in the discretion of the court, if public notice may be prejudicial to the defendant such as disclosing a prior record.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), No. 3-12.3-1.

Law Reviews. Adjudicating Claims of Innocence for the Capitally Condemned in Tennessee: Embracing a Truth Forum (Dwight Aarons), 76 Tenn. L. Rev. 511 (2009).

NOTES TO DECISIONS

Analysis

1. In General.
2. Constitutionality.
3. Retroactivity of Rule.
4. Filing of Notice.
5. Defect in Notice.
6. Right to a Continuance.
7. Resentencing.
8. Presumption of Vindictiveness.
9. Withdrawal of Notice.

1. In General.

The use of the word "shall," as in Tenn. R. Crim. P. 12.3, is indicative of a mandatory legislative intent. State v. Lowe, 811 S.W.2d 526, 1991 Tenn. LEXIS 247 (Tenn. 1991).

2. Constitutionality.

The provisions of Tenn. R. Crim. P. 12.3 satisfy the constitutional requirements of notice. State v. Berry, 141 S.W.3d 549, 2004 Tenn. LEXIS 659 (Tenn. 2004), writ denied, — S.W.3d —, 2016 Tenn. Crim. App. LEXIS 214 (Tenn. Crim. App. Mar. 23, 2016).

3. Retroactivity of Rule.

There is no need to give retroactive application to Tenn. R. Crim. P. 12.3. Strouth v. State, 755 S.W.2d 819, 1986 Tenn. Crim. App. LEXIS 2820 (Tenn. Crim. App. 1986).

4. Filing of Notice.

The fact the notice is not filed until the date trial begins does not render the notice ineffective in the absence of some showing of prejudice on the part of the accused, particularly where defense counsel does not move for a continuance or postponement of the trial as he is clearly authorized to do under Tenn. R. Crim. P. 12.3(a). State v. Stephenson, 752 S.W.2d 80, 1988 Tenn. LEXIS 110 (Tenn. 1988); State v. Gilmore, 823 S.W.2d 566, 1991 Tenn. Crim. App. LEXIS 581 (Tenn. Crim. App. 1991); State v. Kinnaird, 823 S.W.2d 571, 1991 Tenn. Crim. App. LEXIS 589 (Tenn. Crim. App. 1991).

Where the state had timely filed written notice of intent to seek the death penalty and of the aggravating circumstances on which it intended to rely prior to the original trial, its filing of a notice setting forth the same aggravating factors a week before resentencing was sufficient to satisfy the requirements of Tenn. R. Crim. P. 12.3. State v. Hines, 919 S.W.2d 573, 1995 Tenn. LEXIS 503 (Tenn. 1995), cert. denied, Hines v. Tennessee, 519 U.S. 847, 117 S. Ct. 133, 136 L. Ed. 2d 82, 1996 U.S. LEXIS 5179 (1996).

5. Defect in Notice.

In the absence of any demonstrated prejudice, the defect regarding the nature of defendant's release status in the state's notice to seek enhanced punishment was not so substantial as to require reduced sentencing. State v. Debro, 787 S.W.2d 932, 1989 Tenn. Crim. App. LEXIS 3 (Tenn. Crim. App. 1989), appeal denied, — S.W.2d —, 1989 Tenn. LEXIS 220 (Tenn. Apr. 3, 1989).

6. Right to a Continuance.

The right to a continuance under Tenn. R. Crim. P. 12.3 after the filing of an untimely notice is absolute, and the trial judge must either strike the notice of enhancement and proceed to trial, or grant a continuance of at least ten days from the date of the entry of the court order resetting the case for trial. State v.

Lowe, 811 S.W.2d 526, 1991 Tenn. LEXIS 247 (Tenn. 1991); State v. Morgan, 929 S.W.2d 380, 1996 Tenn. Crim. App. LEXIS 99 (Tenn. Crim. App. 1996).

7. Resentencing.

If a case is remanded for resentencing following a determination that the sole aggravating circumstance found by the original sentencing jury was legally invalid, state is not precluded by Tenn. R. Crim. P. 12.3 from relying on new aggravating circumstances. State v. Harris, 919 S.W.2d 323, 1996 Tenn. LEXIS 237 (Tenn. 1996), rehearing denied, — S.W.2d —, 1996 Tenn. LEXIS 381 (Tenn. June 10, 1996).

8. Presumption of Vindictiveness.

State's decision to pursue the death penalty, following the defendant's successful appeal of his conviction for which the death penalty originally was not sought, gave rise to a rebuttable presumption of prosecutorial vindictiveness, and the state had the burden of demonstrating by clear and convincing evidence that the prosecutor's decision was motivated by a legitimate purpose, in order for the court to allow the state to seek the death penalty. State v. Phipps, 959 S.W.2d 538, 1997 Tenn. LEXIS 629 (Tenn. 1997).

9. Withdrawal of Notice.

The state's withdrawal of the original notice of its intention to seek the death penalty, without more, also operated to withdrawal of the notice of its intention to seek life without parole. State v. Gilliland, 22 S.W.3d 266, 2000 Tenn. LEXIS 341 (Tenn. 2000).

Rule 13. Consolidation or Severance. —

(a) Consolidation. — The court may order consolidation for trial of two or more indictments, presentments, or informations if the offenses and all defendants could have been joined in a single indictment, presentment, or information pursuant to Rule 8.

(b) Severance. — The court may order a severance of offenses or defendants before trial if a severance could be obtained on motion of a defendant or of the state pursuant to Rule 14.

Advisory Commission Comments. Rules 8, 13 and 14 are closely tied together. Rule 13 allows at the court's option the consolidation or severance of offenses or defendants in those instances in which the state or the defendant could have elected to consolidate or sever. When the court orders a consolidation under section (a), the case is then in the "permissive joinder" status, and the defendant(s) may exercise the options available under Rule 14. A severance ordered by the court under section (b) is final.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), No. 3-13-1.

Tennessee Jurisprudence. 8 Tenn. Juris., Criminal Procedure, § 25; 16 Tenn. Juris., Intoxicating Liquors, § 15.

NOTES TO DECISIONS

Analysis

1. Issues and Facts Requiring Consolidation.
2. Consolidation Not Detrimental to Accused.
3. Consolidation Improper.
4. Severance.
5. —Held Proper.
6. Standard of Review.
7. Consolidation of Offenses.

1. Issues and Facts Requiring Consolidation.

The trial court did not abuse its discretion in allowing the state, over objection, to consolidate indictments charging defendant and his codefendants with rape, abduction and assault and battery with intent to ravish, since the issues and facts on all the charges were intertwined. Stepheny v. State, 570 S.W.2d 356, 1978 Tenn. Crim. App. LEXIS 319 (Tenn. Crim. App. 1978).

Trial court did not err in joining two first-degree murder counts with an aggravated assault count; joinder of the assault count with the murder counts was mandated, because the assault occurred during an investigation pertaining to the murder, and evidence pertaining thereto would necessarily require proof pertaining to the murder. State v. Shepherd, 902 S.W.2d 895, 1995 Tenn. LEXIS 269 (Tenn. 1995).

2. Consolidation Not Detrimental to Accused.

In prosecution for rape and burglary, the trial judge did not abuse his discretion in refusing defendant severance, since his codefendant's testimony exonerated him. Seelbach v. State, 572 S.W.2d 267, 1978 Tenn. Crim. App. LEXIS 326 (Tenn. Crim. App. 1978).

3. Consolidation Improper.

In an aggravated child abuse case, where defendant struck his stepson on two separate dates with a braided heavy-duty extension cord, the trial court abused its discretion in consolidating the indictments, as the two offenses did not constitute parts of a common scheme or plan, because the evidence relating to the method employed to commit the offenses was markedly different, and the evidence of each offense was not relevant to any material issue in the trial of the other offense. That error, in conjunction with the erroneous admission of evidence of other uncharged crimes, wrongs, or acts of abuse, appeared to have affected the jury's verdict, because the evidence supporting the convictions was legally sufficient but not overwhelming. State v. Toliver, 117 S.W.3d 216, 2003 Tenn. LEXIS 857 (Tenn. 2003).

4. Severance.

5. —Held Proper.

Separate trials for defendant's accused of murder and conspiracy were unnecessary, where the record demonstrated that the guilt or innocence of each defendant could be fairly determined. State v. Gaylor, 862 S.W.2d 546, 1992 Tenn. Crim. App. LEXIS 748 (Tenn. Crim. App. 1992), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 234 (Tenn. June 7, 1993).

6. Standard of Review.

Absent a showing of prejudice, a reviewing court may not overturn the trial court's exercise of discretion on the issue of severance. State v. Gaylor, 862 S.W.2d 546, 1992 Tenn. Crim. App. LEXIS 748 (Tenn. Crim. App. 1992), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 234 (Tenn. June 7, 1993).

7. Consolidation of Offenses.

If the state of Tennessee seeks the consolidation of offenses under Tenn. R. Crim. P. 13(a) and the defendant objects, the prosecution bears the burden of producing evidence to establish that consolidation is proper. The trial court must conclude from the evidence and arguments presented at the hearing that: (1) The multiple offenses constitute parts of a common scheme or plan, Tenn. R. Crim. P. 14(b)(1); (2) Evidence of one offense is relevant to some material issue in the trial of all the other offenses, Tenn. R. Evid. 404(b)(2); and (3) The probative value of the evidence of other offenses is not outweighed by the prejudicial effect that admission of the evidence would have on the defendant, Tenn. R. Evid. 404(b)(3). State v. Garrett, 331 S.W.3d 392, 2011 Tenn. LEXIS 7 (Tenn. Jan. 24, 2011).

Rule 14. Severance of Offenses and Defendants. —

(a) Severance Motion. —

(1) Timing. —

(A) By Defendant. — A defendant's motion for severance of offenses or defendants shall be made before trial, except that a motion for severance may be made before or at the close of all evidence if based on a ground not previously known. A defendant waives severance if the motion is not timely.

(B) By State. — The state's motion for severance of counts or defendants may be granted by the court only prior to trial, except with the consent of the defendant.

(2) Double Jeopardy. — If during the trial the court grants a motion for severance made by the defendant or with the defendant's consent, the ruling does not bar a subsequent trial of that defendant on the offenses severed.

(b) Severance of Offenses. —

(1) Involving Permissive Joinder of Offenses. — If two or more offenses are joined or consolidated for trial pursuant to Rule 8(b), the defendant has the right to a severance of the offenses unless the offenses are part of a common scheme or plan and the evidence of one would be admissible in the trial of the others.

(2) Involving Mandatory Joinder of Offenses. — If two or more offenses are joined or consolidated for trial pursuant to Rule 8(a), the court shall grant a severance of offenses in any of the following situations:

(A) Before Trial. — Before trial on motion of the state or the defendant when the court finds a severance appropriate to promote a fair determination of the defendant's guilt or innocence of each offense.

(B) DURING TRIAL. — During trial, with consent of the defendant, when the court finds a severance is necessary to achieve a fair determination of the defendant's guilt or innocence of each offense. The court shall consider whether–in light of the number of offenses charged and the complexity of the evidence–the trier of fact will be able to distinguish the evidence and apply the law intelligently as to each offense.

(C) CONFLICTING POSITIONS ON CONTINUANCE. — When the court finds merit in both the district attorney general's motion for a continuance based on exigent circumstances that temporarily prevent the state from being ready for trial of the joined prosecutions and in the defendant's objection to the continuance based on a demand for speedy trial. A court granting a severance under this subdivision shall also grant a continuance of the prosecutions in which the exigent circumstances exist.

(c) SEVERANCE OF DEFENDANTS. —

(1) BECAUSE OF OUT-OF-COURT STATEMENT. — If a defendant moves for a severance because an out-of-court statement of a codefendant makes reference to the defendant but is not admissible against the defendant, the court shall determine whether the state intends to offer the statement in evidence at trial. If so, the court shall require the prosecuting attorney to elect one of the following courses:

(A) a joint trial at which the statement is not admitted in evidence or at which, if admitted, the statement would not constitute error;

(B) a joint trial at which the statement is admitted in evidence only after all references to the moving defendant have been deleted and if the redacted confession will not prejudice the moving defendant; or

(C) severance of the moving defendant.

(2) BECAUSE OF SPEEDY TRIAL OR FAIR DETERMINATION CONCERNS. — On motion of the state or the defendant other than under Rule 14(c)(1), the court shall grant a severance of defendants if:

(A) before trial, the court finds a severance necessary to protect a defendant's right to a speedy trial or appropriate to promote a fair determination of the guilt or innocence of one or more defendants; or

(B) during trial, with consent of the defendants to be severed, the court finds a severance necessary to achieve a fair determination of the guilt or innocence of one or more defendants.

(3) BECAUSE OF FAILURE TO PROVE GROUNDS FOR JOINDER. — The court shall grant a severance of defendants if:

(A) a defendant moves for severance at the conclusion of the state's case or at the conclusion of all the evidence;

(B) there is not sufficient evidence to support the allegation on which the moving defendant was joined for trial with the other defendant or defendants; and

(C) in view of this lack of evidence, severance is necessary to achieve a fair determination of the moving defendant's guilt or innocence.

Advisory Commission Comments. Offenses permissively joined by the prosecution (or by the court) may be severed upon motion by the defendant as a matter of right, with one exception: where the offenses are part of a common scheme or plan and the evidence of one would be admissible upon the trial of the others.

The provisions of section (b)(2) set out when and under what circumstances there may be a severance of cases consolidated under the compulsory joinder rule.

Severance of defendants is covered in section (c), dealing with the *Bruton* issue. *Bruton v. United States*, 391 U.S. 123 (1968). Subdivision (c)(1) contains provisions making severance unnecessary where no *Bruton* violation would follow, as would be true, for example, where the confessing codefendant testifies or where redaction eliminates any prejudice to the nonconfessing codefendant.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 3-14-1 — 3-14-5.

Tennessee Jurisprudence. 8 Tenn. Juris., Criminal Procedure, § 25.

NOTES TO DECISIONS

ANALYSIS

1. Procedure for Joinder.
2. Consolidation Not Detrimental to Accused.
3. Issues Requiring Consolidation.
4. Consolidation Improper.
5. Severance Necessary.
6. Severance Unnecessary.
7. Severance Not Discretionary.
8. Elements of Common Scheme.
9. Discretion of Judge.
10. Review of Denial to Sever.
11. Harmless Error.
12. Open-ended Indictment.
13. Standard of Review.
14. Effect of Pro Se Codefendant.
15. Waiver.
16. Severance of Offenses.
17. Common Scheme or Plan.

1. Procedure for Joinder.

Before two or more offenses may properly be joined in the same indictment, Tenn. R. Crim. P. 14(b)(1) requires that the trial court find that the offenses are a part of a common scheme or plan, and comply with the procedural requirements of Tenn. Rule Evid. 404(b). State v. Hoyt, 928 S.W.2d 935, 1995 Tenn. Crim. App. LEXIS 965 (Tenn. Crim. App. 1995), overruled in part, Spicer v. State, 12 S.W.3d 438, 2000 Tenn. LEXIS 57 (Tenn. 2000).

Prosecutor should refrain from seeking the consolidation of offenses over a defendant's objection unless the prosecutor has a good faith basis for arguing that the requirements of Tenn. R. Crim. P. 14(b)(1) will be met. State v. Garrett, 331 S.W.3d 392, 2011 Tenn. LEXIS 7 (Tenn. Jan. 24, 2011).

Trial court erred in failing to conduct a hearing under Tenn. R. Crim. P. 14(b)(1) on defendant's objection to the state of Tennessee's motion to consolidate defendant's offenses of aggravated robbery in one incident and first degree felony murder and especially aggravated robbery in a separate incident, in failing to set forth its findings of fact and conclusions of law, and in granting the motion because defendant objected to the pretrial motion to consolidate offenses. The trial court's error was not harmless with respect to defendant's aggravated robbery conviction because of the relative weakness of the state's case, but the trial court's error was harmless with respect to defendant's convictions for the first degree felony murder and especially aggravated robbery because the proof was sufficiently strong to conclude that the jury would have convicted defendant of those offenses even had it not heard any proof about the aggravated robbery conviction. State v. Garrett, 331 S.W.3d 392, 2011 Tenn. LEXIS 7 (Tenn. Jan. 24, 2011).

2. Consolidation Not Detrimental to Accused.

In prosecution for rape and burglary, the trial judge did not abuse his discretion in refusing defendant severance, since his codefendant's testimony exonerated him. Seelbach v. State, 572 S.W.2d 267, 1978 Tenn. Crim. App. LEXIS 326 (Tenn. Crim. App. 1978).

Codefendant's guilty plea, standing alone, did not require severance of appellant's trial from that of codefendant, since the plea did not implicate appellant. State v. Coleman, 619 S.W.2d 112, 1981 Tenn. LEXIS 460 (Tenn. 1981).

Where no evidence was introduced against the defendant that would not have been admissible against him in a separate trial, a severance was not necessary. State v. Hammonds, 616 S.W.2d 890, 1981 Tenn. Crim. App. LEXIS 337 (Tenn. Crim. App. 1981).

Burglary, kidnappings and extortions were found to be part of common scheme to abduct child, proof of any of the crimes would have been admissible in a trial of any of the others, and there was no error by trial court in refusing to sever all charges for separate trials. State v. Sammons, 656 S.W.2d 862, 1982 Tenn. Crim. App. LEXIS 491 (Tenn. Crim. App. 1982).

Severance was not necessary where the trial court's instructions properly directed the jury to consider each defendant's guilt separately; and no prejudice resulted by the joint trial of the defendants. State v. Kyger, 787 S.W.2d 13, 1989 Tenn. Crim. App. LEXIS 690 (Tenn. Crim. App. 1989), rehearing denied, — S.W.2d —, 1989 Tenn. Crim. App. LEXIS 757 (Tenn. Crim. App. Oct. 24, 1989).

In prosecution for unlawful abandonment of a body and first degree murder, severance of charges was not necessary where concealment

of victim's body tended to show guilt of defendant on offense of murder and evidence of victim's death is an element of offense of unlawful abandonment. State v. Furlough, 797 S.W.2d 631, 1990 Tenn. Crim. App. LEXIS 293 (Tenn. Crim. App. 1990).

Record failed to reflect that the speculative risk of a spill-over effect upon codefendant from his brother's criminal history justified a conclusion that a joint trial was an abuse of discretion in a prosecution for aggravated kidnapping, aggravated robbery and extortion. State v. Meeks, 867 S.W.2d 361, 1993 Tenn. Crim. App. LEXIS 503 (Tenn. Crim. App. 1993), cert. denied, Meeks v. Tennessee, 510 U.S. 1168, 114 S. Ct. 1200, 127 L. Ed. 2d 548, 1994 U.S. LEXIS 1998 (1994).

Postconviction court erred by granting relief on petitioner's claim that he received ineffective assistance of counsel based on trial counsel's having a conflict of interest and his failure to obtain a severance because counsel determined, after consideration of the facts and consultation with petitioner and his girlfriend who was also charged, that a joint defense was in petitioner's best interests and petitioner consented, and moving for a severance or a mistrial would have been contrary to that objective. It was counsel's view that a joint trial benefitted petitioner and his girlfriend because the total denial of culpability of each bolstered the other. Rathbone v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 311 (Tenn. Crim. App. Apr. 30, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 508 (Tenn. Sept. 16, 2020).

3. Issues Requiring Consolidation.

The trial judge did not abuse his discretion in denying severance where, even if defendant had been tried separately, the proof at trial would have necessarily shown that her husband, the codefendant, was involved, and where all the jurors repeated that they would not consider the reputation of defendant's husband or the plea of guilty of another defendant. Lackey v. State, 578 S.W.2d 101, 1978 Tenn. Crim. App. LEXIS 284 (Tenn. Crim. App. 1978).

Trial court did not err in joining two first-degree murder counts with an aggravated assault count; joinder of the assault count with the murder counts was mandated because the assault occurred during an investigation pertaining to the murder and evidence pertaining thereto would necessarily require proof pertaining to the murder. State v. Shepherd, 902 S.W.2d 895, 1995 Tenn. LEXIS 269 (Tenn. 1995).

Defense counsel was not ineffective for failing to file a motion to sever the child neglect, aggravated child abuse, and felony murder counts against defendant for separate trials because the cases were mandatorily joined as the incidents were part of a single continuing episode of multiple abuse of the infant victim over the course of days. Demeza v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 707 (Tenn. Crim. App. Oct. 30, 2020).

4. Consolidation Improper.

The connection between two cases involving an armed robbery of a convenience store and a separate robbery-murder of a student was far too tenuous to support joinder or consolidation, and the trial judge erred in ordering consolidation under Tenn. R. Crim. P. 8(a) and (b), Tenn. R. Crim. P. 14(b)(1). State v. Adams, 859 S.W.2d 359, 1992 Tenn. Crim. App. LEXIS 829 (Tenn. Crim. App. 1992).

Trial court abused its discretion in consolidating two indictments against defendant charging him with aggravated sexual battery and with rape of a child, where the state produced no evidence at the consolidation hearing to demonstrate that the two offenses were parts of a common scheme or plan. Spicer v. State, 12 S.W.3d 438, 2000 Tenn. LEXIS 57 (Tenn. 2000).

Two charges against defendant were improperly consolidated under Tenn. R. Crim. P. 14(b)(1) where there was no evidence of a common scheme or plan, the offenses were not "signature" crimes, were not part of the same transaction, identity and intent were not at issue, and defendant did not assert a defense of mistake of fact or accident. State v. Prentice, 113 S.W.3d 326, 2001 Tenn. Crim. App. LEXIS 961 (Tenn. Crim. App. 2001).

In an aggravated child abuse case, where defendant struck his stepson on two separate dates with a braided heavy-duty extension cord, the trial court abused its discretion in consolidating the indictments, as the two offenses did not constitute parts of a common scheme or plan, because the evidence relating to the method employed to commit the offenses was markedly different, and the evidence of each offense was not relevant to any material issue in the trial of the other offense. That error, in conjunction with the erroneous admission of evidence of other uncharged crimes, wrongs, or acts of abuse, appeared to have affected the jury's verdict, because the evidence supporting the convictions was legally sufficient but not overwhelming. State v. Toliver, 117 S.W.3d 216, 2003 Tenn. LEXIS 857 (Tenn. 2003).

5. Severance Necessary.

Where codefendant's statement contained numerous references such as the "other man," motion for severance should have been granted. State v. Howard, 617 S.W.2d 656, 1981 Tenn. Crim. App. LEXIS 341 (Tenn. Crim. App. 1981).

Sex crimes committed more than 11 years apart against two victims, where the first crime was committed the year the second victim was born, did not constitute a common scheme or plan. State v. Burchfield, 664 S.W.2d 284, 1984 Tenn. LEXIS 725 (Tenn. 1984).

Where the only way to insure that defendant's punishment in second murder case would be determined on the merits of that case and without regard to the first murder case was for the trial judge to have granted the motion for severance of the two offenses, the trial judge committed reversible error in denying that severance. State v. Smith, 755 S.W.2d 757, 1988 Tenn. LEXIS 25 (Tenn. 1988), overruled in part, State v. Middlebrooks, 840 S.W.2d 317, 1992 Tenn. LEXIS 563 (Tenn. 1992).

Failure of court to sever unrelated charges of furnishing alcohol to a minor and aggravated rape denied defendant a fair trial. State v. Myers, 764 S.W.2d 214, 1988 Tenn. Crim. App. LEXIS 584 (Tenn. Crim. App. 1988).

Even though two counts of rape involving two different victims showed a common plan or scheme, joinder would unduly prejudice defendant at trial because evidence of multiple sexual offenses would be admissible under each count and the "taint" of such evidence introduced under one count would bolster the second joined offense and vice versa. State v. Hoyt, 928 S.W.2d 935, 1995 Tenn. Crim. App. LEXIS 965 (Tenn. Crim. App. 1995), overruled in part, Spicer v. State, 12 S.W.3d 438, 2000 Tenn. LEXIS 57 (Tenn. 2000).

Joinder of a count of aggravated sexual rape and two counts of rape involving two other victims was improper because the circumstances surrounding the sexual battery offense were dissimilar from the rape offenses so that the former was not part of a common plan or scheme, and evidence elicited in support of the sexual battery count would not be admissible in separate trials for the rape counts. State v. Hoyt, 928 S.W.2d 935, 1995 Tenn. Crim. App. LEXIS 965 (Tenn. Crim. App. 1995), overruled in part, Spicer v. State, 12 S.W.3d 438, 2000 Tenn. LEXIS 57 (Tenn. 2000).

Trial court abused its discretion in denying motion to sever because robberies did not share a distinct or unique modus operandi, and this abuse of discretion affected the outcome of the trial; thus, defendant's convictions and sentences were vacated. State v. Shirley, 6 S.W.3d 243, 1999 Tenn. LEXIS 575 (Tenn. 1999).

Where defendant was charged in connection with four robberies, trial court erred by refusing to sever the offenses under Tenn. R. Crim. P. 14(b)(1), as multiple charges and testimony inevitably hung in the backdrop as each particular offense was presented to the jury; it was unlikely that the jury examined each charge on its own proof. State v. Dotson, 254 S.W.3d 378, 2008 Tenn. LEXIS 277 (Tenn. Apr. 28, 2008).

6. Severance Unnecessary.

A severance need not be granted where the evidence which was introduced could have been admitted against requesting defendant in a separate trial. State v. Little, 854 S.W.2d 643, 1992 Tenn. Crim. App. LEXIS 404 (Tenn. Crim. App. 1992).

Where defendant was charged with conspiracy along with codefendant and even if defendant had been tried separately, testimony could have been introduced to establish a larger, ongoing conspiracy of which the instant drug transaction was a part, severance requested by defendant was properly denied. State v. Little, 854 S.W.2d 643, 1992 Tenn. Crim. App. LEXIS 404 (Tenn. Crim. App. 1992).

It is not an abuse of the trial court's discretion to refuse to sever when the defendant claims that a codefendant would have given exculpatory testimony at a separate trial but the codefendant invoked the Fifth Amendment at a joint trial. State v. Price, 46 S.W.3d 785, 2000 Tenn. Crim. App. LEXIS 597 (Tenn. Crim. App. 2000), review or rehearing denied, — S.W.3d —, 2001 Tenn. LEXIS 146 (Tenn. Feb. 26, 2001).

The trial court erred in "conditionally" granting a severance where counsel for defendant never consented to a severance and there was no showing that a severance was necessary to achieve a fair determination of guilt or innocence of all the defendants. State v. King, 40 S.W.3d 442, 2001 Tenn. LEXIS 56 (Tenn. 2001), rehearing denied, — S.W.3d —, 2001 Tenn. LEXIS 121 (Tenn. Feb. 20, 2001).

The trial court erred by effectively conditioning a severance on whether counsel for defendant was able to proceed with trial on Sunday, creating a prejudicial choice: whether to go to trial on Sunday or have counsel's client severed from the trial altogether. State v. King, 40 S.W.3d 442, 2001 Tenn. LEXIS 56 (Tenn. 2001), rehearing denied, — S.W.3d —, 2001 Tenn. LEXIS 121 (Tenn. Feb. 20, 2001).

Four gang members who engaged in the kidnapping of two gang members were jointly tried for the ensuing death of one of the gang members. The trial court did not err in refusing the sever the trials; codefendants failed to establish why a joint trial prevented a fair determination as to guilt or innocence. State v. Mickens, 123 S.W.3d 355, 2003 Tenn. Crim. App. LEXIS 107 (Tenn. Crim. App. 2003), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 805 (Tenn. Sept. 2, 2003)

In a criminally negligent homicide and reckless endangerment case, a court did not err by denying defendant's motion to sever the offenses, where the crimes of criminally negligent homicide and felony reckless endangerment required the finder of fact to determine whether the conduct of defendant constituted a gross deviation from the standard of care that an ordinary person would have exercised under all the circumstances as viewed from the accused person's standpoint; therefore, the absence of evidence of the surrounding circumstances would have resulted in jury confusion as to material issues in the case. State v. Goodwin, 143 S.W.3d 771, 2004 Tenn. LEXIS 552 (Tenn.

2004), rehearing denied, — S.W.3d —, 2004 Tenn. LEXIS 696 (Tenn. 2004).

Two minor victims were direct witnesses to the sexual offenses committed by defendant against the other, and the offenses committed against each victim were substantially similar to the offenses committed against the other victim; each of the victims' testimony as to the crimes against the other was relevant under Tenn. R. Evid. 404(b) to rebut the theory that someone other than defendant had committed the alleged offenses, and the probative value of the evidence was not outweighed by the danger of unfair prejudice. State v. Osborne, 251 S.W.3d 1, 2007 Tenn. Crim. App. LEXIS 689 (Tenn. Crim. App. Aug. 28, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 59 (Tenn. Jan. 28, 2008).

Both minor victims clearly testified about the sexual offenses which were committed against them jointly or in the presence of the other, and the fact that one of the victims was not questioned about or did not recollect specific instances of sexual abuse testified to by the other victim went to the credibility of the victim's testimony; also, the jury was unable to reach a verdict on three counts, indicating that the jury was not predisposed to convict defendant at all costs, and demonstrating an ability to distinguish the evidence and apply the law as to each offense, and thus defendant failed to show that he was unduly or unfairly prejudiced by the trial court's denial of his renewed motion for a severance. State v. Osborne, 251 S.W.3d 1, 2007 Tenn. Crim. App. LEXIS 689 (Tenn. Crim. App. Aug. 28, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 59 (Tenn. Jan. 28, 2008).

Trial court allowed the state to proceed jointly as to those counts of the indictment involving alleged sexual offenses committed against the two minor victims at the same time because the offenses occurred either simultaneously or closely related in time and circumstances, they were clearly part of the same criminal transaction, and the evidence of one offense would be admissible at the separate trials of the others; accordingly, the trial court did not err in denying defendant's motion to sever those counts. State v. Osborne, 251 S.W.3d 1, 2007 Tenn. Crim. App. LEXIS 689 (Tenn. Crim. App. Aug. 28, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 59 (Tenn. Jan. 28, 2008).

Alleged sexual offenses against the younger victim occurred during "sleep overs" while defendant was charged with the care of the younger victim, and the younger victim testified at a hearing that she did not remember any offenses committed against her in defendant's apartment when the older victim, defendant's daughter, was not present; thus, the trial court did not err in finding that defendant's conduct constituted a continuing plan or scheme to commit sexual offenses against the two minor victims and in denying defendant's motion to sever the consolidated offenses. State v. Osborne, 251 S.W.3d 1, 2007 Tenn. Crim. App. LEXIS 689 (Tenn. Crim. App. Aug. 28, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 59 (Tenn. Jan. 28, 2008).

Contrary to the inmate's allegations, the pieces of evidence he claimed were only relevant to a codefendant were actually relevant to the commission of the crime of which they were both accused and ultimately convicted; the contested evidence established, or at least strongly implied, that the murders were committed by means of weapons which had been shot and arguably possessed by the codefendant or by someone who was practice-shooting in his yard. Since the evidence revealed the inmate and the codefendant were together during the pertinent times and since the ballistic evidence was connected to the murders, the evidence was properly admitted against those persons standing trial for those murders; thus, the inmate was not deprived of any constitutional right by the denial of a severance. Sutton v. Bell, 683 F. Supp. 2d 640, 2010 U.S. Dist. LEXIS 5292 (E.D. Tenn. Jan. 22, 2010).

Trial court did not abuse its discretion in denying defendant's motion for severance based on the number of defendants charged, the number of counts considered by the jury, the non-complex nature of the indictment, the length of the trial, the non-disparate evidence at trial against defendants, the similar degrees of involvement by defendants, and because defendant was not hampered in presenting defendant's defense at the joint trial. The charged offenses were connected in time, place, and occasion. State v. Harbison, 539 S.W.3d 149, 2018 Tenn. LEXIS 7 (Tenn. Jan. 9, 2018).

Trial court did not abuse its discretion in denying defendant one's motion for severance as it was not required for a fair determination of guilt or innocence; the trial court instructed the jury to give separate consideration to each defendant and instructed on criminal responsibility, the jury was presumed to follow the instructions, and the jury heard defendant's claim that he was not present at the shooting and did not accept his version. State v. Clayton, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 458 (Tenn. Crim. App. July 31, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 556 (Tenn. Dec. 10, 2019).

Trial court did not err by refusing to sever defendant's sexual crimes from the assault crimes because defendant's physical abuse of the victim was part of his continuing plan to subdue the victim in order to profit from her prostitution, the offenses were properly admissible under Tenn. R. Evid. 404(b) as the elements of the alternative sex trafficking charge explicitly made the assault relevant and the sex trafficking and promoting prostitution charges were relevant to defendant's motive and intent

in the assault offenses. State v. Jeffries, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 637 (Tenn. Crim. App. Oct. 10, 2019).

Trial court did not err by declining the sever the homicide charges from the unlawful possession of a firearm by a convicted felon charge because the offenses were subject to mandatory joinder as they arose from the same conduct and defendant chose to stipulate to his criminal record which mitigated any prejudicial effect that substantive evidence of his convictions would have had. State v. Johnson, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 736 (Tenn. Crim. App. Nov. 14, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 168 (Tenn. Apr. 1, 2020).

Trial court determined that defendant's two offenses were totally intertwined and that the proof of one would have been admissible in the trial of the other; therefore, the trial court reasonably determined that defendant was not entitled to a severance because the offenses were part of a common scheme or plan and plain error relief was not warranted. State v. Jives-Nealy, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 156 (Tenn. Crim. App. Feb. 28, 2020), appeal denied, State v. Jives-Nealy, — S.W.3d —, 2020 Tenn. LEXIS 319 (Tenn. Aug. 11, 2020).

Although defendant contended that a severance of defendants was necessary because the admission of evidence of pertaining to an additional aggravated sexual battery charge against co-defendant resulted in prejudice to defendant when defendant was accused of aggravated burglary and robbery charges in a home invasion, the trial court did not abuse its discretion in denying the severance because the court determined that a severance of defendants was not required to promote a fair determination of the guilt or innocence of defendant. State v. Anderson, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 76 (Tenn. Crim. App. Mar. 5, 2021).

In a case involving five defendants who were convicted of forgery and fraudulent filing of a lien, the court of criminal appeals concluded that the trial court did not abuse its discretion in denying the motion of one of the defendants based on a finding that severance was not required for a fair determination of guilt or innocence. State v. Lyons, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 100 (Tenn. Crim. App. Mar. 22, 2021).

7. Severance Not Discretionary.

The matter of severance of offenses under Tenn. R. Crim. P. 14(b)(1) is not solely within the discretion of the trial court. State v. Peacock, 638 S.W.2d 837, 1982 Tenn. Crim. App. LEXIS 386 (Tenn. Crim. App. 1982).

8. Elements of Common Scheme.

In order to be "parts of a common scheme or plan" as contemplated by Tenn. R. Crim. P. 8(b) and Tenn. R. Crim. P. 14(b)(1), two or more sets of offenses must be so similar in modus operandi and occur within such a relatively close proximity of time and location to each other that there can be little doubt that the offenses were committed by the same person(s). State v. Peacock, 638 S.W.2d 837, 1982 Tenn. Crim. App. LEXIS 386 (Tenn. Crim. App. 1982); State v. Wooden, 658 S.W.2d 553, 1983 Tenn. Crim. App. LEXIS 412 (Tenn. Crim. App. 1983); State v. Edwards, 868 S.W.2d 682, 1993 Tenn. Crim. App. LEXIS 228 (Tenn. Crim. App. 1993).

In determining whether the evidence of one crime would be admissible upon the trial of another, the court would not create an exception for sex crimes which would have allowed evidence of other crimes of the same kind for the purpose of showing disposition, where such evidence would not ordinarily be admissible. State v. Burchfield, 664 S.W.2d 284, 1984 Tenn. LEXIS 725 (Tenn. 1984).

Where various crimes were all part of a common scheme and plan on the part of the defendant to sexually molest young victims, severance of counts in the multi-count indictment was not required. State v. Morris, 788 S.W.2d 820, 1990 Tenn. Crim. App. LEXIS 731 (Tenn. Crim. App. 1990).

Denial of severance of charges was proper where five victims were white females between 21 and 24 years of age; attacks took place in apartment complexes or duplexes within two mile radius and all were on first floor; victims were asleep and were alone or appeared to be alone at time of attack; incidents involved burglary before rape; assailant instructed victims to be quiet; rubbed victim's breasts; digitally penetrated victims; and, where not interrupted, attempted or completed vaginal intercourse. State v. Edwards, 868 S.W.2d 682, 1993 Tenn. Crim. App. LEXIS 228 (Tenn. Crim. App. 1993).

There are three categories of common scheme or plan evidence: (1) Offenses that reveal a distinctive design or are so similar as to constitute "signature" crimes; (2) Offenses that are part of a larger, continuing plan or conspiracy; and (3) Offenses that are all part of the same criminal transaction. State v. Moore, 6 S.W.3d 235, 1999 Tenn. LEXIS 574 (Tenn. 1999); State v. Shirley, 6 S.W.3d 243, 1999 Tenn. LEXIS 575 (Tenn. 1999).

The rules of criminal procedure intend that a common scheme or plan for severance purposes is the same as a common scheme or plan for evidentiary purposes. State v. Moore, 6 S.W.3d 235, 1999 Tenn. LEXIS 574 (Tenn. 1999).

When a defendant objects to a pretrial consolidation motion by the state, the trial court must consider the motion by the severance provisions of Tenn. R. Crim. P. 14(b)(1), not whether the offenses meet the "same or similar character" standard contemplated by Tenn. R. Crim. P., Rule 8(b). Spicer v. State, 12 S.W.3d 438, 2000 Tenn. LEXIS 57 (Tenn. 2000).

Because the state introduced no evidence of a common scheme or plan at the consolidation hearing, the trial court abused its discretion in not holding separate trials on each of the indictments. Spicer v. State, 12 S.W.3d 438, 2000 Tenn. LEXIS 57 (Tenn. 2000).

9. Discretion of Judge.

The issue of severance or joinder of offenses is addressed to the sound discretion of the trial judge. State v. Wiseman, 643 S.W.2d 354, 1982 Tenn. Crim. App. LEXIS 468 (Tenn. Crim. App. 1982).

Whether or not to grant a severance is a matter which rests within the sound discretion of the trial court. State v. Howell, 34 S.W.3d 484, 2000 Tenn. Crim. App. LEXIS 167 (Tenn. Crim. App. 2000), appeal denied, — S.W.3d —, 2000 Tenn. LEXIS 539 (Tenn. Sept. 25, 2000), cert. denied, Sturgill v. Tennessee, 149 L. Ed. 2d 478, 121 S. Ct. 1614, 532 U.S. 977, 2001 U.S. LEXIS 2998 (2001).

Whether a severance should be granted is a matter entrusted to the sound discretion of the trial court, and the Tennessee supreme court will not interfere with the exercise of that discretion unless it results in clear prejudice to the defendant. State v. Carruthers, 35 S.W.3d 516, 2000 Tenn. LEXIS 683 (Tenn. 2000), cert. denied, Carruthers v. Tennessee, 533 U.S. 953, 121 S. Ct. 2600, 150 L. Ed. 2d 757, 2001 U.S. LEXIS 5032 (2001).

10. Review of Denial to Sever.

A denial of a motion to sever offenses will be reviewed for an abuse of discretion. State v. Moore, 6 S.W.3d 235, 1999 Tenn. LEXIS 574 (Tenn. 1999).

In most severance cases, the line between harmless and prejudicial error is in direct proportion to the degree by which proof exceeds the standard required to convict. Spicer v. State, 12 S.W.3d 438, 2000 Tenn. LEXIS 57 (Tenn. 2000).

The appellate court cannot interfere with the exercise of the discretion afforded the trial court absent clear abuse. State v. Howell, 34 S.W.3d 484, 2000 Tenn. Crim. App. LEXIS 167 (Tenn. Crim. App. 2000), appeal denied, — S.W.3d —, 2000 Tenn. LEXIS 539 (Tenn. Sept. 25, 2000), cert. denied, Sturgill v. Tennessee, 149 L. Ed. 2d 478, 121 S. Ct. 1614, 532 U.S. 977, 2001 U.S. LEXIS 2998 (2001).

Disparity in the evidence against the defendants is not alone sufficient to warrant the grant of a severance. State v. Howell, 34 S.W.3d 484, 2000 Tenn. Crim. App. LEXIS 167 (Tenn. Crim. App. 2000), appeal denied, — S.W.3d —, 2000 Tenn. LEXIS 539 (Tenn. Sept. 25, 2000), cert. denied, Sturgill v. Tennessee, 149 L. Ed. 2d 478, 121 S. Ct. 1614, 532 U.S. 977, 2001 U.S. LEXIS 2998 (2001).

11. Harmless Error.

Where the evidence of guilt adduced against the defendant in both armed robbery and felony murder cases was abundant and legally sufficient, and the result would have been the same were the cases tried before different juries, error in joining unrelated cases was harmless. State v. Adams, 859 S.W.2d 359, 1992 Tenn. Crim. App. LEXIS 829 (Tenn. Crim. App. 1992).

A motion to sever is discretionary with the trial court, and the court's decision will not be reversed unless it clearly prejudiced the defendant. State v. Hutchison, 898 S.W.2d 161, 1994 Tenn. LEXIS 157 (Tenn. 1994), rehearing denied, 898 S.W.2d 161, 1995 Tenn. LEXIS 198 (1995), cert. denied, Hutchinson v. Tennessee, 516 U.S. 846, 116 S. Ct. 137, 133 L. Ed. 2d 84, 1995 U.S. LEXIS 5846 (1995), dismissed, Hutchison v. Bell, — F. Supp. 2d —, 2010 U.S. Dist. LEXIS 31736 (E.D. Tenn. Mar. 30, 2010).

Where the trial court erred in not severing one count of child rape from the other counts, the error was harmless as defendant was acquitted of two of the three counts, and the evidence was sufficient to support a guilty verdict on the remaining count. State v. Moore, 6 S.W.3d 235, 1999 Tenn. LEXIS 574 (Tenn. 1999).

Even though the trial court erred by failing to sever the prejudicial and unrelated failure to appear charges from the remaining charges at trial, the error was harmless because the jury acquitted defendant on all three of the failure to appear charges as well as several other counts and the proof of defendant's guilt on the remaining charges was overwhelming. State v. Winbush, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 198 (Tenn. Crim. App. Mar. 24, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 453 (Tenn. Aug. 6, 2020).

12. Open-ended Indictment.

When offenses are alleged in an open-dated indictment, the state may not meet its burden of producing evidence to establish a common scheme or plan with evidence later developed at trial. To the extent that State v. Hoyt, 928 S.W.2d 935, 1995 Tenn. Crim. App. LEXIS 965 (Tenn. Crim. App. 1995), overruled in part, Spicer v. State, 12 S.W.3d 438, 2000 Tenn. LEXIS 57 (Tenn. 2000), can be read to permit appellate review of severance issues based only upon the offenses actually elected at the close of the evidence, it is overruled. Spicer v. State, 12 S.W.3d 438, 2000 Tenn. LEXIS 57 (Tenn. 2000).

13. Standard of Review.

Decisions to consolidate or sever offenses pursuant to Tenn. R. Crim. P. 8(b) and Tenn. R. Crim. P. 14(b)(1) are to be reviewed for an abuse of discretion. State v. Shirley, 6 S.W.3d 243, 1999 Tenn. LEXIS 575 (Tenn. 1999).

14. Effect of Pro Se Codefendant.

Rather than automatically granting a severance in trials involving a pro se defendant and a represented codefendant, certain precautionary measures should be employed to minimize

the possibility of prejudice, including standby counsel, warning the defendant that he will be held to the rules of law and evidence and that he should refrain from speaking in the first person in his comments on the evidence, and instructing the jury prior to the closing remarks, during summation and in final instructions, that no thing the lawyer said is evidence in the case. The judge should also make clear to the jury that anything the pro se defendant says is not evidence, should instruct the pro se defendant that he should avoid reference to codefendants without prior permission of the court and refrain from commenting on matters not in evidence or solely within his personal knowledge or belief. State v. Carruthers, 35 S.W.3d 516, 2000 Tenn. LEXIS 683 (Tenn. 2000), cert. denied, Carruthers v. Tennessee, 533 U.S. 953, 121 S. Ct. 2600, 150 L. Ed. 2d 757, 2001 U.S. LEXIS 5032 (2001).

Defendant's right to a fair trial was prejudiced when he was denied a severance and was jointly tried with pro se codefendant where pro se codefendant was offensive before the jury and his questioning of witnesses elicited incriminating evidence. State v. Carruthers, 35 S.W.3d 516, 2000 Tenn. LEXIS 683 (Tenn. 2000), cert. denied, Carruthers v. Tennessee, 533 U.S. 953, 121 S. Ct. 2600, 150 L. Ed. 2d 757, 2001 U.S. LEXIS 5032 (2001).

15. Waiver.

Defendant waived his procedural objection to the severance of three child rape counts against him on the morning that his trial began because, from the record, it did not appear that defendant objected to the motion as untimely. State v. Schiefelbein, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 138 (Tenn. Crim. App. Feb. 8, 2007), modified, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 213 (Tenn. Crim. App. Mar. 7, 2007).

Defendant three waived his issue by failing to either file a written motion to sever or orally join in the motion to sever argued prior to trial. State v. Clayton, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 458 (Tenn. Crim. App. July 31, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 556 (Tenn. Dec. 10, 2019).

Defendant two waived his claim that his motion for severance from other defendants was improperly denied as he argued a different theory on appeal. State v. Clayton, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 458 (Tenn. Crim. App. July 31, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 556 (Tenn. Dec. 10, 2019).

16. Severance of Offenses.

Charges of rape of a child under T.C.A. § 39-13-522 were improperly severed from charges of aggravated sexual battery of a child under thirteen years of age under T.C.A. § 39-13-504(a)(4) because the rape counts met the criteria for mandatory joinder under Tenn. R. Crim. P. 8(a)(1)(A); the severance of the offenses was not necessary pursuant to Tenn. R. Crim. P. 14(b)(2)(A) because that state's reasons for moving to sever the offenses were insufficient, and the state did not explain why a limiting instruction to the jury would not have preserved a fair determination of defendant's guilt or innocence of each offense. State v. Schiefelbein, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 138 (Tenn. Crim. App. Feb. 8, 2007), modified, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 213 (Tenn. Crim. App. Mar. 7, 2007).

After the trial court entered the judgments of acquittal, defendant could have, and should have, moved to strike any evidence related to the robber. Because defendant failed to seek a severance under Tenn. R. Crim. P. 14, or move to strike, defendant could not now complain of the introduction of proof related to the robbery charges. State v. Little, 402 S.W.3d 202, 2013 Tenn. LEXIS 309 (Tenn. Mar. 22, 2013).

Trial counsel was not ineffective by failing to seek severance of defendant's charged offenses of molestation of the minor victim and filming of that molestation because a severance was not warranted and would not have been granted. It was difficult to envision how trial counsel could have made any sort of winning argument that defendant's molestation of the victim and defendant's filming of that molestation were not part of a common scheme or plan, or that evidence of one offense should not have been admitted at the trial of the other. Wilson v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 806 (Tenn. Crim. App. Dec. 22, 2020).

Trial court did not commit plain error by failing to sever the offenses alleged against defendant for an alleged home invasion in the morning from the offenses alleged against defendant for an alleged return in the afternoon because the evidence of both sets of crimes demonstrated a larger, continuing plan or conspiracy between defendant and co-defendant to take the money which the victim told co-defendant that the victim was going to receive. State v. Anderson, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 76 (Tenn. Crim. App. Mar. 5, 2021).

17. Common Scheme or Plan.

Trial court erred by denying defendant's motion to sever his first-degree murder charge from offenses concerning a second victim because the evidence presented at the severance hearings failed to establish that the offenses were part of a common scheme or plan, as they involved separate acts against different victims the occurred at different times by different means. The error was not harmless because the failure to sever the offenses allowed the State to bolster its proof of the murder charge, for which the proof was not overwhelming, with evidence of the other offenses and more probably than not affected the verdict. State v. Brown, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 220

(Tenn. Crim. App. Apr. 8, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 387 (Tenn. Aug. 15, 2019).

Rule 15. Depositions. —

(a) When Taken. —

(1) In General. — A party may move that a prospective witness be deposed in order to preserve testimony for trial. Any such motion may be filed at any time after the defendant's initial appearance before a magistrate and after the defendant has been afforded counsel. Such motion shall be filed in a court of record. The Court may:

(A) grant the motion because of exceptional circumstances and in the interest of justice; and

(B) order that the witness produce at the deposition any designated, non-privileged book, paper, document, record, recording, or other material.

(2) Detained Witness. — A witness who is detained for failure to give bail to appear to testify at a trial or hearing may request to be deposed by filing a written motion and giving notice to the parties. The court may then order that the deposition be taken and may discharge the witness after the deposition is subscribed.

(3) By Written Agreement of the Parties. — The district attorney general and the attorney for the defendant may take the deposition of a witness by written agreement of the parties without the necessity of court approval.

(b) Notice of Taking. —

(1) To the Parties. — A party at whose instance a deposition is to be taken shall give every other party reasonable written notice of the deposition's time and location. The notice shall state each deponent's name and address. On its own initiative or on motion of a party receiving this notice of a deposition, the court may change the deposition's time or location for good cause.

(2) To the Custodial Officer. — The officer having custody of a defendant shall be notified of the time, date, and location of the deposition.

(c) Defendant's Presence. —

(1) Defendant in Custody. — The officer who has custody of a defendant shall produce the defendant at the deposition and keep the defendant in the witness's presence during the examination unless:

(A) the defendant waives in writing the right to be present; or

(B) the defendant persists in conduct justifying exclusion from the place of the deposition after being warned by the court that disruptive conduct will result in the defendant's exclusion.

(2) Defendant not in Custody. — A defendant who is not in custody has the right, on request, to be present at the deposition, subject to any conditions imposed by the court. If the state provides notice of the deposition and tenders expenses as provided by Rule 15(d) but the defendant still fails to appear, the defendant–absent good cause–waives both the right to appear and any objection, based on that right, to the taking and use of the deposition.

(d) Expenses. — If a deposition is taken at the instance of the state or of a defendant who is unable to pay the deposition expenses, the court may order the state to pay:

(1) the expense of the defendant and defendant's attorney for travel and subsistence to attend the deposition; and

(2) the cost of the deposition transcript.

(e) Manner and Place of Taking. —

(1) In General. — Unless these rules or the court provides otherwise, a deposition shall be taken and filed in the manner as a deposition in civil actions, except that:

(A) a defendant may not be deposed without his or her consent; and

(B) the scope and manner of examination and cross-examination are the same as allowed at trial.

(2) Deponent's Prior Statements. — The state shall provide to the defendant or the defendant's counsel, for use at the deposition, any statement of the deponent which is in the state's possession and to which the defendant would be entitled at trial.

(3) Place of Taking. — A deposition may be taken in a location authorized by Rule 17(e).

(f) Use as Evidence. —

(1) In General. — At the trial or in any hearing, a party may use a part or all of a deposition –otherwise admissible under the Tennessee Rules of Evidence–as substantive evidence if:

(A) the witness is unavailable as defined in Rule 15(h); or

(B) on motion and notice, the court–in the interest of justice with due regard to the importance of presenting the testimony of witnesses orally in open court–finds such exceptional circumstances exist that make it desirable to allow the deposition to be used.

(2) Contradiction or Impeachment. — Any party may use any deposition to contradict or impeach the testimony of the deponent as a witness.

(3) Completeness. — If only part of a deposition is offered in evidence by a party:

(A) an adverse party may require the party to offer all of the deposition that is relevant to the part offered; and

(B) any party may offer other parts of the deposition.

(g) Objections to Deposition Testimony. — A party objecting to deposition evidence or testimony shall state the grounds for the objection during the deposition.

(h) Unavailability. —

(1) Definition. — Unavailability of a witness under Rule 15(f) means situations in which the declarant:

(A) is exempted by court ruling on the ground of privilege from testifying concerning the subject matter of the declarant's statement;

(B) persists in refusing to testify concerning the subject matter of the declarant's statement despite a court order to do so;

(C) demonstrates a lack of memory of the subject matter of the declarant's statement;

(D) is unable to be present or to testify at the hearing because of the declarant's death or then existing physical or mental illness or infirmity; or

(E) is absent from the hearing and the party seeking to introduce the declarant's statement has been unable to procure the declarant's attendance by process or other reasonable means.

(2) Exception for Wrongdoing. — A declarant is not unavailable as a witness if the declarant's exemption, refusal, inability, or absence is due to the procurement or wrongdoing of the proponent of the statement for the purpose of preventing the witness from attending or testifying. [As amended by order entered December 14, 2009, effective July 1, 2010; and by order entered December 16, 2013, effective July 1, 2014.]

Advisory Commission Comments. Since the Code of 1858, Tennessee has long provided that the accused may, by order of the court, have the depositions of witnesses taken in the manner prescribed for taking depositions in civil cases, on notice to the district attorney general. Rule 15 extends to the state the same potential use of depositions.

Prior law was that depositions could only be taken by leave of the court, and not upon agreement of counsel without such a court authorization. *Curtis v. State*, 82 Tenn. 502 (1884). This rule modification–included as part of the 2006 revision–alters the prior law, and parties may now take depositions by written agreement.

Apart from depositions taken by agreement, the commission also wants to make clear that depositions are not meant to function as discovery devices in criminal cases. Their taking is meant to be tightly confined to those exceptional cases where the interests of justice require the taking for the preservation of testimony for use at trial, and not for discovery.

This rule conforms to its federal counterpart, except that the commission added section (f)(1) to permit the use of a deposition as proof under extraordinary circumstances in the interest of justice.

Paragraph (h)(1)(C) makes lack of memory a ground of unavailability in conformity with Evidence Rule 804(a)(3).

Advisory Commission Comments [2010]. The amendment to Rule 15(f)(1)(A) corrects a cross-reference.

Advisory Commission Comments [2014]. Rule 15(a)(1) was amended by adding the second and third sentences, which provide that a motion to take the deposition of a prospective witness may be filed at any time after a defendant's initial appearance before a magistrate as required by Tenn. R. Crim. P. 5(a)(1) and that such motion shall be filed in a court of record. The amendment did not affect any other provision of Tenn. R. Crim. P. 15 and in no way altered the requirement that depositions taken pursuant to this rule are for the preservation of testimony for use at trial and not for discovery. The amendment's requirement that a motion for a deposition be filed in a "court of record" signifies that such motions are not within the jurisdiction of the general sessions court under Tenn. R. Crim. P. 1(b).

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated December 14, 2009, was ratified and approved by 2010 Senate Resolution 179 and 2010 House Resolution 235. The order promulgating the amendment of this rule provided that it take effect July 1, 2010.

The amendment of rule 15, which amended subdivision (a)(1) and added the 2014 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 16, 2013, was ratified and approved by 2014 House Resolution 154 and Senate Resolution 74. The order promulgating the 2014 amendment of subdivision (a)(1) and the addition of the 2014 Advisory Commission Comments provided that it take effect on July 1, 2014.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 3-15-1 — 3-15-5.

NOTES TO DECISIONS

Analysis

1. When Deposition Admissible.
2. Right to Face Accuser.
3. Videotape Interviews.
4. Reluctant Witnesses.
5. Exceptional Circumstances.

1. When Deposition Admissible.

It was not error to admit into evidence the deposition of a witness, who was in military service, and was out of the state prior to date of trial. State v. Simon, 635 S.W.2d 498, 1982 Tenn. LEXIS 413 (Tenn. 1982), cert. denied, Simon v. Tennessee, 459 U.S. 1055, 103 S. Ct. 473, 74 L. Ed. 2d 621 (1982).

Any interpretation of Tenn. R. Crim. P. 15 must be made against the backdrop of constitutional protections that are inherent in the Confrontation Clause of the Sixth Amendment to the United States Constitution and Tenn. Const. art. 1, § 9; depositions should be taken only in those cases wherein their use is clearly necessary, and their taking should not be authorized in other cases; the deposition, even when videotaped, is a weak substitute for live testimony, a substitute that the Sixth Amendment does not countenance on a routine basis;

it is doubtful that a witness' vacation plans rise to the level of "exceptional circumstances" under Tenn. R. Crim. P. 15(a), even when balanced against the relatively minimal importance of witness' testimony. State v. Coulter, 67 S.W.3d 3, 2001 Tenn. Crim. App. LEXIS 485 (Tenn. Crim. App. 2001), overruled in part, State v. Johnson, — S.W.3d —, 2013 Tenn. Crim. App. LEXIS 1051 (Tenn. Crim. App. Dec. 3, 2013).

As a notary authorized to administer oaths, a court reporter was authorized to administer oaths in Mississippi, and therefore, a trial court properly admitted deposition testimony of a witness taken in Mississippi in defendant's murder trial. State v. Powers, 101 S.W.3d 383, 2003 Tenn. LEXIS 2 (Tenn. 2003), cert. denied, Powers v. Tennessee, 538 U.S. 1038, 123 S. Ct. 2083, 155 L. Ed. 2d 1071, 2003 U.S. LEXIS 3797 (Tenn. May 19, 2003).

2. Right to Face Accuser.

The right to face one's accuser in civil matters is not the same as in criminal matters. Goodwin v. Metropolitan Bd. of Health, 656 S.W.2d 383, 1983 Tenn. App. LEXIS 710 (Tenn. Ct. App. 1983).

3. Videotape Interviews.

Ex parte videotape interviews under T.C.A. §§ 37-1-405, 37-1-406 and 37-1-609 are not designed to take the place of depositions in criminal cases as authorized by Tenn. R. Crim. P. 15. State v. Pilkey, 776 S.W.2d 943, 1989 Tenn. LEXIS 395 (Tenn. 1989), rehearing denied, — S.W.2d —, 1989 Tenn. LEXIS 426 (1989), cert. denied, Pilkey v. Tennessee, 494 U.S. 1032, 110 S. Ct. 1483, 108 L. Ed. 2d 619, 1990 U.S. LEXIS 1318 (1990), cert. denied, Tennessee v. Pilkey, 494 U.S. 1046, 110 S. Ct. 1510, 108 L. Ed. 2d 646, 1990 U.S. LEXIS 1305 (1990), cert. denied, In re Disbarment of Marcone, 108 L. Ed. 2d 967, 110 S. Ct. 1839, 494 U.S. 1092, 1990 U.S. LEXIS 1998 (1990).

Trial court did not abuse its discretion in allowing video deposition of forensic pathologist who performed autopsy on the victim to be entered into evidence, despite the jury's inability to see the face of the witness for a large portion of the deposition, because the display of autopsy photographs in lieu of the face of the witness was not unfairly prejudicial to defendant. Defendant's rights under the Due Process Clause were not violated as defendant and trial counsel were present at the deposition and allowed to cross-examine the witness. State v. Sarden, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 637 (Tenn. Crim. App. Sept. 25, 2020).

4. Reluctant Witnesses.

Trial courts cannot order reluctant police witnesses to speak to defense counsel. State v. Singleton, 853 S.W.2d 490, 1993 Tenn. LEXIS 161 (Tenn. 1993).

5. Exceptional Circumstances.

Trial court did not err by failing to order the deposition of the victim because the defense did not shown that "exceptional circumstances" warranted the victim's deposition, as there was no evidence in the record that the victim in fact moved or that she would refuse to return for the hearing, it does not appear that a subpoena was issued for the victim for the day of the motion for new trial hearing, and the record was silent as to the victim's location at the time of the hearing, any efforts to secure the victim's presence at the hearing, or the victim's ability to attend the hearing. State v. Watkins, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 184 (Tenn. Crim. App. Mar. 26, 2019).

Rule 16. Discovery and Inspection. —

(a) Disclosure of Evidence by the State. —

(1) Information Subject to Disclosure. —

(A) Defendant's Oral Statement. — Upon a defendant's request, the state shall disclose to the defendant the substance of any of the defendant's oral statements made before or after arrest in response to interrogation by any person the defendant knew was a law-enforcement officer if the state intends to offer the statement in evidence at the trial;

(B) Defendant's Written or Recorded Statement. — Upon a defendant's request, the state shall disclose to the defendant, and make available for inspection, copying, or photographing, all of the following:

(i) the defendant's relevant written or recorded statements, or copies thereof, if:

(I) the statement is within the state's possession, custody, or control; and

(II) the district attorney general knows–or through due diligence could know–that the statement exists; and

(ii) the defendant's recorded grand jury testimony which relates to the offense charged.

(C) ORGANIZATIONAL DEFENDANT. — Upon a defendant's motion, if the defendant is a corporation, limited liability company, limited liability partnership, partnership, association, or labor union, the court may grant the defendant discovery of relevant recorded testimony of any witness before a grand jury who was:

(i) at the time of the testimony, so situated as an officer or employee as to have been able legally to bind the defendant regarding conduct constituting the offense; or

(ii) at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant regarding that alleged conduct in which the witness was involved.

(D) CODEFENDANTS. — Upon a defendant's request, when the state decides to place codefendants on trial jointly, the state shall promptly furnish each defendant who has moved for discovery under this subdivision with all information discoverable under Rule 16(a)(1)(A), (B), and (C) as to each codefendant.

(E) DEFENDANT'S PRIOR RECORD. — Upon a defendant's request, the state shall furnish the defendant with a copy of the defendant's prior criminal record, if any, that is within the state's possession, custody, or control if the district attorney general knows–or through due diligence could know–that the record exists.

(F) DOCUMENTS AND OBJECTS. — Upon a defendant's request, the state shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings, or places, or copies or portions thereof, if the item is within the state's possession, custody, or control and:

(i) the item is material to preparing the defense;

(ii) the government intends to use the item in its case-in-chief at trial; or

(iii) the item was obtained from or belongs to the defendant.

(G) REPORTS OF EXAMINATIONS AND TESTS. — Upon a defendant's request, the state shall permit the defendant to inspect and copy or photograph the results or reports of physical or mental examinations, and of scientific tests or experiments if:

(i) the item is within the state's possession, custody, or control;

(ii) the district attorney general knows–or through due diligence could know–that the item exists; and

(iii) the item is material to preparing the defense or the state intends to use the item in its case-in-chief at trial.

(2) INFORMATION NOT SUBJECT TO DISCLOSURE. — Except as provided in paragraphs (A), (B), (E), and (G) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal state documents made by the district attorney general or other state agents or law enforcement officers in connection with investigating or prosecuting the case. Nor does this rule authorize discovery of statements made by state witnesses or prospective state witnesses.

(3) Grand Jury Transcripts. — This rule does not apply to the discovery or inspection of a grand jury's recorded proceedings, except as provided in Rule 6 and Rule 16(a)(1)(A), (B), and (C).

(4) Failure to Call Witness. — The fact that a witness's name is furnished under this rule is not grounds for comment on a failure to call the witness.

(b) Disclosure of Evidence by the Defendant. —

(1) Information Subject to Disclosure. —

(A) Documents and Tangible Objects. — If a defendant requests disclosure under subdivision (a)(1)(F) or (G) of this rule and the state complies, then the defendant shall permit the state, on request, to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions of these items if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to introduce the item as evidence in the defendant's case-in-chief at trial.

(B) Reports of Examinations and Tests. — If the defendant requests disclosure under subdivision (a)(1)(F) or (G) of this rule and the state complies, the defendant shall permit the state, on request, to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to introduce the item as evidence in the defendant's case-in-chief at trial; or

(iii) the defendant intends to call as a witness at trial the person who prepared the report, and the results or reports relate to the witness's testimony.

(2) Information Not Subject to Disclosure. — Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of:

(A) reports, memoranda, or other internal defense documents made by the defendant or the defendant's attorneys or agents in connection with the investigation or defense of the case; or

(B) a statement made by the defendant to the defendant's agents or attorneys or statements by actual or prospective state or defense witnesses made to the defendant or the defendant's agents or attorneys.

(3) Failure to Call Witness. — The fact that a witness's name is on a list furnished under this rule is not grounds for comment on a failure to call the witness.

(c) Continuing Duty to Disclose. — A party who discovers additional evidence or material before or during trial shall promptly disclose its existence to the other party, the other party's attorney, or the court if:

(1) the evidence is subject to discovery or inspection under this rule, and

(2) the other party previously requested, or the court ordered, its production.

(d) Regulating Discovery. —

(1) Protective and Modifying Orders. — At any time, for good cause shown, the court may deny, restrict, or defer discovery or inspection, or grant other

appropriate relief. On a party's motion, the court may permit the party to make such showing, in whole or in part, by written statement that the court will inspect ex parte. If relief is granted following an ex parte submission, the court shall preserve under seal in the court records the entire text of the party's written statement.

(2) Failure to Comply with a Request. — If a party fails to comply with this rule, the court may:

(A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms or conditions;

(B) grant a continuance;

(C) prohibit the party from introducing the undisclosed evidence; or

(D) enter such other order as it deems just under the circumstances.

(3) Procedure in Child Pornography Cases. — In any criminal proceeding relating to the sexual exploitation of minors under title 39, chapter 17, part 10 that involves documents or objects discoverable pursuant to Rule 16(a)(F), the court shall, on motion of the state:

(A) Deny any request by the defendant to copy or photograph any documents or objects depicting the sexual exploitation of minors under title 39, chapter 17, part 10, so long as the state shows that the documents or objects will be made reasonably available to the defendant throughout the proceeding.

(B) For the purposes of subdivision (d)(3)(A), documents or objects shall be deemed to be reasonably available to the defendant if the state provides ample opportunity for inspection, viewing, and examination at a state facility of the documents or objects by the defendant, the defendant's attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial. The Court may, in its discretion, permit other individuals to have access to the documents or objects if necessary to protect the rights of the defendant.

(C) If the state fails to demonstrate that the documents or objects will be made reasonably available to the defendant throughout the proceeding, or fails to make the documents or objects reasonably available to the defendant at any time during the proceeding, the trial court may order the state to permit the defendant to copy or photograph any documents or objects subject to terms and conditions set by the court in an appropriate protective order.

(e) Alibi Witnesses. — Discovery of alibi witnesses is governed by Rule 12.1.

[As amended by order filed January 8, 2018, effective July 1, 2018.]

Advisory Commission Comments. This rule substantially conforms to the new federal discovery Rule 16, and was adopted by the commission as a middle-ground reciprocal rule.

The reference in (a)(1)(B) to the discovery of recorded grand jury testimony of a defendant will not have the same utility in state court, because under state procedure a prospective defendant seldom is required to testify before a grand jury. The commission left this language in the rule because it might be useful in connection with the operation of Rule 6(j)(5) and (6), the immunity provisions. Grand jury proceedings in Tennessee are not presently regularly recorded, but could be.

The rule is always triggered by the defendant; where the defendant requests disclosure, the reciprocal rights of the state come into play.

The commission agrees that the defendant shall still receive advance notice of the names of the state's witnesses, as is now provided by T.C.A. §§ 40-13-107, 40-17-106.

It is intended that section (a)(1)(F), as it relates to the inspection of tangible objects, shall mean that in controlled substance cases the defendant upon request must be furnished

a sufficient quantity of the substance to permit a scientific examination for identification purposes. The defendant has this right under existing case law. The commission considers that a meaningful "inspection" of a controlled substance means a scientific testing of a sample thereof. Results are subject to discovery by the state under section (b)(1)(B).

The continuing duty to disclose set out in section (c), and the flexibility of the court's regulation of discovery as set out in section (d), are deemed to be very important.

Rules 12.1 and 12.2, although not technically discovery rules, are closely related.

While we have heretofore had a substantial body of statutory and case law providing for discovery by the defendant, this rule for the first time provides the state with reciprocal discovery.

This rule is not the exclusive procedure for obtaining discovery, since discovery required by due process is not expressly structured into the rule. For example, for the rule as to the state's duty to disclose exculpatory evidence, see *Brady v. Maryland*, 373 U.S. 83 (1963). The voluntary disclosure of evidence not within the ambit of this rule is encouraged by the commission. Under section (a)(1)(A), the commission originally provided that the defendant might obtain all of his or her statements, whether made to a law-enforcement official or to a lay witness. However, this was amended to conform to the federal rule, being limited by the language, "in response to interrogation by any person then known to the defendant to be a law-enforcement officer."

The statements of a codefendant discoverable by the codefendant are likewise made discoverable by the defendant, if the codefendant and the defendant are scheduled to be tried jointly. Such statements of a codefendant may be reviewed to determine whether or not a severance under Rule 14(c) need be sought.

The procedure provided in 16(a)(1)(E) conforms to T.C.A. § 40-17-120. It is similar to the federal Jencks Act (18 U.S.C. § 3500), but broader. This rule allows the defendant and the state to request a witness's statement from the presenting adverse party after the witness has testified on direct examination. Although it is technically a discovery device, its most important function is to promote the integrity of the fact-finding process, and is related to the due process requirements of *Brady* and its progeny. The commission deliberately did not incorporate that provision of subdivision (e)(3) of the federal Jencks Act, which applies to statements of witnesses before a grand jury, and such statements are not meant to be obtainable hereunder simply because a grand jury witness testifies for the state. Such statements may only be obtained under the limited provisions of existing law now embodied in Rule 6(k)(2).

Advisory Commission Comments [2018]. Title 39, chapter 17, part 10 of the Tennessee Code Annotated prohibits conduct that involves child pornography. See Sentencing Commission Comment to Tenn. Code Ann. §39-17-1001. Consequently, evidence in those cases often will be material that constitutes child pornography. The amendment conforms Tennessee discovery practice to federal law concerning the reproduction of material constituting child pornography under 18 U.S.C. §3509(m). Tennessee courts face this situation on a routine basis, and the absence of a clear procedural rule can lead to delay in a defendant's defense, time-consuming proceedings, and the expenditure of judicial resources. *See, e.g., State v. Re'Licka Dajuan Allen*, No. E2007-01018-CCA-R3-CD (Tenn. Crim. App., Feb. 12, 2009). The amendment provides the procedural means for trial courts to control the reproduction and dissemination of material constituting child pornography, while protecting a defendant's right to access the information for the purpose of a defense. A form for a protective order under section (d)(3)(C) is provided below as part of this comment.

TENN. R. CRIM. P. 16 - PROTECTIVE ORDER

State of Tennessee Circuit / Criminal Court County	PROTECTIVE ORDER PURSUANT TO TENN. R. CRIM. P. 16(d)(3)	Case Number
STATE OF TENNESSEE vs. _____ [Defendant's Name]		

This matter is before the Court upon the motion of the State of Tennessee pursuant to Tenn. R. Crim. P. 16(d)(3) for a protective order governing the production in discovery of documents and objects relating to the sexual exploitation of minors under title 39, chapter 17, part 10. It is, therefore, ORDERED, that the following provisions of this Order shall control the disclosure, dissemination, and use of information in this action:

1. The state of Tennessee has failed to demonstrate that the documents or objects subject to discovery pursuant to Tenn. R. Crim. P. 16(a)(F) will be made reasonably available to the defendant throughout the proceeding or has failed to make the property or material reasonably available to the defendant at any time during the proceeding. Therefore, the trial court orders the state to permit the defendant to copy or photograph any documents or objects that constitute "material" (hereinafter "Prima Facie Contraband") as defined in Tenn. Code Ann. § 39-17-1002 and prohibited by Tenn. Code Ann. §§ 39-17-1003, -1004, and -1005, subject to the following conditions.

2. Defendant and Defendant's counsel acknowledged that the material that is subject to this order is prima facie contraband the possession of which is otherwise prohibited. Defendant and Defendant's counsel shall be authorized to possess the Prima Facie Contraband during the pendency of this proceeding as long as Defendant and Defendant's counsel comply with the terms of this order.

3. Defendant and Defendant's counsel may possess and use the Prima Facie Contraband only for purposes of this litigation and not for any personal, business, commercial, scientific, competitive, or any other purpose whatsoever.

4. Except as permitted by Paragraph 5, Defendant and Defendant's counsel shall not disclose the Prima Facie Contraband to any person. Any unauthorized disclosure shall be treated as contempt of this order and may result in criminal prosecution.

5. Defendant and Defendant's counsel may disclose the Prima Facie Contraband to the following Authorized Persons: (a) counsel of record for the parties; (b) the permanent or temporary attorneys, paralegals, clerical, and secretarial staff employed by or in practice with Defendants' counsel; (c) non-party experts or consultants (together with their associates, consultants and clerical and secretarial staff) retained to assist in the defense, settlement, or other disposition of this action; (d) court reporter(s) employed in this action; (e) court personnel; (f) a witness at any deposition or other proceeding in this action and counsel for that witness; and (g) third-party contractors engaged in one or more aspects of organizing, copying, imaging, filing, coding, converting, storing or retrieving data, documents, or other information, or designing programs for handling data connected with this litigation, including the performance of such duties in relation to a computerized litigation support system.

6. Before making any disclosure authorized by Paragraph 5, Defendant and Defendant's counsel shall deliver a copy of this Order to the Authorized Persons, shall explain its terms to the Authorized Persons, shall instruct the Authorized Persons to comply with this Order, and shall require the Authorized Persons to acknowledge receipt of a copy of this Order in writing.

7. Within 30 days of the final disposition of this action in the highest court to which an appeal is taken, or if no appeal is taken within 30 of entry of the judgment, Defendant, Defendant's counsel, and each Authorized Person shall return the Prima Facie Contraband to the state or certify under oath that the Prima Facie Contraband has been destroyed.

8. Defendant, Defendant's counsel, and each Authorized Person who receives Prima Facie Contraband shall maintain the Prima Facie Contraband in a safe and secure area consistent with the provisions of this Order to prevent unauthorized disclosure or dissemination.

9. This Order shall remain in effect after the final determination of this action, unless otherwise ordered by the Court.

10. Each person to whom any Prima Facie Contraband is disclosed agrees to be subject to the jurisdiction of this Court for the purpose of proceedings relating to compliance with or violation of this Order.

IT IS SO ORDERED.

_____

JUDGE

Compiler's Notes. In its order filed January 8, 2018, the Supreme Court adopted amendments to this rule, effective July 1, 2018, subject to approval by resolution of the General Assembly.

The amendment of Rule 16, which added subdivision (d)(3) and added the [2018] Advisory Comments, as promulgated and adopted by the Supreme Court in its order dated January 8, 2018, was ratified and approved by 2018 House Resolution 207 and Senate Resolution 166. The order promulgating the amendment of subdivision (d)(3) and the addition of the [2018] Advisory Comments, provided that it take effect July 1, 2018.

Cross-References. Confidentiality of records, T.C.A. § 10-7-504.

Dismissal under civil rules, Tenn. R. Civ. P. 41.02.

District attorney general, endorsement of names of witnesses, T.C.A. § 40-17-106.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 3-12-13, 3-16-1 — 3-16-6.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, § 117; 8 Tenn. Juris., Criminal Procedure, §§ 26, 35; 9 Tenn. Juris., Discovery, § 2; 10 Tenn. Juris., Drugs and Druggists, § 5; 11 Tenn. Juris., Evidence, § 177; 17 Tenn. Juris., Larceny, § 8; 25 Tenn. Juris., Witnesses, §§ 3, 27.

Law Reviews. Cheating the Constitution (Pamela R. Metzger), 59 Vand. L. Rev. 475 (2006).

Closing the Crime Victims Coverage Gap: Protecting Victims' Private Records from Public Disclosure Following Tennessean v. Metro, 11 Tenn. J. L. & Pol'y 129 (2016).

Guidelines for Juvenile Court Practice (Andrew J. Shookhoff), 19 Tenn. B.J. 5 (1983).

The Habitual Offender Laws of Tennessee (Steven W. Feldman), 14 Mem. St. U.L. Rev. 293 (1984).

Updating Tennessee's Public Records Law (Douglas Pierce), 24 No. 5 Tenn. B.J. 24 (1988).

Closing the Crime Victims Coverage Gap: Protecting Victims' Private Records from Public Disclosure Following Tennessean v. Metro, 11 Tenn. J. L. & Pol'y 129 (2016).

Attorney General Opinions. Confidentiality of 911 tapes used in pending criminal investigation, OAG 99-022 (2/9/99).

Confidential communications between an employee of a sheriff's department and a clergy member are not subject to discovery, OAG 01-009 (1/25/01).

Upon order of the court, documents sealed from the public are available to the parties in the clerk's office and are generally discoverable, OAG 02-075 (6/12/02).

Inspection of investigative reports and other evidence sent to the district attorney general in anticipation of potential criminal litigation, OAG 07-039, 2007 Tenn. AG LEXIS 39 (4/2/07).

Whether a particular citizen review board has subpoena power depends on the provisions of the local government charter under which the citizen review board was created. If subpoena power is authorized, such power must be exercised in accordance with the provisions of the charter. Further, a citizen review board's ability to access records, training sessions, recordings, and other information will depend on the scope of the subpoena and the person on whom the subpoena is served because the reach of a subpoena can be circumscribed by constitutional guarantees, statutory provisions, privilege, and other like constraints. As for information related to pending criminal cases, Rule 16 of the Tennessee Rules of Criminal Procedure would most likely prevent a citizen review board from obtaining this information through a subpoena. OAG 18-07, 2018 Tenn. AG LEXIS 6 (3/8/2018).

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1. Application.

Tenn. R. Crim. P. 16 does not apply in general sessions court. State v. Willoughby, 594 S.W.2d 388, 1980 Tenn. LEXIS 405 (Tenn. 1980).

A waiver of the attorney-client privilege document executed by defendant met none of the criteria of the rule regarding information subject to disclosure. It was not intended for introduction at trial and was not material to the preparation of the defense. State v. Arnold, 719 S.W.2d 543, 1986 Tenn. Crim. App. LEXIS 2683 (Tenn. Crim. App. 1986).

The prosecution is not required to reveal its entire file on a particular case, but is required to disclose evidence favorable to the defendant that, if suppressed, would deprive the accused of a fair trial. Impeachment evidence, as well as exculpatory evidence, falls within this requirement. State v. Davis, 823 S.W.2d 217, 1991 Tenn. Crim. App. LEXIS 533 (Tenn. Crim. App. 1991).

Trial courts cannot order reluctant police witnesses to speak to defense counsel. State v.

Singleton, 853 S.W.2d 490, 1993 Tenn. LEXIS 161 (Tenn. 1993).

Cover sheets that merely reflect the totals paid to court appointed attorneys and experts in the defense of an indigent criminal defendant do not reveal any defense confidences and are not exempt from disclosure under Tenn. R. Crim. P. 16(b)(2). Knoxville News-Sentinel v. Huskey, 982 S.W.2d 359, 1998 Tenn. Crim. App. LEXIS 237 (Tenn. Crim. App. 1998).

Deliberate process privilege did not apply to an assistant district attorney general preparing for a hearing in state court involving a writ of error coram nobis proceeding under T.C.A. § 40-26-105; Tenn. R. Crim. P. 16 adequately protected his or her work product. Swift v. Campbell, 159 S.W.3d 565, 2004 Tenn. App. LEXIS 561 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2005 Tenn. LEXIS 93 (Tenn. Jan. 31, 2005).

Documents described in Tenn. R. Crim. P. 16(a)(2) are not discoverable in either proceedings to which the Tennessee Rules of Criminal Procedure applied or separate proceedings under T.C.A. § 10-7-505, as long as the criminal conviction associated with the records being sought are being collaterally attacked; there was no logical reason to differentiate between pending state post-conviction proceedings and federal habeas corpus proceedings, such that discovery in defendant's pending federal habeas corpus proceeding should be governed by the federal rules applicable to that proceeding, and Tennessee's public records statutes should not be used to circumvent those rules. Swift v. Campbell, 159 S.W.3d 565, 2004 Tenn. App. LEXIS 561 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2005 Tenn. LEXIS 93 (Tenn. Jan. 31, 2005).

Under the state law exception in T.C.A. § 10-7-503(a)(2) that shields some records from disclosure, during the pendency of the criminal case and any collateral challenges to any conviction, Tenn. R. Crim. P. 16 governs the disclosure of information and only the defendant has the right to receive certain information. Tennessean v. Metro. Gov't of Nashville & Davidson Cnty., 485 S.W.3d 857, 2016 Tenn. LEXIS 180 (Tenn. Mar. 17, 2016).

2. Duty to Disclose.

Trial courts have the discretion to enter orders necessary to insure compliance with Tenn. R. Crim. P. 16; however, to do so, reciprocal discovery must have already been triggered. State v. Brown, 836 S.W.2d 530, 1992 Tenn. LEXIS 401 (Tenn. 1992), rehearing denied, — S.W.2d —, 1992 Tenn. LEXIS 509 (Tenn. Aug. 3, 1992), superseded by statute as stated in, Hensley v. Cerza, — S.W.3d —, 2010 Tenn. App. LEXIS 544 (Tenn. Ct. App. Aug. 25, 2010).

The state is not obligated to furnish information, evidence, or material which is available or accessible to the defendant or which could be obtained by exercising reasonable diligence. State v. Dickerson, 885 S.W.2d 90, 1993 Tenn. Crim. App. LEXIS 643 (Tenn. Crim. App. 1993), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 421 (Tenn. Nov. 29, 1993).

Although Tenn. R. Crim. P. 12.2 and Tenn. R. Crim. P. 16 do not address the various interests implicated regarding whether a defendant must give pretrial notice of his intent to introduce expert testimony as to his mental condition at the sentencing phase of a capital trial and whether such defendant must undergo an examination by the state's mental health expert, the inapplicability of these rules does not mandate the conclusion that the trial courts have no legal authority to impose notice, evaluation, and discovery requirements. State v. Reid, 981 S.W.2d 166, 1998 Tenn. LEXIS 695 (Tenn. 1998).

Documents in an active criminal case, which would not be subject to discovery and inspection under Tenn. R. Crim. P. 16, are not subject to inspection under the Public Records Act, T.C.A. §§ 10-7-503 and 10-7-504. Knoxville News-Sentinel v. Huskey, 982 S.W.2d 359, 1998 Tenn. Crim. App. LEXIS 237 (Tenn. Crim. App. 1998).

Regarding failure to comply with discovery, a trial court has great discretion in fashioning a remedy for noncompliance. Sanctions for failure to comply with discovery must fit the circumstances of the individual case. Although Tenn. R. Crim. P. 16 does not specifically provide that a trial court may dismiss an indictment when a party fails to comply with a discovery order, it is implied authority pursuant to Tenn. R. Crim. P. 16(d)(2). State v. Collins, 35 S.W.3d 582, 2000 Tenn. Crim. App. LEXIS 247 (Tenn. Crim. App. 2000).

State was subject to the trial court's order to produce payroll documents during discovery, and therefore it violated this rule by failing to do so, because the state did not object to the order and never asserted that it should not be required to produce the documents because they were beyond the state's control until after the failure to produce them was discovered by the parties during defendants' trial for theft in connection with one defendant's employment. State v. Partin, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 337 (Tenn. Crim. App. June 5, 2019).

Defendant showed no discovery violation when the state's expert witnesses testified beyond the exact scope of the witnesses' expert reports because (1) defendant was notified of the substance of the witnesses' testimony, and (2) the witnesses were allowed to base opinions on information introduced at trial. State v. Lane, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 600 (Tenn. Crim. App. Sept. 20, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 111 (Tenn. Feb. 19, 2020).

Postconviction relief was erroneously denied because had if counsel adequately preserved a challenge to the admission of text messages between the victim and the inmate on direct appeal by including in the record the motion for discovery and the notebook compilation of the text messages, the inmate would have successfully established that the State substantially prejudiced the inmate's case by failing to disclose the contents of the full extraction report and the notebook compilation containing over 6000 text messages and the post-conviction court erred in denying the inmate's petition. Jernigan v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 557 (Tenn. Crim. App. Aug. 14, 2020).

3. Harmless Error.

Although discovery restrictions adopted by the trial court were contrary to the requirements of Tenn. R. Crim. P. 16(a)(1)(F), defendant failed to demonstrate per se reversible error; no evidence in the trial record showed that defendant attempted to mitigate the harmful effect of the restrictions, as required by T.R.A.P. 36(a), by seeking a continuance to afford additional time to complete his review of videotapes seized from his apartment by police, and he did not show prejudice ensuing from the alleged "waste" of his attorney's time. State v. Schiefelbein, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 138 (Tenn. Crim. App. Feb. 8, 2007), modified, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 213 (Tenn. Crim. App. Mar. 7, 2007).

Defendant was not entitled to the raw data upon which the state's expert under Tenn. R. Crim. P. 16 and Tenn. R. Crim. P. 26.2 nor Tenn. R. Evid. 705 because the expert was not a person defendant knew to be a law enforcement officer, and the statement was not a statement of the expert, but defendant's own statement; moreover, any error in not disclosing the raw data was harmless pursuant to Tenn. R. Crim. P. 52(a) and T.R.A.P. 36(b). State v. Schiefelbein, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 138 (Tenn. Crim. App. Feb. 8, 2007), modified, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 213 (Tenn. Crim. App. Mar. 7, 2007).

There was no error by overruling defendant's motion to dismiss the indictment when the state violated rules of discovery because trial court's decision to suppress the videotape was sufficient penalty for the state's discovery violation; trial court was able to give curative instruction to the jury regarding the portion of the video that had been played, which contained the discussion of possible sentence ranges, thus negating any prejudice that may have occurred. State v. Downey, 259 S.W.3d 723, 2008 Tenn. LEXIS 536 (Tenn. Aug. 15, 2008).

4. —Failure to Provide Statement.

Prosecutor's failure to provide defendant with a copy of defendant's statement, pursuant to a discovery motion under Tenn. R. Crim. P. 16, was harmless error in the absence of surprise to defendant and when no objection was offered at the time the statement was introduced at trial. State v. Denami, 594 S.W.2d 747, 1979 Tenn. Crim. App. LEXIS 308 (Tenn. Crim. App. 1979).

Where defendant's statement was made in response to an improper interrogation by a police officer, and the defense was prejudiced in its preparation for trial by the failure of the state to reveal the oral statement in response to the defendant's discovery motion and the order of the court, it was reversible error to allow the use of such statement to rebut defendant's testimony, and, upon reversal on such ground, the state was barred from using defendant's testimony in the former trial as part of its case-in-chief at the retrial. State v. Jenkins, 859 S.W.2d 364, 1993 Tenn. Crim. App. LEXIS 291 (Tenn. Crim. App. 1993).

Where defendant's girlfriend's testimony would have corroborated much of that given by codefendant and her statements were not favorable, it could not be plausibly argued that had the statements been received prior to trial, results of the proceeding would have been different in a manner favorable to the defendant. State v. Parker, 932 S.W.2d 945, 1996 Tenn. Crim. App. LEXIS 167 (Tenn. Crim. App. 1996), overruled in part, State v. King, — S.W.3d —, 2013 Tenn. Crim. App. LEXIS 192 (Tenn. Crim. App. Mar. 4, 2013), overruled in part, State v. King, 432 S.W.3d 316, 2014 Tenn. LEXIS 351 (Tenn. Apr. 23, 2014).

5. Statements.

Summaries of pretrial statements contained in an investigative report compiled by police detective clearly were not "statements" as defined by Tenn. R. Crim. P. 16 because none of them had been "signed or otherwise adopted or approved" by the witnesses involved, nor were they "stenographic, mechanical, electrical, or other recording of a statement, or a transcription or summary thereof, which is an essentially verbatim recital of an oral statement" made by those witnesses, and hence the investigative report was not discoverable under Tenn. R. Crim. P. 16. State v. Venable, 606 S.W.2d 298, 1980 Tenn. Crim. App. LEXIS 299 (Tenn. Crim. App. 1980).

Computer print-out did not constitute a "statement" by police officer and was not subject to inspection under Tenn. R. Crim. P. 16. State v. Robinson, 618 S.W.2d 754, 1981 Tenn. Crim. App. LEXIS 353 (Tenn. Crim. App. 1981), superseded by statute as stated in, State v. Finney, — S.W.2d —, 1987 Tenn. Crim. App. LEXIS 2739 (Tenn. Crim. App. Nov. 6, 1987).

An arrest ticket is not a "statement" under Tenn. R. Crim. P. 16. State v. Williams, 623 S.W.2d 118, 1981 Tenn. Crim. App. LEXIS 375 (Tenn. Crim. App. 1981).

The content of an audio tape recording transactions between the defendant and confidential informants used to establish probable cause to support the issuance of a search warrant was not relevant and thus not discoverable where the defendant was not prosecuted for the sales made to the confidential informants, the informants did not testify at trial or at the suppression hearing, the tape was not played at trial or at the suppression hearing and the prosecution was limited to the quantity of narcotics seized under the search warrant. State v. Vanderford, 980 S.W.2d 390, 1997 Tenn. Crim. App. LEXIS 1249 (Tenn. Crim. App. 1997).

6. Defendant's Prior Statements.

Tenn. R. Crim. P. 16 permits discovery of a defendant's written statement regardless of whether it is offered in evidence. State v. Hicks, 618 S.W.2d 510, 1981 Tenn. Crim. App. LEXIS 350 (Tenn. Crim. App. 1981).

State may withhold disclosure of a statement it does not intend to offer in evidence only if that statement is oral. State v. Hicks, 618 S.W.2d 510, 1981 Tenn. Crim. App. LEXIS 350 (Tenn. Crim. App. 1981).

Once the Tenn. R. Crim. P. 16(a)(1)(A) (now Tenn. R. Crim. P. 16(a)(1)) request was made, the burden was on the prosecution to use reasonable diligence prior to and during the trial to discover the existence of a statement and to provide the defendant with an opportunity to inspect and copy it. State v. Hicks, 618 S.W.2d 510, 1981 Tenn. Crim. App. LEXIS 350 (Tenn. Crim. App. 1981).

The prosecutor's duty to disclose extends not only to material in his or her immediate custody, but also to statements in the possession of the police which are normally obtainable by "exercise of due diligence," that is, a request to all officers participating in the investigation or preparation of the case. State v. Hicks, 618 S.W.2d 510, 1981 Tenn. Crim. App. LEXIS 350 (Tenn. Crim. App. 1981).

Even if it had been established that the prosecution had made a good faith attempt to discover the existence of statements made by the defendant and that it was the fault of the police that the statement had failed to come to light, this would be no defense. State v. Hicks, 618 S.W.2d 510, 1981 Tenn. Crim. App. LEXIS 350 (Tenn. Crim. App. 1981).

Oral statements by the defendant to which the officers testified during the course of a demonstration of the defendant's reenactment of the crime were admissible even though they had not been summarized or provided to defense counsel upon his demand for discovery; the defendant had an opportunity to know of these statements because of the preliminary hearing and the statements placed no undue burden upon the defendant. State v. Underwood, 669 S.W.2d 700, 1984 Tenn. Crim. App. LEXIS 2709 (Tenn. Crim. App. 1984).

Tenn. R. Crim. P. 16 was not violated where defendant's oral statements were not introduced by the state and did not prejudice defendant. State v. Black, 745 S.W.2d 302, 1987 Tenn. Crim. App. LEXIS 2717 (Tenn. Crim. App. 1987), dismissed, Thompson v. Morrow, — F. Supp. 2d —, 2010 U.S. Dist. LEXIS 118470 (M.D. Tenn. Nov. 3, 2010).

Where remarks made by the defendant are not the result of interrogation by the officer, they are not excludable because the state does not reveal them. State v. Balthrop, 752 S.W.2d 104, 1988 Tenn. Crim. App. LEXIS 221 (Tenn. Crim. App. 1988).

Tenn. R. Crim. P. 16(a)(1)(A) (now Tenn. R. Crim. P. 16(a)(1)), requiring the state to reveal the substance of any oral statement made by an accused in response to an officer's interrogation if it is intended to be used in evidence, makes no exception for statements to be used in rebuttal. State v. Balthrop, 752 S.W.2d 104, 1988 Tenn. Crim. App. LEXIS 221 (Tenn. Crim. App. 1988).

In a murder case, the state did not violate discovery rules because, although defendant contended that the state provided defense counsel with an inaudible tape of defendant's interview with an investigator, the prosecutor stated and defense counsel agreed that the state had not been made aware of any problem with the tape prior to trial; there was no proof that the state had intentionally provided a faulty tape and the trial court provided defense counsel with an opportunity to listen to the tape. State v. Gann, 251 S.W.3d 446, 2007 Tenn. Crim. App. LEXIS 813 (Tenn. Crim. App. Oct. 16, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 243 (Tenn. Apr. 7, 2008), dismissed, Gann v. Lester, — F. Supp. 2d —, 2016 U.S. Dist. LEXIS 120372 (E.D. Tenn. Sept. 7, 2016).

7. Witness' Prior Statements.

Although defense counsel used a portion of victim's prior statement to police during cross-examination of victim to show a prior inconsistent statement, it was error to permit the assistant district attorney general to place the entire typewritten statement in evidence during redirect examination. State v. Braggs, 604 S.W.2d 883, 1980 Tenn. Crim. App. LEXIS 293 (Tenn. Crim. App. 1980).

A request made pursuant to Tenn. R. Crim. P. 16 is properly denied if made after the completion of the witness' testimony. State v. Wright, 618 S.W.2d 310, 1981 Tenn. Crim. App. LEXIS 346 (Tenn. Crim. App. 1981).

Tenn. R. Crim. P. 16 involves the right of defense counsel during trial to inspect prior statements of prosecution witnesses following their testimony on direct examination, for purposes of impeachment. State v. Robinson, 618 S.W.2d 754, 1981 Tenn. Crim. App. LEXIS 353 (Tenn. Crim. App. 1981), superseded by statute

as stated in, State v. Finney, — S.W.2d —, 1987 Tenn. Crim. App. LEXIS 2739 (Tenn. Crim. App. Nov. 6, 1987).

Tenn. R. Crim. P. 16 does not establish a right to pretrial discovery; it only allows counsel to examine any prior statements made by a witness after the witness has testified. State v. Williams, 645 S.W.2d 258, 1982 Tenn. Crim. App. LEXIS 480 (Tenn. Crim. App. 1982).

8. Grand Jury Testimony.

Since Tenn. R. Crim. P. 16 permits the discovery of the testimony of a defendant before the grand jury, it is proper for the grand jury, but not the district attorney general, to record or have recorded the testimony of witnesses appearing before that body, provided that the injunction of secrecy contained in Tenn. R. Crim. P. 6(k) is strictly adhered to. Tiller v. State, 600 S.W.2d 709, 1980 Tenn. LEXIS 464 (Tenn. 1980), superseded by statute as stated in, State v. Gonzales, 638 S.W.2d 841, 1982 Tenn. Crim. App. LEXIS 452 (Tenn. Crim. App. 1982).

9. Police Reports and Records.

Although police reports are not subject to disclosure under Tenn. R. Crim. P. 16, it does not abrogate case law to the effect that where a witness uses a police report as a memorandum to refresh his memory, such memoranda must be produced for inspection by opposing counsel and for his use in cross-examination unless the witness' use of such memoranda takes place prior to his testimony and not while on the witness stand. Jones v. State, 601 S.W.2d 323, 1980 Tenn. Crim. App. LEXIS 280 (Tenn. Crim. App. 1980).

To the extent that a police report contains the defendant's pretrial statement, his prior criminal record, or the results of tests related to the investigation in question, that police report is discoverable prior to trial by the defendant for purposes of preparing his defense. State v. Robinson, 618 S.W.2d 754, 1981 Tenn. Crim. App. LEXIS 353 (Tenn. Crim. App. 1981), superseded by statute as stated in, State v. Finney, — S.W.2d —, 1987 Tenn. Crim. App. LEXIS 2739 (Tenn. Crim. App. Nov. 6, 1987).

Police reports do not fall within the definition of a "statement" as stated in Tenn. R. Crim. P. 16. State v. Rice, 638 S.W.2d 424, 1982 Tenn. Crim. App. LEXIS 381 (Tenn. Crim. App. 1982).

Criminal defendants may not routinely have access to police personnel records, but upon a strong showing that the personnel records might contain information material to a defendant's case, the trial court should conduct an in camera inspection of the records and release to defendant those items the court deems material to the defense. State v. Butts, 640 S.W.2d 37, 1982 Tenn. Crim. App. LEXIS 390 (Tenn. Crim. App. 1982); State v. Kelly, 697 S.W.2d 355, 1985 Tenn. Crim. App. LEXIS 2687 (Tenn. Crim. App. 1985).

A report that appeared to be a summary of the reports of several different officers, made by an unknown compiler, and bore no one's signature was not a "statement" as defined by Tenn. R. Crim. P. 16. State v. Cannon, 661 S.W.2d 893, 1983 Tenn. Crim. App. LEXIS 366 (Tenn. Ct. App. 1983).

Where a report which the officer telephoned into the police department was taped, this tape or a transcript thereof should have been furnished to defense counsel pursuant to Tenn. R. Crim. P. 16. State v. Cannon, 661 S.W.2d 893, 1983 Tenn. Crim. App. LEXIS 366 (Tenn. Ct. App. 1983).

Complete report of an investigation from its initiation through its completion, containing 60 or 70 pages, various standardized police forms for internal departmental use, summary reports by various police officers, crime reports, laboratory reports, statements of various witnesses, warrants, history sheets and all of the miscellaneous items of information essential to or resulting from the ongoing investigation did not meet the definition of the term "statement" as applied in Tenn. R. Crim. P. 16. State v. Daniel, 663 S.W.2d 809, 1983 Tenn. Crim. App. LEXIS 425 (Tenn. Crim. App. 1983).

Closed investigative files of a municipal law enforcement department are not given a limitation on public access by Tenn. R. Crim. P. 16. Memphis Pub. Co. v. Holt, 710 S.W.2d 513, 1986 Tenn. LEXIS 689 (Tenn. 1986).

The exception in Tenn. R. Crim. P. 16(a)(2) to disclosure and inspection does not apply to investigative files in possession of state agents or law enforcement officers, where the files have been closed and are not relevant to any pending or contemplated criminal action, but does apply where the files are open and are relevant to pending or contemplated criminal action. Appman v. Worthington, 746 S.W.2d 165, 1987 Tenn. LEXIS 1017 (Tenn. 1987).

Material in the possession of the police and not in the possession of the district attorney's office is discoverable because the discovery request is to the state, and not limited to the files of the prosecuting attorney. State v. Davis, 823 S.W.2d 217, 1991 Tenn. Crim. App. LEXIS 533 (Tenn. Crim. App. 1991).

The state may shield the identity of a material confidential informant seeking a protective order pursuant to Tenn. R. Crim. P. 16(d)(1), and where appropriate, the state can seek a protective order State v. Vanderford, 980 S.W.2d 390, 1997 Tenn. Crim. App. LEXIS 1249 (Tenn. Crim. App. 1997).

10. Internal State Documents.

Tenn. R. Crim. P. 16 excludes the discovery or inspection of reports, memoranda or other internal state documents made by the district attorney general or state agents or law enforcement officers in connection with the investigation or prosecution of the case. State v. Irick,

762 S.W.2d 121, 1988 Tenn. LEXIS 200 (Tenn. 1988), cert. denied, Irick v. Tennessee, 489 U.S. 1072, 109 S. Ct. 1357, 103 L. Ed. 2d 825, 1989 U.S. LEXIS 1298 (1989).

11. Scientific Tests.

When the state uses the facilities of the FBI laboratory for various scientific tests, the FBI is an agent for the state of Tennessee, and reports in its possession are in the state's possession for the purposes of Tenn. R. Crim. P. 16(a)(1)(D) (now Tenn. R. Crim. P. 16(a)(1)(G)). State v. Goodman, 643 S.W.2d 375, 1982 Tenn. Crim. App. LEXIS 469 (Tenn. Crim. App. 1982).

When an accused is charged with the offense of driving while under the influence, and blood is drawn from the accused for the purpose of a blood alcohol test, the accused has a right to demand and receive a sample or specimen of his blood in order to have an independent analysis made by an expert of his own selection. State v. Gilbert, 751 S.W.2d 454, 1988 Tenn. Crim. App. LEXIS 220 (Tenn. Crim. App. 1988).

Giving defendant an expert's full report of scientific testing mid-trial did not entitle defendant to exclude the expert's testimony because (1) defendant properly received the expert's official report before trial, and (2) defendant did not show the remainder of the report was material to defendant's defense. State v. Toles, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 315 (Tenn. Crim. App. May 17, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 462 (Tenn. Sept. 20, 2019).

12. Handwriting Analysis.

Court did not err in admitting handwriting evidence which was not given to defense counsel until the day of the trial, where counsel had been aware of and granted discovery of preliminary reports, one of which had suggested a strong possibility of defendant's guilt, and where counsel failed to move for a continuance upon learning of the more conclusive test on the day of the trial. State v. Smith, 926 S.W.2d 267, 1995 Tenn. Crim. App. LEXIS 993 (Tenn. Crim. App. 1995).

13. Psychiatric or Mental Examinations.

Tenn. R. Crim. P. 16 is applicable only to reports in possession, custody or control of state, and it was not error to allow psychiatric examiner to testify who had refused a Tenn. R. Crim. P. 16(a)(1)(D) (now Tenn. R. Crim. P. 16(a)(1)(G)) of this rule discovery request where the examiner, who had performed a mental examination on minor victim upon request of mother, had not participated in investigation or preparation of case and had refused to provide defense counsel with results when mother refused to give consent. State v. Fears, 659 S.W.2d 370, 1983 Tenn. Crim. App. LEXIS 413 (Tenn. Crim. App. 1983).

The trial judge did not err in ordering the defendant to deliver a report of the findings of the psychiatrist, either by way of memorandum or otherwise; however, the ordering of a deposition of a psychiatrist for discovery purposes, although not authorized, was harmless error at most. State v. Bell, 690 S.W.2d 879, 1985 Tenn. Crim. App. LEXIS 2516 (Tenn. Crim. App. 1985).

Defendant is not entitled to discovery of psychologist's records on rape victim from private nonprofit corporation which are not in the possession of the state and not within the jurisdiction of the court. State v. Fox, 733 S.W.2d 116, 1987 Tenn. Crim. App. LEXIS 2473 (Tenn. Crim. App. 1987).

Defendant was not entitled to witness' confidential psychiatric records possessed by the hospital, because there was no evidence that the hospital was connected in any way with the state so that the records could be considered "within the possession, custody or control of the state" for discovery purposes, or that the information contained in the records was "material to the preparation of the defense." State v. Middlebrooks, 840 S.W.2d 317, 1992 Tenn. LEXIS 563 (Tenn. 1992), cert. dismissed, Tennessee v. Middlebrooks, 510 U.S. 124, 114 S. Ct. 651, 126 L. Ed. 2d 555, 1993 U.S. LEXIS 7942 (1993), cert. denied, Tennessee v. Middlebrooks, 510 U.S. 1064, 114 S. Ct. 740, 126 L. Ed. 2d 702, 1994 U.S. LEXIS 402 (1994), superseded by statute as stated in, State v. Banks, 271 S.W.3d 90, 2008 Tenn. LEXIS 963 (Tenn. 2008).

When a psychologist or psychiatrist does not prepare a summary report, but instead relies on extensive memoranda to record not only observations and hypotheses but also evaluations, such records are discoverable. State v. Nichols, 877 S.W.2d 722, 1994 Tenn. LEXIS 135 (Tenn. 1994), rehearing denied, — S.W.2d —, 1994 Tenn. LEXIS 202 (1994), cert. denied, Nichols v. Tennessee, 513 U.S. 1114, 115 S. Ct. 909, 130 L. Ed. 2d 791, 1995 U.S. LEXIS 589 (1995).

The provisions requiring the disclosure of the results of mental examinations and tests by a defendant only if the defendant intends to introduce evidence or call a particular witness at trial, do not apply to the disclosure of the results of a mental examination ordered under Tenn. R. Crim. P. 12.2. State v. Huskey, 964 S.W.2d 892, 1998 Tenn. LEXIS 119 (Tenn. 1998), rehearing denied, — S.W.2d —, 1998 Tenn. LEXIS 287 (Tenn. May 18, 1998), rehearing denied, 969 S.W.2d 917, 1998 Tenn. LEXIS 358 (Tenn. 1998), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 127 (Tenn. Feb. 18, 2003).

Petitioner failed to show that counsel was ineffective for failing to argue that the trial court's order requiring the defense to disclose a psychologist's notes violated petitioner's right against self-incrimination because petitioner did not show that there was a reasonable probability of a different outcome in petitioner's

case but for counsel's failure to argue that the disclosure of the psychologist's notes violated petitioner's right against self-incrimination. Nichols v. State, 90 S.W.3d 576, 2002 Tenn. LEXIS 419 (Tenn. 2002).

When a psychologist did not prepare a summary report but instead relied on extensive memoranda to record not only observations and hypotheses but also evaluations, such records were discoverable under Tenn. R. Crim. P. 16(b)(1)(B) because to allow defendant to evade a reciprocal discovery rule by making no formal report and then claiming that mere "notes" were undiscoverable would have effectively nullified the meaning of Rule 16(b)(1)(B). Nichols v. Bell, 440 F. Supp. 2d 730, 2006 U.S. Dist. LEXIS 50972 (E.D. Tenn. 2006).

14. Attorney's Work Product.

The transcript of a public trial or other hearing in open court prepared by a court reporter cannot be considered the attorney's "work product." State v. Hunter, 764 S.W.2d 769, 1988 Tenn. Crim. App. LEXIS 644 (Tenn. Crim. App. 1988).

Court of criminal appeals erred in reversing the trial court's order dismissing petitioner's application for a writ of error coram nobis because the assistant district attorney's handwritten note petitioner discovered was not newly discovered evidence on which a petition for writ of error coram nobis could be based; the handwritten note recording the assistant prosecutor's impressions as to the credibility of witnesses qualified as a memorandum prepared in anticipation of trial and constituted work product under Tenn. R. Crim. P. 16(a)(2), and thus, the note was neither discoverable nor admissible. Wilson v. State, 367 S.W.3d 229, 2012 Tenn. LEXIS 288 (Tenn. Apr. 20, 2012), writ denied, — S.W.3d —, 2014 Tenn. Crim. App. LEXIS 754 (Tenn. Crim. App. July 30, 2014), overruled in part, Nunley v. State, 552 S.W.3d 800, 2018 Tenn. LEXIS 382 (Tenn. July 19, 2018).

15. Remedies for Noncompliance.

Evidence should not be excluded except when it is shown that a party is actually prejudiced by the failure to comply with the discovery order and that the prejudice cannot be otherwise eradicated. State v. Garland, 617 S.W.2d 176, 1981 Tenn. Crim. App. LEXIS 340 (Tenn. Crim. App. 1981), superseded by statute as stated in, State v. Kennedy, 7 S.W.3d 58, 1999 Tenn. Crim. App. LEXIS 136 (Tenn. Crim. App. 1999); State v. Briley, 619 S.W.2d 149, 1981 Tenn. Crim. App. LEXIS 356 (Tenn. Crim. App. 1981); State v. James, 688 S.W.2d 463, 1984 Tenn. Crim. App. LEXIS 2703 (Tenn. Crim. App. 1984).

The sanction to be applied for noncompliance must fit the circumstances of the individual case. State v. Cadle, 634 S.W.2d 623, 1982 Tenn. Crim. App. LEXIS 428 (Tenn. Crim. App. 1982).

Where the trustworthiness of the previously undisclosed evidence is questioned, the trial court should either grant a continuance or suppress the evidence altogether. State v. Cadle, 634 S.W.2d 623, 1982 Tenn. Crim. App. LEXIS 428 (Tenn. Crim. App. 1982).

There is no express provision in the Rules of Criminal Procedure for involuntary dismissal as a sanction against the state for its failure to comply with discovery rules or orders of the court and no express provision for such a dismissal to be either on the merits or otherwise a bar to reindictment. If such provisions exist at all they exist only by implication in that part of Tenn. R. Crim. P. 16(d)(2) for the court to "enter such order as it deems just under the circumstances." State v. Freseman, 684 S.W.2d 106, 1984 Tenn. Crim. App. LEXIS 2556 (Tenn. Crim. App. 1984).

Where a death row inmate, during the sentencing phase of his criminal proceedings, failed to provide reciprocal discovery to the state as ordered pursuant to Tenn. R. Crim. P. 16(b)(1)(B), the trial court did not err in imposing a sanction under Rule 16(d)(2) permitting the state access to an expert witness's memoranda. Nichols v. Bell, 440 F. Supp. 2d 730, 2006 U.S. Dist. LEXIS 50972 (E.D. Tenn. 2006).

When the prosecution failed to disclose discoverable evidence until mid-trial, the trial court did not abuse its discretion in fashioning a remedy by permitting defendant to recall witnesses to cross-examine them in light of the new evidence and to present the testimony of a detective. State v. Ward, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 516 (Tenn. Crim. App. July 28, 2020).

16. Defendant's Prior Record.

Where at a sentencing hearing, the defendant asserted that he had not seen either the certified copy of a conviction in North Carolina nor his juvenile record from Maryland which the prosecution sought to introduce into evidence, but it was then brought out that the defendant had been given a copy of his FBI sheet which showed the North Carolina convictions and that the charging documents from Maryland had just been received by the district attorney general and that they were then made available to the defendant prior to the continuation of the sentencing hearing, these circumstances demonstrated a substantial compliance with the discovery required by Tenn. R. Crim. P. 16(a)(1)(B). State v. Strouth, 620 S.W.2d 467, 1981 Tenn. LEXIS 473 (Tenn. 1981), cert. denied, Strouth v. Tennessee, 455 U.S. 983, 102 S. Ct. 1491, 71 L. Ed. 2d 692, 1982 U.S. LEXIS 1099 (1982).

Where defendant knew that state alleged prior DUI conviction in indictment, he was not prejudiced by state's failure to produce judgment document related to prior conviction until date of sentencing and, thus, suppression of

prior judgment was not required. State v. Cottrell, 868 S.W.2d 673, 1992 Tenn. Crim. App. LEXIS 940 (Tenn. Crim. App. 1992).

Even though the state should have provided certified copies of prior convictions to defendant before trial, it was not an abuse of discretion for the trial court to allow the copies into evidence, given the extent of defendant's admitted knowledge of the convictions and the state's intent to prove them, and the fact that defendant failed to seek enforcement as provided by the court's discovery order. State v. Anderson, 894 S.W.2d 320, 1994 Tenn. Crim. App. LEXIS 823 (Tenn. Crim. App. 1994).

Where state complied with Tenn. R. Crim. P. 16(a)(1)(B) (now Tenn. R. Crim. P. 16(a)(1)(E)) in responding to defendant's pretrial discovery request and the response generally indicated its intent to seek enhanced sentencing and included an attached copy of defendant's criminal record, compliance with Tenn. R. Crim. P. 16(a)(1)(B) (now Tenn. R. Crim. P. 16(a)(1)(E)) did not affect whether the state met the statutory requirements for giving notice of the intent to seek enhanced sentencing, because Tenn. R. Crim. P.16(a)(1)(B) (now Tenn. R. Crim. P. 16(a)(1)(E)) has nothing to do with sentencing. State v. Benham, 113 S.W.3d 702, 2003 Tenn. LEXIS 824 (Tenn. 2003).

17. Victim's Prior Record.

The criminal history of a victim is not the kind of information the state has a duty to produce pursuant to Tenn. R. Crim. P. 16. State v. King, 905 S.W.2d 207, 1995 Tenn. Crim. App. LEXIS 77 (Tenn. Crim. App. 1995), overruled, State v. Williams, 977 S.W.2d 101, 1998 Tenn. LEXIS 512 (Tenn. 1998).

18. Child and Family Services' Records.

In a prosecution for aggravated sexual battery and aggravated rape, the trial court did not err in denying defendant's request to review records from child and family services since the records were not material to the preparation of the defense, and the intended use by the defense to establish inconsistencies in the victims' statements did not constitute a material use. State v. Clabo, 905 S.W.2d 197, 1995 Tenn. Crim. App. LEXIS 37 (Tenn. Crim. App. 1995), appeal denied, — S.W.2d —, 1995 Tenn. LEXIS 312 (Tenn. June 5, 1995).

19. Witness Names and Addresses.

Tenn. R. Crim. P. 16 does not authorize pretrial discovery of the names and addresses of state's witnesses. State v. Martin, 634 S.W.2d 639, 1982 Tenn. Crim. App. LEXIS 431 (Tenn. Crim. App. 1982); State v. Craft, 743 S.W.2d 203, 1987 Tenn. Crim. App. LEXIS 2314 (Tenn. Crim. App. 1987); State v. Harris, 839 S.W.2d 54, 1992 Tenn. LEXIS 348 (Tenn. 1992), rehearing denied, — S.W.2d —, 1992 Tenn. LEXIS 557 (Tenn. Sept. 8, 1992), cert. denied, Harris v. Tennessee, 507 U.S. 954, 113 S. Ct. 1368, 122 L. Ed. 2d 746, 1993 U.S. LEXIS 1703 (1993).

20. Evidence Not in State's Possession.

There is no violation of Tenn. R. Crim. P. 16 in the introduction of tapes where the state did not know of the existence of the tapes, which were in the custody of federal agents, until Thursday prior to the trial which began on Monday, and did not have an opportunity to hear the tapes until Friday, and defendant's counsel was also allowed to hear the tapes on that day. State v. Crabtree, 655 S.W.2d 173, 1983 Tenn. Crim. App. LEXIS 396 (Tenn. Crim. App. 1983), superseded by statute as stated in, State v. Walker, 910 S.W.2d 381, 1995 Tenn. LEXIS 547 (Tenn. 1995), superseded by statute as stated in, State v. Henry, 33 S.W.3d 797, 2000 Tenn. LEXIS 715 (Tenn. 2000).

Where the state did not have certain documents in its control, actually or constructively, until the middle of the trial, introduction of the documents did not violate Tenn. R. Crim. P. 16. State v. Hutchison, 898 S.W.2d 161, 1994 Tenn. LEXIS 157 (Tenn. 1994), rehearing denied, 898 S.W.2d 161, 1995 Tenn. LEXIS 198 (1995), cert. denied, Hutchinson v. Tennessee, 516 U.S. 846, 116 S. Ct. 137, 133 L. Ed. 2d 84, 1995 U.S. LEXIS 5846 (1995), dismissed, Hutchison v. Bell, — F. Supp. 2d —, 2010 U.S. Dist. LEXIS 31736 (E.D. Tenn. Mar. 30, 2010).

Tenn. R. Crim. P. 16(a)(1)(C) (now Tenn. R. Crim. P. 16(a)(1)(F)) was not violated where photographic evidence was taken on the morning of the trial by police officer; therefore, the state could not have shown the photograph to defendant before the day of trial because the photograph did not exist. State v. Harris, 30 S.W.3d 345, 1999 Tenn. Crim. App. LEXIS 1072 (Tenn. Crim. App. 1999).

21. Reversible Error.

Failure of prosecution to comply with defendant's motion for discovery was reversible error. State v. Benson, 645 S.W.2d 423, 1983 Tenn. Crim. App. LEXIS 379 (Tenn. Crim. App. 1983).

Where the record was devoid of any reason why the state did not reveal the name of the witness to the defendant, the action of the state was prejudicial error, which entitled the defendant to a new trial. State v. West, 825 S.W.2d 695, 1992 Tenn. Crim. App. LEXIS 62 (Tenn. Crim. App. 1992).

Defendants convicted of burglary of an automobile and felonious assault were entitled to post-conviction relief due to Brady violations. The state failed to disclose an exculpatory witness statement and FBI laboratory reports showing the tools used in the burglary did not belong to the petitioners. Hutchison v. State, 118 S.W.3d 720, 2003 Tenn. Crim. App. LEXIS 253 (Tenn. Crim. App. 2003).

22. Evidence Unknown Until Trial.

Where state responded to discovery motion that it had no knowledge of any eyewitnesses to

the murder, testimony of witness was allowed where state for first time at trial found out witness could identify defendant as person he saw in vicinity immediately after crime, where state had previously notified defendant of existence of witness and all information it had at the time and the witness was not an eyewitness to the crime itself. State v. Williams, 657 S.W.2d 405, 1983 Tenn. LEXIS 789 (Tenn. 1983), cert. denied, Williams v. Tennessee, 465 U.S. 1073, 104 S. Ct. 1429, 79 L. Ed. 2d 753 (1984).

23. Involuntary Dismissal.

Nothing in Tenn. R. Crim. P. 16 specifically provides for an involuntary dismissal as a sanction for noncompliance with discovery orders or for failure to respond promptly to discovery motions. State v. Street, 768 S.W.2d 703, 1988 Tenn. Crim. App. LEXIS 615 (Tenn. Crim. App. 1988).

24. Dismissal Improper.

Trial court abused its discretion in dismissing the theft charges against defendants as a sanction for the state's failure to produce payroll documents during discovery under Tenn. R. Crim. P. 16(d)(2) because the prejudice stemming from a loss of the element of surprise on cross-examination during a retrial was insufficient to warrant dismissal. The trial court's conclusion that it had no effective sanction other than dismissal was contrary to reason because the discovery of the documents occurred during a bench trial which had already been continued over a period of months and in which witnesses could have been recalled, the credibility of the state's witnesses was a matter for the trial court's sole determination, and the trial court granted a mistrial to allow the defense to use the new discovery on cross-examination. State v. Partin, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 337 (Tenn. Crim. App. June 5, 2019).

25. Informant's Identity.

The identity of an informant is not deemed discoverable under Tenn. R. Crim. P. 16. House v. State, 44 S.W.3d 508, 2001 Tenn. LEXIS 419 (Tenn. 2001).

26. State's Duty to Preserve Evidence.

Trial court did not abuse its discretion in dismissing the charges of driving under the influence, reckless endangerment, and reckless driving on the basis that the state's loss of the video recording of the police officer's stop of defendant deprived defendant of a fair trial. The video recording became more significant in light of the relative strength of the state's case. State v. Merriman, 410 S.W.3d 779, 2013 Tenn. LEXIS 641 (Tenn. Aug. 16, 2013).

Trial court's determination of the appropriate remedy for the state's failure to preserve evidence is reviewed under an abuse of discretion standard. State v. Merriman, 410 S.W.3d 779, 2013 Tenn. LEXIS 641 (Tenn. Aug. 16, 2013).

Loss of the video recording of a police officer's stop of defendant deprived defendant of her right to a fair trial given that the lost evidence recorded defendant's conduct, which provided the factual basis for her charges. State v. Merriman, 410 S.W.3d 779, 2013 Tenn. LEXIS 641 (Tenn. Aug. 16, 2013).

27. No Prejudice to Defendant.

As a remedy for the state's discovery violation, where there was no prejudice to defendant, the trial court did not err in stopping a trial for a day, to be resumed the next morning, and having an inadvertently undisclosed witness remain in the courtroom to be available to be interviewed by defense counsel. State v. Martinez, 372 S.W.3d 598, 2011 Tenn. Crim. App. LEXIS 809 (Tenn. Crim. App. Oct. 27, 2011), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 188 (Tenn. Mar. 9, 2012).

Failure to provide defendant with a copy of the video recording did not more probably than not affect the outcome of the trial; although the state refused to provide defendant with a copy of the recording, it did permit defense counsel and the doctor to view the recording at any time at the district attorney's office. State v. Ackerman, 397 S.W.3d 617, 2012 Tenn. Crim. App. LEXIS 510 (Tenn. Crim. App. July 13, 2012), overruled, State v. Sanders, 452 S.W.3d 300, 2014 Tenn. LEXIS 912 (Tenn. Nov. 10, 2014).

Although notice that an agent would testify as an expert was not reported in a timely manner, the trial court did not abuse its discretion in admitting the agent's testimony because the delayed disclosure did not prejudice defendant, who was on notice regarding the substance of the expert's testimony the State would offer at trial. State v. Polk, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 677 (Tenn. Crim. App. Oct. 23, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 252 (Tenn. Mar. 26, 2020).

Regardless of whether the material was subject to disclosure pursuant, defendants have failed to establish that the delay in the disclosure prevented them from effectively using the material effectively in preparing and presenting their defense. Accordingly, the trial court did not abuse its discretion in holding the trial as scheduled. State v. Morales, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 619 (Tenn. Crim. App. Sept. 18, 2020).

Although the State required all three attorneys for the defendants to be present in order to view the evidence, which the trial court stated was not the better practice, the conduct did not rise to the level of improper conduct; and the conduct did not affect the verdict to the prejudice of one of the defendants as the defendants' attorneys adequately, thoroughly, and effectively cross-examined the State's witnesses regarding the evidence. State v. Robinson, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 96 (Tenn. Crim. App. Mar. 17, 2021).

28. No Violation Shown.

Trial court did not err in refusing to fashion a remedy for alleged discovery violations made by the state because the state provided defendant with the evidence at issue in his motion to compel and other discovery motions; there was nothing in the record to suggest that defendant requested a continuance due to the lateness of the state's discovery responses; and there was no evidence in the record that defendant was prejudiced by the slowness of the state's discovery responses. State v. Giles, 493 S.W.3d 504, 2016 Tenn. Crim. App. LEXIS 178 (Tenn. Crim. App. Mar. 10, 2016).

29. Tennessee Public Records Act.

Trial court erred in holding that state officials properly denied access to non-investigative public records on the ground that such records subsequently became relevant to a criminal investigation because a reporter sought non-investigative public records created in the ordinary course of business and kept by their respective agencies, and under the Tennessee Public Records Act, he was entitled to inspect them; the records were accessible from their inception. Scripps Media., Inc. v. Tenn. Dep't of Mental Health & Substance Abuse Servs., — S.W.3d —, 2019 Tenn. App. LEXIS 398 (Tenn. Ct. App. Aug. 16, 2019).

Rule 17. Subpoena. —

(a) Issuance. — A subpoena shall be issued by a clerk or other authorized court officer, who shall sign it but otherwise leave it blank. The party requesting the subpoena shall fill in the blanks before the subpoena is served.

(b) Defendants Unable to Pay. — On a defendant's ex parte application, the court shall order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness fees and that the presence of the witness is necessary for an adequate defense. If the court orders the subpoena to be issued, the process costs and witness fees shall be paid in the same manner as those paid for state witnesses.

(c) Witnesses. — A subpoena shall state the court's name and the title of the proceeding and command each person to whom it is directed to attend and give testimony at the time and place and for the party the subpoena specifies.

(d) Documents and Objects. — A subpoena may order a person to produce the books, papers, documents, or other objects the subpoena designates.

(1) Production to Permit Inspection. — The court may direct that the designated items be produced in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.

(2) Compliance Unreasonable. — On motion made promptly and in any event by the time specified in the subpoena for compliance therewith, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may condition denial of the motion on the advancement by the party in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, or other objects.

(e) Depositions; Place of Examination. —

(1) Issuance. — A court order to take a deposition authorizes the clerk of the court in which the proceeding is pending to issue subpoenas for the persons named or described in the deposition order.

(2) Place of Deposition. — A Tennessee resident may be required to give a deposition only in the Tennessee county in which the person resides, is employed, transacts the person's business in person, or at such other convenient place the court orders. A nonresident of Tennessee may be required to attend only in the Tennessee county where the nonresident is served with subpoena or at such other place the court orders.

(f) SERVICE. —

(1) METHOD OF SERVICE. — A subpoena may be served by any person authorized to serve process, or the witness may acknowledge service in writing on the subpoena. The server shall deliver or offer to deliver a copy of the subpoena to the person to whom it is directed or leave a copy with an adult occupant of the person's usual residence.

(2) SERVICE WITHIN STATE. — A subpoena requiring the attendance of a witness at a hearing or trial may be served any place within Tennessee.

(g) CONTEMPT. — When a subpoena is served on a person, the court issuing the subpoena may deem the person's refusal to obey the subpoena to be contempt of court unless the person has an adequate excuse.

(h) INFORMATION NOT SUBJECT TO SUBPOENA. — Statements by witnesses or prospective witnesses may not be subpoenaed from the state or the defendant under this rule, but are subject to production only in accordance with the provisions of Rule 26.2.

Advisory Commission Comments. This rule is an adaptation of the federal rule. The first provision of section (e)(2) is taken from the Tennessee Rules of Civil Procedure, Rule 45.04(2). Rule 17(h) is similar to its federal counterpart. This provision only makes it clear that the proper method to secure witness statements from the opposing side–either at trial or at a pretrial hearing under Rule 12(b)–is as set forth in Rule 26.2.

Compiler's Notes. This rule may affect Tenn. Code Ann. § 40-28-106.

The amendment the Advisory Commission Comments, which deleted the former third sentence of the Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated January 8, 2009, was ratified and approved by 2009 House Resolution 14 and Senate Resolution 17. The order promulgating the amendment of this rule provided that it take effect July 1, 2009.

Law Reviews. Better, Happier Juries (Neil P. Cohen), 39 Tenn. B.J. 16 (2003).

Obtaining medical records for mental health evaluations (David L. Raybin), 37 Tenn. B.J. 27 (2001).

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), No. 3-17-3.

Tennessee Jurisprudence. 25 Tenn. Juris., Witnesses, §§ 3, 5.

Tennessee Law of Evidence (Paine, Schaffner, and Ulin), § 52.

Rule 17.1. Pretrial Conference. —

(a) TIMING; PURPOSES. — At any time after the filing of the indictment, presentment, or information, the court–on a party's motion or on its own initiative–may order one or more pretrial conferences to consider matters that will:

(1) promote a fair and expeditious trial; and

(2) to the extent feasible, minimize the time that jurors are not directly involved in the trial or deliberations.

(b) MEMORANDUM OF RESULT. — At the conclusion of the conference, the court shall file a memorandum of the matters resolved.

(c) ADMISSIBILITY OF DEFENDANT'S ADMISSIONS. — No admissions made by the defendant or the defendant's attorney at the conference may be used against the defendant unless the admissions are in writing and signed by the defendant and the defendant's attorney.

(d) EXCEPTION FOR UNREPRESENTED DEFENDANT. — This rule shall not be invoked in the case of a defendant who is not represented by counsel.

Advisory Commission Comments. This rule, taken from the federal rules, provides the courts with an excellent tool for expediting trials.

Rule 17.1(a)(2) is designed to encourage judges to make serious efforts to reduce the time that jurors are required to be at the courthouse when not directly involved in the case. Pretrial conferences may greatly facilitate the efficient use of juror time by encouraging the pretrial resolution of evidentiary and other issues and the early preparation of jury instructions and juror notebooks.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), No. 3-17.1-1.

V. VENUE.

Rule 18. Venue. —

(a) County of Offense. — Except as otherwise provided by statute or by these rules, offenses shall be prosecuted in the county where the offense was committed.

(b) Multiple Counties. — If one or more elements of an offense are committed in one county and one or more elements in another, the offense may be prosecuted in either county.

(c) Boundary. — Offenses committed on the boundary of two (2) or more counties may be prosecuted in either county.

(d) All or Partly Outside State. — In circumstances that give Tennessee jurisdiction to prosecute the offender, the following rules apply:

(1) An offense committed in part outside Tennessee may be prosecuted in any county in which an element of the offense occurs.

(2) An offense committed wholly outside Tennessee may be prosecuted in any Tennessee county in which the offender is found.

Advisory Commission Comments. Subdivision (a) is derived from Art. 1, § 9, Constitution of Tennessee; T.C.A. § 40-104 [now repealed]; and § 40-3-101 of the Law Revision Commission's proposed code.

Cross-References. Venue for trial, Tenn. Const., art. I, § 9.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), No. 3-18-1.

Tennessee Jurisprudence. 1 Tenn. Juris., Abduction and Kidnapping, § 1; 24 Tenn. Juris., Venue, § 5.

NOTES TO DECISIONS

Analysis

1. Venue Jurisdictional.
2. Proof of Venue.
3. Burden of Proof.
4. Venue Change over Objection.
5. Accomplices.
6. Venue Proper.
7. Venue Improper.

1. Venue Jurisdictional.

Venue must be proven to establish the jurisdiction of the court to adjudicate the proceeding on its merits. Smith v. State, 607 S.W.2d 906, 1980 Tenn. Crim. App. LEXIS 325 (Tenn. Crim. App. 1980).

Venue is a jurisdictional matter and not an element of the crime charged. State v. Bloodsaw, 746 S.W.2d 722, 1987 Tenn. Crim. App. LEXIS 2376 (Tenn. Crim. App. 1987).

Defendant did not raise the issue of venue in his motion for a new trial, nor did he object to the issue of venue at trial, but his claim was not waived; a motion for a new trial was not required given that he elected to proceed with a bench trial, and in case law that the court could not distinguish, a defendant's failure to object to venue at trial did not amount to waiver of venue. State v. Haven, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 431 (Tenn. Crim. App. June 19, 2020).

2. Proof of Venue.

Venue may be shown by a preponderance of the evidence which may be either direct or circumstantial evidence or both. Smith v. State, 607 S.W.2d 906, 1980 Tenn. Crim. App. LEXIS 325 (Tenn. Crim. App. 1980); State v. Bloodsaw, 746 S.W.2d 722, 1987 Tenn. Crim. App. LEXIS 2376 (Tenn. Crim. App. 1987); State v. Chadwick, 750 S.W.2d 161, 1987 Tenn. Crim. App. LEXIS 2773 (Tenn. Crim. App. 1987); State v. Reed, 845 S.W.2d 234, 1992 Tenn. Crim. App. LEXIS 645 (Tenn. Crim. App. 1992).

A jury is entitled to draw reasonable inferences from proven facts and this includes the

issue of venue. Smith v. State, 607 S.W.2d 906, 1980 Tenn. Crim. App. LEXIS 325 (Tenn. Crim. App. 1980).

Courts may take judicial notice of the location of public institutions, such as state prisons or penitentiaries, for the purpose of holding venue established. Smith v. State, 607 S.W.2d 906, 1980 Tenn. Crim. App. LEXIS 325 (Tenn. Crim. App. 1980).

With reference to venue, slight evidence will be enough to carry the prosecution's burden of preponderance if it is uncontradicted. State v. Bloodsaw, 746 S.W.2d 722, 1987 Tenn. Crim. App. LEXIS 2376 (Tenn. Crim. App. 1987).

In a prosecution for forgery, circumstantial evidence was sufficient to establish that the allegedly forged instrument was executed in Morristown, Tennessee, and that, therefore, venue was proper in Hamblen County. State v. Smith, 926 S.W.2d 267, 1995 Tenn. Crim. App. LEXIS 993 (Tenn. Crim. App. 1995).

Venue may be established upon the uncorroborated testimony of an accomplice. State v. Anderson, 985 S.W.2d 9, 1997 Tenn. Crim. App. LEXIS 1296 (Tenn. Crim. App. 1997).

3. Burden of Proof.

The burden is on the prosecution to prove that the offense was committed in the county laid in the indictment. State v. Bloodsaw, 746 S.W.2d 722, 1987 Tenn. Crim. App. LEXIS 2376 (Tenn. Crim. App. 1987); State v. Chadwick, 750 S.W.2d 161, 1987 Tenn. Crim. App. LEXIS 2773 (Tenn. Crim. App. 1987); State v. Reed, 845 S.W.2d 234, 1992 Tenn. Crim. App. LEXIS 645 (Tenn. Crim. App. 1992).

On appeal from his criminal convictions, defendant's argument that the State failed to prove venue in Smith County by a preponderance of the evidence was without merit under Tenn. R. Crim. P. 18(a). The State presented sufficient evidence to support the jury's determination that the victim died in Smith County; moreover, the jury was entitled to disbelieve any implication contained in defendant's testimony that the victim died in another county. State v. Trusty, 326 S.W.3d 582, 2010 Tenn. Crim. App. LEXIS 339 (Tenn. Crim. App. Apr. 23, 2010), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 906 (Tenn. Sept. 27, 2010).

4. Venue Change over Objection.

Since a defendant is entitled to a trial in the county where the crimes were committed, action of trial court in transferring the situs of a trial over defendant's objection to a county other than where the crimes were committed was an error requiring reversal of defendant's conviction, despite the fact that the members of the petit jury were all residents of the county where the crimes were committed. State v. Upchurch, 620 S.W.2d 540, 1981 Tenn. Crim. App. LEXIS 366 (Tenn. Crim. App. 1980).

5. Accomplices.

Where all of the acts of receiving, concealing and transporting through two counties were the result of an agreement between an accomplice and the defendant, this agreement put in force the agency for the commission of the crimes, and in legal contemplation, the defendant was present at all times and at all places of the crimes' commission, and this would be true had the defendant never been present in either county. State v. Hamsley, 672 S.W.2d 437, 1984 Tenn. Crim. App. LEXIS 2341 (Tenn. Crim. App. 1984).

6. Venue Proper.

Venue for conspiracy trial was proper in county where certain acts in furtherance of the criminal conspiracy took place. State v. Reed, 845 S.W.2d 234, 1992 Tenn. Crim. App. LEXIS 645 (Tenn. Crim. App. 1992).

In a capital murder case, change of venue was improper, where a meticulous and detailed jury selection process was conducted, the nature and conduct of the pre-trial publicity was informative but not sensational or unfairly prejudicial, and although the news accounts affected the area in which the venire was later selected, the court found that most of the pretrial publicity occurred several months before the trial and was not prejudicial or pervasive either shortly before or during the trial. State v. Davidson, 121 S.W.3d 600, 2003 Tenn. LEXIS 1007 (Tenn. 2003), cert. denied, Davidson v. Tennessee, 541 U.S. 1049, 158 L. Ed. 2d 743, 124 S. Ct. 2174, 2004 U.S. LEXIS 3512, 72 U.S.L.W. 3711 (2004).

There was more than enough evidence to establish venue in Shelby County because the victim testified as to the location of the movie rental machine where defendant first approached her and stole her car; the video of the encounter was played for the jury; all of the responding officers were employed by the Memphis Police Department or Memphis Housing Authority at the time of trial; and the officers each gave testimony including street names as to the location of the police chase, the crash, and the foot chase that gave rise to defendant's arrest. State v. Derring, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 32 (Tenn. Crim. App. Jan. 16, 2019).

Traffic stop occurred in Memphis where the marijuana was discovered inside the truck, and witnesses testified that defendant was driving the truck, which was stopped in Shelby County; therefore, defendant was in possession of the marijuana found inside the truck during the stop, and both venue and jurisdiction were adequately established at trial. State v. Hampton, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 159 (Tenn. Crim. App. Mar. 12, 2019).

Trial court did not abuse its discretion in denying defendant's motion for a change of venue because the trial court carefully and meticulously orchestrated the jury selection process to insure that defendant received a fair trial, the trial court conducted a voir dire of a

juror who knew a witness and confirmed that it would not affect the juror's ability to decide the case, and defendant failed to establish that any members of the jury were biased from exposure to pretrial publicity or any pretrial knowledge of the case or the witnesses. State v. Waggoner, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 595 (Tenn. Crim. App. Sept. 24, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 126 (Tenn. Feb. 19, 2020).

Tennessee had territorial jurisdiction and the county was the proper venue for defendant's trial for conspiracy to sell over 300 grams of methamphetamine because the evidence showed that one of co-conspirator's transported methamphetamine from Atlanta to the county in Tennessee. State v. Castillo, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 472 (Tenn. Crim. App. July 9, 2020).

In a case involving five defendants who were convicted of forgery and fraudulent filing of a lien, the trial court did not abuse its discretion in denying a motion to change venue filed by one of the defendants. The moving defendant failed to show prejudice or bias or point to any actual place in the record where he was referred to as a sovereign citizen. State v. Lyons, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 100 (Tenn. Crim. App. Mar. 22, 2021).

7. Venue Improper.

While the record contained evidence from which it could be inferred that the offenses at the home occurred in Obion County, the record did not support the conclusion that the touching that was the basis of the conviction occurred at the home; defendant's stepdaughter's testimony at trial clarified that the incident she had described, which formed the basis of the charge, occurred elsewhere, and thus venue was not established by a preponderance of the evidence as to this aggravated sexual battery conviction. State v. Haven, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 431 (Tenn. Crim. App. June 19, 2020).

Rules 19, 20. [Reserved.]

Rule 21. Change Of Venue. —

(a) Grounds for Change. — The court may change venue of a criminal case on the defendant's motion or on its own initiative with the defendant's consent. The court should order a venue change when a fair trial is unlikely because of undue excitement against the defendant in the county where the offense was committed or for any other cause.

(b) Motion and Affidavit. — A defendant's motion for change of venue shall be accompanied by affidavit(s) averring facts constituting the alleged undue excitement or other cause on which the motion is based. The state may file counter-affidavits.

(c) Timing of Motion. — A motion for a change of venue shall be made at the earliest date after which the cause for the change of venue is alleged to have arisen.

(d) Location of New Venue. —

(1) Multi-County Circuit. — In a multi-county judicial circuit, the court shall change the venue to the nearest county in the judicial circuit in which the prosecution is pending where the cause for change of venue does not exist. If the same cause for change of venue exists in all other counties in the judicial circuit, the court shall change venue to the nearest county where the same cause for change of venue does not exist.

(2) Single-County Circuit. — In a single-county judicial circuit, the court shall change venue to the nearest county where the same cause for change of venue does not exist.

(3) Two Possible Counties. — If the court finds that there are two (2) or more adjoining or approximately equivalent counties to which the case might be removed under the provisions of this rule, the court shall determine where the case is to be heard.

(d) Procedure After Venue Change Ordered. —

(1) Duties of Clerk in Sending Court. — After the court orders a change of venue, the clerk of that court shall:

(A) make a complete transcript of the record and proceedings in the case; and

(B) transmit the transcript, including the indictment and all other papers on file, to the clerk of the receiving court.

(2) Duties of Clerk in Receiving Court. — The clerk of the receiving court shall enter the transcript from the sending court on the minutes of the receiving court.

(3) Defendant in Custody. — If the defendant is in the custody of the sending county's sheriff, the sheriff shall–on order of the court–transfer and deliver the defendant to the sheriff of the receiving county to which the venue is changed. The sheriff of the receiving county shall receive and detain the defendant in custody until legally discharged.

(4) Receiving Court. — The receiving court:

(A) shall take the case and proceed to trial, judgment, and execution, in all respects as if the indictment or presentment had been returned to that court;

(B) may release the defendant on bail or recognizance; and

(C) may enforce the attendance of the prosecutor and all witnesses by recognizance or bail.

(f) Fines, Forfeitures, and Fees After Venue Change. — When venue is changed, all fines and forfeitures in such cases go to the county in which the indictment was returned, and judgment shall be rendered accordingly. The fees of all jurors and witnesses, on being properly certified by the clerk of the receiving court, are a charge to the county in which the indictment or presentment was returned, in like manner as if the trial had not been removed.

Advisory Commission Comments. This rule was derived from T.C.A. § 40-2201 [now repealed] et seq.; the Law Revision Commission's proposed code, § 40-3-105; and Smith-Hurd Illinois Ann. Stat. Ch. 38, § 114-6(b). This rule does not allow the defendant to choose the county to which the case is removed.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), No. 3-21-1.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, § 238; 24 Tenn. Juris., Venue, §§ 10, 11; 25 Tenn. Juris., Witnesses, § 3.

NOTES TO DECISIONS

Analysis

1. In General.
2. Evidence Insufficient for Change of Venue.
3. Discretion of Trial Judge.
4. Final Jury Panel Unbiased.
5. Relevant Factors.
6. Interpretation by Federal Court.
7. Defendant's Consent to Change.

1. In General.

The appropriate remedy for prejudicial pretrial publicity is a motion for a change of venue pursuant to Tenn. R. Crim. P. 21. State v. Mackey, 638 S.W.2d 830, 1982 Tenn. Crim. App. LEXIS 385 (Tenn. Crim. App. 1982).

Juror exposure to information about the crime and the defendant's prior convictions is not presumably prejudicial. State v. Bates, 804 S.W.2d 868, 1991 Tenn. LEXIS 44 (Tenn. 1991), rehearing denied, — S.W.2d —, 1991 Tenn. LEXIS 82 (Tenn. Feb. 25, 1991), cert. denied, Bates v. Tennessee, 502 U.S. 841, 112 S. Ct. 131, 116 L. Ed. 2d 98, 1991 U.S. LEXIS 4994 (1991).

2. Evidence Insufficient for Change of Venue.

In prosecution for rape and burglary the trial court did not err by failing to grant a motion for a change of venue because of newspaper and radio publicity, where the trial began almost six months after the pretrial publicity complained

of, and the proof did not show extensive publicity or any undue excitement or hostility against the defendants. Seelbach v. State, 572 S.W.2d 267, 1978 Tenn. Crim. App. LEXIS 326 (Tenn. Crim. App. 1978).

The mere fact that there was extensive knowledge in the community of the crimes and the defendants is not sufficient to render the trial constitutionally unfair. State v. Kyger, 787 S.W.2d 13, 1989 Tenn. Crim. App. LEXIS 690 (Tenn. Crim. App. 1989), rehearing denied, — S.W.2d —, 1989 Tenn. Crim. App. LEXIS 757 (Tenn. Crim. App. Oct. 24, 1989).

Where most of pretrial publicity occurred two years before trial, approximately 60 percent of prospective jurors recalled the occurrence of the offense, and none of the jurors could remember any details of news reports, trial court did not err in denying defendant's motion for change of venue. State v. Howell, 868 S.W.2d 238, 1993 Tenn. LEXIS 408 (Tenn. 1993), cert. denied, Howell v. Tennessee, 510 U.S. 1215, 114 S. Ct. 1339, 127 L. Ed. 2d 687, 1994 U.S. LEXIS 2487 (1994).

In a capital murder case, change of venue was improper, where a meticulous and detailed jury selection process was conducted, the nature and conduct of the pre-trial publicity was informative but not sensational or unfairly prejudicial, and although the news accounts affected the area in which the venire was later selected, the court found that most of the pretrial publicity occurred several months before the trial and was not prejudicial or pervasive either shortly before or during the trial. State v. Davidson, 121 S.W.3d 600, 2003 Tenn. LEXIS 1007 (Tenn. 2003), cert. denied, Davidson v. Tennessee, 541 U.S. 1049, 158 L. Ed. 2d 743, 124 S. Ct. 2174, 2004 U.S. LEXIS 3512, 72 U.S.L.W. 3711 (2004).

Trial court did not abuse its discretion in denying defendant's motion for a change of venue because defendant failed to identify which jurors with potential pre-trial exposure to the case were actually selected for the jury and failed to explain how he was prejudiced by the same. State v. Fletcher, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 160 (Tenn. Crim. App. Mar. 2, 2020).

3. Discretion of Trial Judge.

The question of change of venue is largely within the discretion of the trial judge, and the Court of Criminal Appeals may not reverse his action unless there is a clear abuse of discretion. Lackey v. State, 578 S.W.2d 101, 1978 Tenn. Crim. App. LEXIS 284 (Tenn. Crim. App. 1978).

The matter of a change of venue addresses itself to the sound judicial discretion of the trial judge and his decision must be respected absent an affirmative and clear abuse of that discretion. State v. Hoover, 594 S.W.2d 743, 1979 Tenn. Crim. App. LEXIS 307 (Tenn. Crim. App. 1979).

The opinion of the trial judge concerning the legal necessity for a change of venue may be reversed, but a strong case of error must appear in the facts before an appellate court could feel authorized to reverse his judgment and opinion in such a matter, for it is so difficult to present in a bill of exceptions all the facts and circumstances on which the opinion may rest. State v. Hoover, 594 S.W.2d 743, 1979 Tenn. Crim. App. LEXIS 307 (Tenn. Crim. App. 1979).

The judgment of the trial court as to the legal necessity of a change of venue in a criminal prosecution may be reversed. It will only be done in a strong case of error, apparent upon the record. State v. Bates, 804 S.W.2d 868, 1991 Tenn. LEXIS 44 (Tenn. 1991), rehearing denied, — S.W.2d —, 1991 Tenn. LEXIS 82 (Tenn. Feb. 25, 1991), cert. denied, Bates v. Tennessee, 502 U.S. 841, 112 S. Ct. 131, 116 L. Ed. 2d 98, 1991 U.S. LEXIS 4994 (1991).

In determining whether to grant a change of venue due to undue excitement against a defendant in the county where the offense occurred, the question lies in the sound discretion of a trial court, whose decision must be respected absent a clear abuse of discretion. State v. Harris, 839 S.W.2d 54, 1992 Tenn. LEXIS 348 (Tenn. 1992), rehearing denied, — S.W.2d —, 1992 Tenn. LEXIS 557 (Tenn. Sept. 8, 1992), cert. denied, Harris v. Tennessee, 507 U.S. 954, 113 S. Ct. 1368, 122 L. Ed. 2d 746, 1993 U.S. LEXIS 1703 (1993).

Trial court did not abuse its discretion by denying defendant's motion to change venue, as he did not challenge, either peremptorily or for cause, jurors who either had knowledge of pretrial publicity or knew persons involved in the case, and there was no indication that the publicity or the jurors' acquaintance with the sheriff, district attorney general, or members of the victims' family adversely impacted the jury panel. State v. Sexton, 368 S.W.3d 371, 2012 Tenn. LEXIS 377 (Tenn. May 29, 2012).

Trial court did not abuse its discretion in denying defendant's motion for a change of venue because the trial court carefully and meticulously orchestrated the jury selection process to insure that defendant received a fair trial, the trial court conducted a voir dire of a juror who knew a witness and confirmed that it would not affect the juror's ability to decide the case, and defendant failed to establish that any members of the jury were biased from exposure to pretrial publicity or any pretrial knowledge of the case or the witnesses. State v. Waggoner, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 595 (Tenn. Crim. App. Sept. 24, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 126 (Tenn. Feb. 19, 2020).

4. Final Jury Panel Unbiased.

The trial court did not err in failing to grant defendant's motion for change of venue, which was made during the voir dire of the jury, when

it developed that several of the prospective jurors had formed strongly held opinions as to defendant's guilt or innocence, based on what had appeared in local news stories, as well as on general knowledge in the community, wherein prospective jurors who said that they could not lay aside previously formed opinions were excused by the court and those who, after considerable "rehabilitation" by the court, said only that they would "try" to lay aside such opinions but expressed no self-confidence in their ability to do so were excused peremptorily by the defendant, who did not exhaust his peremptory challenges and made no effort to renew his motion before accepting the jury as finally constituted. Mothershed v. State, 578 S.W.2d 96, 1978 Tenn. Crim. App. LEXIS 283 (Tenn. Crim. App. 1978).

The fact that there was extensive media coverage cannot alone create a presumption that the selected jurors were prejudiced against the defendant. Maddux v. Rose, 483 F. Supp. 661, 1980 U.S. Dist. LEXIS 9948 (E.D. Tenn. 1980), aff'd without opinion, 627 F.2d 1091, 1980 U.S. App. LEXIS 15672 (6th Cir. 1980).

5. Relevant Factors.

Relevant factors to be considered in determining whether to grant a change of venue are: (1) Nature, extent, and timing of pretrial publicity; (2) Nature of publicity as fair or inflammatory; (3) The particular content of the publicity; (4) The degree to which the publicity complained of has permeated the area from which the venire is drawn; (5) The degree to which the publicity circulated outside the area from which the venire is drawn; (6) The time elapsed from the release of the publicity until the trial; (7) The degree of care exercised in the selection of the jury; (8) The ease or difficulty in selecting the jury; (9) The veniremen's familiarity with the publicity and its effect, if any, upon them as shown through their answers on voir dire; (10) The defendant's utilization of his peremptory challenges; (11) The defendant's utilization of challenges for cause; (12) The participation by police or by prosecution in the release of publicity; (13) The severity of the offense charged; (14) The absence or presence of threats, demonstrations or other hostility against the defendant; (15) Size of the area from which the venire is drawn; (16) Affidavits, hearsay or opinion testimony of witnesses; and (17) Nature of the verdict returned by the trial jury. State v. Hoover, 594 S.W.2d 743, 1979 Tenn. Crim. App. LEXIS 307 (Tenn. Crim. App. 1979).

Defendant failed to demonstrate that the trial court abused its discretion in refusing to change venue where the defendant claimed that prospective jurors were exposed to extensive publicity, where the court seated only jurors who had no or limited pretrial exposure to the case, or who said they could disregard pretrial information and return a verdict based exclusively upon the evidence. State v. Harris, 839 S.W.2d 54, 1992 Tenn. LEXIS 348 (Tenn. 1992), rehearing denied, — S.W.2d —, 1992 Tenn. LEXIS 557 (Tenn. Sept. 8, 1992), cert. denied, Harris v. Tennessee, 507 U.S. 954, 113 S. Ct. 1368, 122 L. Ed. 2d 746, 1993 U.S. LEXIS 1703 (1993).

6. Interpretation by Federal Court.

As regards the appropriate interpretation of the elective provisions of the Tennessee Change of Venue Statute, interpretation of state statutory law is not a proper function for a federal court under its habeas corpus jurisdiction absent some question of the constitutionality of the statute. Maddux v. Rose, 483 F. Supp. 661, 1980 U.S. Dist. LEXIS 9948 (E.D. Tenn. 1980), aff'd without opinion, 627 F.2d 1091, 1980 U.S. App. LEXIS 15672 (6th Cir. 1980).

7. Defendant's Consent to Change.

Even though defendant had unsuccessfully sought a change of venue from a particular county before a second trial, involving both the guilt and penalty phases, he was not precluded from seeking to have the retrial of the penalty phase occur in that county and the trial court was not justified in changing the venue to another county on its own motion. State v. Smith, 906 S.W.2d 6, 1995 Tenn. Crim. App. LEXIS 269 (Tenn. Crim. App. 1995).

Rule 22. [Reserved.]

VI. TRIAL.

Rule 23. Trial by Jury. —

(a) Right to Jury Trial. — In all criminal prosecutions except for small offenses, the defendant is entitled to a jury trial unless waived.

(b) Waiver. —

(1) Timing. — The defendant may waive a jury trial at any time before the jury is sworn.

(2) Procedures. — A waiver of jury trial must:

(A) be in writing;
(B) have the consent of the district attorney general; and
(C) have the approval of the court.

Advisory Commission Comments. While the state does not have a constitutional right to a trial by jury, this rule requires the consent of the district attorney general to any waiver of the defendant's right. The court must also approve the waiver. This rule is applicable in general sessions court, in the context of a defendant's offer to waive trial by jury.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), No. 3-23-2.

Tennessee Jurisprudence. 8 Tenn. Juris., Criminal Procedure, § 28; 17 Tenn. Juris., Jury, §§ 7, 12.

Law Reviews. Adjudicating Claims of Innocence for the Capitally Condemned in Tennessee: Embracing a Truth Forum (Dwight Aarons), 76 Tenn. L. Rev. 511 (2009).

Criminal Contempt, Jury Trial, Private Prosecutors & Child Support, (Clarke Lee Shaw), 34 Tenn. B.J. 22 (1998).

Attorney General Opinions. State's remedies to prevent general sessions court from improperly reducing a criminal offense, OAG 88-80 (4/7/88).

NOTES TO DECISIONS

Analysis

1. In General.
2. "Small Offense."
3. Relinquishment of Right.

1. In General.

If the defendants could waive the jury entirely, it stands to reason that they could have consented to a trial by the remaining 11 jurors. State v. Bobo, 814 S.W.2d 353, 1991 Tenn. LEXIS 291 (Tenn. 1991).

Without formal compliance with Tenn. R. Crim. P. 23, the record should clearly show a voluntary relinquishment of the rights to be tried by a common law jury. State v. Bobo, 814 S.W.2d 353, 1991 Tenn. LEXIS 291 (Tenn. 1991).

2. "Small Offense."

Prosecutions for contempt for the violation of T.C.A. § 36-5-104, relating to failure to comply with child support orders, where imprisonment may not exceed six months upon conviction, is a "small offense" within the meaning of Tenn. R. Crim. P. 23. Robinson v. Gaines, 725 S.W.2d 692, 1986 Tenn. Crim. App. LEXIS 2865 (Tenn. Crim. App. 1986).

3. Relinquishment of Right.

Where the trial court did not address defendant as to his right to a jury trial, nor did defendant personally forgo this right, defendant did not relinquish his right to a jury trial by the acquiescence of his trial attorney. State v. Ellis, 953 S.W.2d 216, 1997 Tenn. Crim. App. LEXIS 363 (Tenn. Crim. App. 1997).

Where defendant had not waived his right to a trial by jury in writing in the general sessions court, he still did not waive his right to a jury trial by his failure to demand a jury trial at the time of his appeal to the criminal court. State v. Jarnigan, 958 S.W.2d 135, 1997 Tenn. Crim. App. LEXIS 94 (Tenn. Crim. App. 1997).

Rule 24. Trial Jurors. —

(a) Initial Actions in Jury Selection. —

(1) By Court. — The court shall:

(A) cause the prospective jurors to swear or affirm to answer truthfully the questions they will be asked during the selection process;

(B) identify the parties and their counsel; and

(C) briefly outline the nature of the case.

(2) By Counsel. – At or near the beginning of jury selection, the court shall permit counsel to introduce themselves and make brief, non-argumentative remarks that inform the potential jurors of the general nature of the case.

(b) Questioning Potential Jurors. —

(1) Questioning Jurors by Court and Counsel. — The court may ask potential jurors appropriate questions regarding their qualifications to serve as jurors in the case. It shall permit the parties to ask questions for the purpose of

discovering bases for challenge for cause and intelligently exercising peremptory challenges.

(2) Questioning Outside Presence of Other Jurors. — On motion of a party or its own initiative, the court may direct that any portion of the questioning of a prospective juror be conducted out of the presence of the tentatively selected jurors and other prospective jurors.

(c) Challenges for Cause. —

(1) Procedures. — After examination of any juror, the judge shall excuse that juror from the trial of the case if the court is of the opinion that there are grounds for challenge for cause. After the court has tentatively determined that the jury meets the prescribed qualifications, counsel may conduct further examination and, alternately, may exercise challenges for cause.

(2) Grounds. — Any party may challenge a prospective juror for cause if:

(A) Cause Provided by Law. — There exists any ground for challenge for cause provided by law;

(B) Exposure to Information. — The prospective juror's exposure to potentially prejudicial information makes the person unacceptable as a juror. The court shall consider both the degree of exposure and the prospective juror's testimony as to his or her state of mind. A prospective juror who states that he or she will be unable to overcome preconceptions is subject to challenge for cause no matter how slight the exposure. If the prospective juror has seen or heard and remembers information that will be developed in the course of trial, or that may be inadmissible but is not so prejudicial as to create a substantial risk that his or her judgment will be affected, the prospective juror's acceptability depends on whether the court believes the testimony as to impartiality. A prospective juror who admits to having formed an opinion about the case is subject to challenge for cause unless the examination shows unequivocally that the prospective juror can be impartial.

(d) Exercising Peremptory Challenge. — After the court conducts its initial examination and seats a tentative group of jurors not excluded for cause, the following procedure shall be followed until a full jury has been selected from those jurors and accepted by counsel:

(1) At each round of peremptory challenges, counsel shall submit simultaneously to the court either a blank sheet of paper or a sheet of paper challenging one or more jurors in the group of the first twelve (or more if additional jurors are seated under the single entity process of Rule 24(f)(2)(A)) jurors who have been seated. Neither party shall make known the fact that the party has not challenged a juror.

(2) Replacement jurors will be seated in the panel of twelve (or more if additional jurors are seated under the single entity process of Rule 24(f)(2)(A)) in the order of their selection.

(3) If necessary, additional replacement jurors will be examined for cause and, after passed, counsel will again submit simultaneously, and in writing, the name of any juror in the group of twelve (or more if additional jurors are seated under the single entity process of Rule 24(f)(2)(A)) that counsel elects to challenge peremptorily. Peremptory challenges may be directed to any member of the jury; counsel are not limited to using such challenges against replacement jurors.

(4) Alternate jurors are selected in the same manner, unless the single entity process of Rule 24(f)(2)(A) is used.

(5) The trial judge shall keep a list of those challenged. If the same juror is challenged by both parties, each party is charged with the challenge. The trial judge shall not disclose to any juror the identity of the party challenging the juror.

(e) Number of Peremptory Challenges. —

(1) Death Penalty. — If the offense charged is punishable by death, each defendant is entitled to fifteen peremptory challenges and the state is entitled to fifteen peremptory challenges for each defendant.

(2) Imprisonment More Than Year. If the offense charged is punishable by imprisonment for more than one year, each defendant is entitled to eight peremptory challenges and the state is entitled to eight peremptory challenges for each defendant.

(3) Imprisonment Less Than Year or Fine. — If the offense charged is punishable by imprisonment for less than one year or by fine or both, each side is entitled to three peremptory challenges for each defendant.

(4) Additional Jurors. — For each additional juror selected pursuant to Rule 24(f), each side is entitled to one peremptory challenge for each defendant. Such additional peremptory challenges may be used against any regular or additional juror.

(f) Additional Jurors. — Before jury selection begins, the court may call and impanel one or more jurors in addition to the regular jury of twelve persons. The following procedures apply:

(1) Same as Regular Jurors. — The additional jurors shall be drawn in the same manner, have the same qualifications, be subject to the same examination and challenges, take the same oath, and have the same functions, powers, facilities, and privileges as the regular jurors.

(2) Methods of Impaneling Additional Jurors. The trial court may use either of the following methods to select and impanel additional jurors:

(A) Single Entity. — During jury selection and trial of the case, the court shall make no distinction as to which jurors are additional jurors and which jurors are regular jurors. Before the jury retires to consider its verdict, the court shall select by lot the names of the requisite number of jurors to reduce the jury to a body of twelve or such other number as the law provides. A juror who is not selected to be a member of the deliberating jury shall be discharged when that jury retires to consider its verdict.

(B) Separate Entities. — Following the selection of the jury of twelve regular jurors, the additional jurors shall be selected and impaneled as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who become unable or disqualified to perform their duties prior to the time the jury retires to consider its verdict. An alternate juror who does not replace a regular juror shall be discharged when the jury retires to consider its verdict.

(g) Admonitions. — The court shall give the prospective jurors appropriate admonitions regarding their conduct during the selection process. After jurors are sworn, the court shall also give them appropriate admonitions regarding their conduct during the case. In both situations these shall include admonitions:

(1) not to communicate with other jurors or anyone else regarding any subject connected with the trial;

(2) not to form or express any opinion about the case until it is finally submitted to the jury;

(3) to report promptly to the court:

(A) any incident involving an attempt by any person improperly to influence any jury member; or

(B) a juror's violation of any of the court's admonitions;

(4) not to read, hear, or view any news reports concerning the case; and

(5) to decide the case solely on the evidence introduced in the trial.

(h) LIST OF PROSPECTIVE JURORS. — On request, the parties shall be furnished with a list indicating for each member of the jury panel:

(1) the member's name, address, occupation, spouse's name and occupation; and

(2) whether each member has served previously on a criminal court jury. Information about previous jury experience need not be provided prior to the day of trial. [As amended by order filed January 8, 2009, effective July 1, 2009.]

Advisory Commission Comments. This rule assures counsel the right to conduct at least part of the voir dire examination of prospective jurors. It also expressly reflects the trial court's authority to sequester prospective and tentatively selected jurors from a prospective juror being individually questioned.

A prospective juror who has formed or expressed an opinion as to the merits of the case may still be qualified to serve, but only upon an unequivocal showing of impartiality. The commission disapproves of questions tending to lead the prospective juror or suggest partiality in the first instance, and also disapproves of that procedure in "rehabilitating" the prospective juror into vocalizing impartiality. Such a prospective juror shall be held to be qualified only upon a truly unequivocal showing of impartiality.

The procedure for exercising peremptory challenges in writing is designed to insulate parties and counsel from the public exercise of a peremptory challenge. Counsel will be expected to honor the spirit of the rule and to maintain the privacy of their respective peremptory challenges.

The number of peremptory challenges is the same as that provided under present law.

The identity of and minimal information about each member of the jury panel available upon request should save time by shortening the voir dire.

Subdivision (d) permits trial judges to seat more than twelve prospective jurors for purposes of voir dire–possibly but not necessarily a number equal to twelve plus the number of peremptories to each side and the number of alternates available. All of these persons in the jury "universe" could be questioned at once. Note that if the "separate entities" procedure of Rule 24(f)(2)(B) is used, challenges are initially made to only the first twelve seated. Note also that under this procedure "replacement jurors will be seated in the panel of twelve in the order of their selection."

For example, a judge might chose to impanel thirty-two prospects. Each would be assigned a number. If during the initial round of peremptory challenges jurors number 3 and 6 are excused, juror 13 would replace 3 and juror 14 would replace 6. By this method lawyers would know who is coming up next.

Subdivision (e) gives the state the same number of challenges as the accused. For example, in most felony trials each side would have eight strikes. This amendment conforms the rule to T.C.A. § 40-18-118.

Subdivision (f) deletes the earlier limitation on the number of alternate jurors. Now more than four alternates can be selected, which may be necessary for protracted trials.

Rule 24(a)(2) gives counsel the right to make brief, non-argumentative statements near the beginning of the jury selection process. These may be made before selection begins or when counsel is first permitted to ask questions of prospective jurors. During these remarks counsel should introduce themselves and briefly describe the nature of the case. This process should give jurors a better sense of the participants in the trial and the nature of the responsibility the jurors may be chosen to undertake.

Rule 24(f)(2)(A) gives the court the option of using a procedure that eliminates the distinction between regular and alternate jurors. This procedure should facilitate juror attention to the evidence. If the court decides to use extra jurors in case a regular juror becomes unable to

serve, the additional juror is combined with the other jurors for all purposes during the trial. Thus, if a court decides to use twelve jurors plus two additional jurors, all fourteen jurors are considered to be the jurors during the entire trial. Under this new rule, before the jury retires to deliberate the court will randomly deselect the additional jurors, leaving the desired number of jurors, ordinarily twelve. The deselected jurors are then discharged when the remaining jurors retire to deliberate.

Each side is given one peremptory challenge for each additional juror. Since under this model both regular and additional jurors are considered as part of a single jury, peremptory challenges may be used against any such juror, a process commonly known as "backstriking." This procedure provides counsel with considerable flexibility in the exercise of peremptory challenges.

Advisory Commission Comments [2009]. Rule 24(e)(4) is amended to refer to "Rule 24(f)," correcting an erroneous reference to "23(f)."

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 8, 2009, was ratified and approved by 2009 House Resolution 14 and Senate Resolution 17. The order promulgating the amendment of this rule provided that it take effect July 1, 2009.

Cross-References. Civil actions, peremptory challenges, T.C.A. § 22-3-104.

Civil actions, trial by jury, Tenn. R. Civ. P. 38.

Examination and challenge of jurors, T.C.A. title 22, ch. 3.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 3-24-1 — 3-24-4.

Tennessee Jurisprudence. 8 Tenn. Juris., Criminal Procedure, §§ 21, 23; 17 Tenn. Juris., Jury, §§ 34, 38-41.

Law Reviews. Peremptory Challenges: The Reelfoot Lake Night Rider Trial (Donald F. Paine), 39 Tenn. B.J. 17 (2003).

NOTES TO DECISIONS

Analysis

1. Participation of Trial Judge.
2. Procedure for Individual Interview of Jurors.
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1. Participation of Trial Judge.

It is proper for the trial judge to take part in the examination of prospective jurors. Lackey v. State, 578 S.W.2d 101, 1978 Tenn. Crim. App. LEXIS 284 (Tenn. Crim. App. 1978); State v. Doelman, 620 S.W.2d 96, 1981 Tenn. Crim. App. LEXIS 364 (Tenn. Crim. App. 1981).

Trial court's refusal to allow either party to delve into racial aspects was not an abuse of discretion where the trial court in its own examination of the prospective jurors inquired as to any possible bias or prejudice the prospective jurors might have because the victim was white and the appellant was black. State v. Black, 618 S.W.2d 526, 1981 Tenn. Crim. App. LEXIS 352 (Tenn. Crim. App. 1981).

The control of voir dire is within the sound discretion of the trial court, and, absent a showing of prejudice, there is no error in the exercise of this discretion. State v. Plummer, 658 S.W.2d 141, 1983 Tenn. Crim. App. LEXIS 358 (Tenn. Crim. App. 1983).

It is the duty of the trial judge to participate in the examination of prospective jurors. The conduct of voir dire examination in a criminal prosecution is entrusted to his discretion and his actions in the conduct of voir dire examination will not be disturbed unless there is an abuse of that discretion. State v. Irick, 762 S.W.2d 121, 1988 Tenn. LEXIS 200 (Tenn. 1988), cert. denied, Irick v. Tennessee, 489 U.S. 1072, 109 S. Ct. 1357, 103 L. Ed. 2d 825, 1989 U.S. LEXIS 1298 (1989).

2. Procedure for Individual Interview of Jurors.

When the court considers it advisable to examine prospective jurors out of the presence of others, the prospective jurors should be kept from the courtroom and then called individually into the courtroom for their examination in a public trial. Lackey v. State, 578 S.W.2d 101, 1978 Tenn. Crim. App. LEXIS 284 (Tenn. Crim. App. 1978).

Trial court's denial of individual interrogation during the voir dire was not an abuse of discretion. State v. Black, 618 S.W.2d 526, 1981 Tenn. Crim. App. LEXIS 352 (Tenn. Crim. App. 1981); State v. Plummer, 658 S.W.2d 141, 1983 Tenn. Crim. App. LEXIS 358 (Tenn. Crim. App. 1983).

The prevailing practice in this state is to examine the jurors collectively rather than individually, but individual voir dire is mandated when there is a significant possibility that a prospective juror has been exposed to potentially prejudicial material, and the better practice is to permit individual voir dire in a highly publicized case. State v. Oody, 823 S.W.2d 554,

1991 Tenn. Crim. App. LEXIS 405 (Tenn. Crim. App. 1991).

Trial court's refusal to sequester jurors for questions about the death penalty, pretrial publicity, homosexuality, and illegal drug use was not an abuse of discretion where it was not shown that any juror was exposed to potentially prejudicial information. State v. Hutchison, 898 S.W.2d 161, 1994 Tenn. LEXIS 157 (Tenn. 1994), rehearing denied, 898 S.W.2d 161, 1995 Tenn. LEXIS 198 (1995), cert. denied, Hutchinson v. Tennessee, 516 U.S. 846, 116 S. Ct. 137, 133 L. Ed. 2d 84, 1995 U.S. LEXIS 5846 (1995), dismissed, Hutchison v. Bell, — F. Supp. 2d —, 2010 U.S. Dist. LEXIS 31736 (E.D. Tenn. Mar. 30, 2010).

The trial court did not abuse its discretion by denying defendant's request for individual voir dire of prospective jurors where the court considered the potential for contamination of the panel before determining that the risk was minimal; furthermore, although the defendant claimed the ability to select a fair and impartial jury was prejudiced, defendant did not explain how. State v. Price, 46 S.W.3d 785, 2000 Tenn. Crim. App. LEXIS 597 (Tenn. Crim. App. 2000), review or rehearing denied, — S.W.3d —, 2001 Tenn. LEXIS 146 (Tenn. Feb. 26, 2001).

3. Exposure of Jurors to Publicity.

The mere exposure of jurors to newspaper publicity is not constitutional error. Lackey v. State, 578 S.W.2d 101, 1978 Tenn. Crim. App. LEXIS 284 (Tenn. Crim. App. 1978).

In a death penalty case, as defendant individually questioned prospective jurors about their exposure to publicity about the murders, and those who acknowledged such exposure promised to serve in an impartial manner and to heed the court's instructions, the trial court did not abuse its discretion by not further questioning the jurors regarding their exposure to pretrial information. State v. Sexton, 368 S.W.3d 371, 2012 Tenn. LEXIS 377 (Tenn. May 29, 2012).

4. Exposure to Potentially Prejudicial Material.

Whenever there is believed to be a significant possibility that a juror has knowledge to the jury verdict at a prior trial, or has been exposed to other potentially prejudicial material, the examination of each juror, with respect to his exposure, shall take place outside the presence of other chosen and prospective jurors. An accurate record of such examinations shall be kept by the court reporter. State v. Claybrook, 736 S.W.2d 95, 1987 Tenn. LEXIS 972 (Tenn. 1987).

When it is believed there is a significant possibility that prospective jurors have been exposed to potentially prejudicial material, individual voir dire is mandated with respect to each prospective juror's exposure to the prejudicial material. State v. Burton, 751 S.W.2d 440, 1988 Tenn. Crim. App. LEXIS 124 (Tenn. Crim. App. 1988).

Where defendant's alleged crimes had been featured on "Unsolved Mysteries" television program, seen by at least nine of the jurors, and at least 10 of the jurors were aware of other murder and rape charges against him, the amount of inadmissible information possessed by most of the members of the jury was so prejudicial that a substantial risk existed that those jurors' judgments were affected. Accordingly, the trial court should have excused the jurors who possessed such knowledge, and failure to do so constituted reversible error. State v. Shepherd, 862 S.W.2d 557, 1992 Tenn. Crim. App. LEXIS 833 (Tenn. Crim. App. 1992), rehearing denied, 862 S.W.2d 557, 1992 Tenn. Crim. App. LEXIS 894 (Tenn. Crim. App. 1992), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 120 (Tenn. Mar. 22, 1993).

A jury panel member's comment that the jury panel member had previously been on a jury panel in a case involving defendant did not substantially risk affecting the jury's judgment, and the trial court found the jurors' indication they could still be impartial to be credible, so the jury was able to hear the case under Tenn. R. Crim. P. 24(b)(2) (now Tenn. R. Crim. P. 24(c)(2)(B)). State v. Bowers, 77 S.W.3d 776, 2001 Tenn. Crim. App. LEXIS 693 (Tenn. Crim. App. 2001), review or rehearing denied, — S.W.3d —, 2002 Tenn. LEXIS 71, (Tenn. 2002).

5. Prejudicial Questioning in Examination.

Although not all of the information mandated by Tenn. R. Crim. P. 24(g) (now Tenn. R. Crim. P. 24(h)) was turned over to defense counsel until the day of trial, where the court gave the defendant's attorneys adequate time to review the jury list and permitted them to conduct wide-ranging voir dire and where, in addition, the defendant's appellate counsel conceded in his brief that no substantial injury was incurred by his client as a result of the procedure followed by the trial judge, any technical error under Tenn. R. Crim. P. 24(g) (now Tenn. R. Crim. P. 24(h)) was at most harmless. Floyd v. State, 596 S.W.2d 836, 1979 Tenn. Crim. App. LEXIS 315 (Tenn. Crim. App. 1979).

The court in referring to the prosecutrix as the victim in its voir dire did not violate Tenn. Const., Art. VI, § 9. State v. Black, 618 S.W.2d 526, 1981 Tenn. Crim. App. LEXIS 352 (Tenn. Crim. App. 1981).

Although defendant contended that the prosecutor improperly questioned the prospective jurors about their understanding and acceptance of the felony murder rule and made an improper hypothetical question that tended to exact a pledge from the jurors, the appellate court could not conclude that any of the prosecutor's statements, if improper, adversely affected defendant's substantial rights. Accord-

ingly, defendant was not entitled to relief because defendant failed to establish that the prosecutor's statements rose to the level of plain error. State v. Toomes, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 700 (Tenn. Crim. App. Oct. 29, 2020).

6. Impartiality.

Dismissal of regular juror and replacement by alternate juror during course of trial, where regular juror was a friend of the defendant's uncle, was proper under Tenn. R. Crim. P. 24 in view of the juror's inability to unequivocally state that he could be fair and impartial. State v. Livingston, 607 S.W.2d 489, 1980 Tenn. Crim. App. LEXIS 322 (Tenn. Crim. App. 1980).

Qualified jurors need not be totally ignorant of the facts and issues involved. State v. Doelman, 620 S.W.2d 96, 1981 Tenn. Crim. App. LEXIS 364 (Tenn. Crim. App. 1981).

Where juror had gone beyond mere formation of opinion based on exposure to pre-trial information and had formed a conviction about the defendant's innocence, and examination of juror did not show unequivocally that she could be impartial, trial court properly allowed state to challenge the juror. State v. Kilburn, 782 S.W.2d 199, 1989 Tenn. Crim. App. LEXIS 556 (Tenn. Crim. App. 1989).

Where juror was exposed to pretrial information concerning the case and knew of defendant's prior murder conviction, and prosecution attempted a difficult and lengthy rehabilitation of the juror by follow-up examination, juror should have been dismissed for cause as her knowledge of prejudicial information and the aggressive rehabilitation created a substantial risk that her judgment would be affected. State v. Kilburn, 782 S.W.2d 199, 1989 Tenn. Crim. App. LEXIS 556 (Tenn. Crim. App. 1989).

Rehabilitation of a prospective juror who has formed or expressed an opinion which shows a lack of impartiality in the case should only be allowed with great care. Cooper v. State, 847 S.W.2d 521, 1992 Tenn. Crim. App. LEXIS 484 (Tenn. Crim. App. 1992).

Where the juror ultimately stated that he could give the petitioner the benefit of the presumption of innocence, could decide the issues based only on the evidence, and could consider both life and death sentences, no basis existed to excuse such juror for cause. Cooper v. State, 847 S.W.2d 521, 1992 Tenn. Crim. App. LEXIS 484 (Tenn. Crim. App. 1992).

Defendant was not deprived of his right to a fair trial by an impartial jury due to the misconduct of a juror as there was no willful concealment or failure to disclose on the part of the juror because he admitted during voir dire that his brother-in-law was the elected public defender, and that his brother was a criminal defense attorney; and defendant failed to present any evidence that the juror was actually prejudiced against him or was exposed to any extraneous information about the case. State v. Lester, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 889 (Tenn. Crim. App. Dec. 10, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 201 (Tenn. Apr. 11, 2019).

7. Challenges for Cause.

A defendant must not only exhaust his peremptory challenges, but he must also challenge or offer to challenge an additional prospective juror in order to complain on appeal that the trial judge's error in refusing to excuse for cause rendered his jury not impartial. State v. Doelman, 620 S.W.2d 96, 1981 Tenn. Crim. App. LEXIS 364 (Tenn. Crim. App. 1981).

Trial court did not err in overruling defendant's challenge for cause where witness stated that he had opinions but believed he could set aside any preconceived opinion and require state to prove beyond reasonable doubt that defendant was guilty. State v. Howell, 868 S.W.2d 238, 1993 Tenn. LEXIS 408 (Tenn. 1993), cert. denied, Howell v. Tennessee, 510 U.S. 1215, 114 S. Ct. 1339, 127 L. Ed. 2d 687, 1994 U.S. LEXIS 2487 (1994).

In a death penalty case, defendant's right to an impartial jury was not violated by the denial of his challenges for cause where on juror was forthcoming about his relationship with one of the state's witnesses and he convinced the trial court that he could judge the evidence in a non-biased manner and with no preconceived notion of defendant's guilt; in addition, defendant failed to explain how the jurors' mild familiarity with the case prior to trial rendered them incompetent as jurors, and he demonstrated neither partiality on the part of any of the jurors, nor any prejudice that he suffered as a result of any of the three persons sitting on the jury. State v. Hugueley, 185 S.W.3d 356, 2006 Tenn. LEXIS 185 (Tenn. 2006).

In a death penalty case, defendant's appellate challenge to the trial court's failure to sua sponte excuse prospective jurors for cause was rejected, as there was no basis for doing so, and there was no indication that defendant used all of his peremptory challenges. State v. Sexton, 368 S.W.3d 371, 2012 Tenn. LEXIS 377 (Tenn. May 29, 2012).

Although defendant argued that the trial court should have excused a juror for cause on its own initiative, defendant was not entitled to plain error relief because defendant did not make a showing that counsel's failure to challenge the juror was not a tactical decision, especially given that the juror's connections to the defense bar may have made him more favorable to the defense; and defendant failed to establish a breach of a clear and unequivocal rule of law by failing to show that the juror should have been excused for cause due to exposure to potentially prejudicial information or any other ground provided by law. State v. Lester, — S.W.3d —, 2018 Tenn. Crim. App.

LEXIS 889 (Tenn. Crim. App. Dec. 10, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 201 (Tenn. Apr. 11, 2019).

Trial court did not err by failing to discharge a prospective juror for cause because of her expressed difficulties with understanding English because the juror was not propter defectum, as the record showed she spoke English relatively well and unfamiliarity with legal terms was a challenge for many prospective jurors. Because the juror did not serve on the jury and defendant did not show that any of the jurors were incompetent or biased, he was not entitled to relief. State v. Ray, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 320 (Tenn. Crim. App. May 6, 2020).

8. Waiver of Challenge.

Failure to use two available peremptory challenges to remove the objectionable juror precluded reliance by defendant upon the juror's disqualification upon appeal. State v. Crawford, 620 S.W.2d 543, 1981 Tenn. Crim. App. LEXIS 367 (Tenn. Crim. App. 1981).

9. List of Prospective Jurors.

Where the names and addresses of prospective jurors were given to the defendant several weeks prior to the date of trial and additional information relative to the jurors, such as occupation, name of spouse, occupation of spouse, and whether a prospective juror had served previously on a criminal court jury, was delivered to the defendant as soon as the information could be collected and collated, which was prior to the date the trial began, the action taken by the trial judge and the clerk to get information concerning prospective jurors into the hands of the defendant was in substantial compliance with Tenn. R. Crim. P. 24(g) (now Tenn. R. Crim. P. 24(h)). State v. Strouth, 620 S.W.2d 467, 1981 Tenn. LEXIS 473 (Tenn. 1981), cert. denied, Strouth v. Tennessee, 455 U.S. 983, 102 S. Ct. 1491, 71 L. Ed. 2d 692, 1982 U.S. LEXIS 1099 (1982).

Furnishing defense counsel with list of prospective jurors on first day of trial complied with Tenn. R. Crim. P. 24(g) (now Tenn. R. Crim. P. 24(h)). State v. Simon, 635 S.W.2d 498, 1982 Tenn. LEXIS 413 (Tenn. 1982), cert. denied, Simon v. Tennessee, 459 U.S. 1055, 103 S. Ct. 473, 74 L. Ed. 2d 621 (1982).

Noncompliance with Tenn. R. Crim. P. 24(g) (now Tenn. R. Crim. P. 24(h)) was necessitated where a special venire had been called for trial, and the court and its officers did not know who the prospective jurors would be. State v. Harris, 839 S.W.2d 54, 1992 Tenn. LEXIS 348 (Tenn. 1992), rehearing denied, — S.W.2d —, 1992 Tenn. LEXIS 557 (Tenn. Sept. 8, 1992), cert. denied, Harris v. Tennessee, 507 U.S. 954, 113 S. Ct. 1368, 122 L. Ed. 2d 746, 1993 U.S. LEXIS 1703 (1993).

Failure to provide trial counsel with a list of prospective jurors did not demonstrate prejudice, since the court permitted counsel to ask each prospective juror for the missing information during voir dire, and the parties were equally impaired; therefore, there was no basis for reversal. State v. Harris, 839 S.W.2d 54, 1992 Tenn. LEXIS 348 (Tenn. 1992), rehearing denied, — S.W.2d —, 1992 Tenn. LEXIS 557 (Tenn. Sept. 8, 1992), cert. denied, Harris v. Tennessee, 507 U.S. 954, 113 S. Ct. 1368, 122 L. Ed. 2d 746, 1993 U.S. LEXIS 1703 (1993).

Defendant was not prejudiced by the trial court's requirement that his counsel go ahead with voir dire when they had been only been in possession of the juror information on two days of the jury selection. State v. Cameron, 909 S.W.2d 836, 1995 Tenn. Crim. App. LEXIS 288 (Tenn. Crim. App. 1995).

10. Juror Opposition to Possible Penalty.

Where during voir dire, a prospective juror in a murder trial repeatedly and unequivocally told the trial judge she would automatically vote against the death penalty, whatever the evidence, her statements left no leeway for rehabilitation, and left the trial judge with no alternative but to disqualify her "for cause." State v. Strouth, 620 S.W.2d 467, 1981 Tenn. LEXIS 473 (Tenn. 1981), cert. denied, Strouth v. Tennessee, 455 U.S. 983, 102 S. Ct. 1491, 71 L. Ed. 2d 692, 1982 U.S. LEXIS 1099 (1982); State v. Hutchison, 898 S.W.2d 161, 1994 Tenn. LEXIS 157 (Tenn. 1994), rehearing denied, 898 S.W.2d 161, 1995 Tenn. LEXIS 198 (1995), cert. denied, Hutchinson v. Tennessee, 516 U.S. 846, 116 S. Ct. 137, 133 L. Ed. 2d 84, 1995 U.S. LEXIS 5846 (1995), dismissed, Hutchison v. Bell, — F. Supp. 2d —, 2010 U.S. Dist. LEXIS 31736 (E.D. Tenn. Mar. 30, 2010).

Unequivocal statements from prospective jurors concerning their unwillingness to impose the death penalty under any circumstances entitled the trial court to disqualify them for cause. Cooper v. State, 847 S.W.2d 521, 1992 Tenn. Crim. App. LEXIS 484 (Tenn. Crim. App. 1992).

In order to safeguard both the defendant's right to an impartial jury in a death penalty case, and the state's interest in empanelling jurors able to impose capital punishment within the framework provided by law, trial courts must consider all of a juror's answers on a questionnaire, rather than giving just one answer dispositive weight, and should permit counsel to examine prospective jurors who provide inconsistent responses to pertinent questions. State v. Sexton, 368 S.W.3d 371, 2012 Tenn. LEXIS 377 (Tenn. May 29, 2012).

11. Peremptory Challenges.

Method of exercising peremptory challenges is generally left to discretion of trial judge. State v. Simon, 635 S.W.2d 498, 1982 Tenn. LEXIS 413 (Tenn. 1982), cert. denied, Simon v. Tennessee, 459 U.S. 1055, 103 S. Ct. 473, 74 L. Ed. 2d 621 (1982).

Tenn. R. Crim. P. 24(c) (now Tenn. R. Crim. P. 24(d)) should be read so as to permit counsel to confer concerning exercise of their peremptory challenges, when more than one defendant is on trial, but otherwise the procedure followed shall be that stated in the rule, with no counsel giving any indication as to source of peremptory challenge. State v. Simon, 635 S.W.2d 498, 1982 Tenn. LEXIS 413 (Tenn. 1982), cert. denied, Simon v. Tennessee, 459 U.S. 1055, 103 S. Ct. 473, 74 L. Ed. 2d 621 (1982).

Only where there is a duplication in a peremptory challenge should more than one defendant be charged with a particular challenge. State v. Simon, 635 S.W.2d 498, 1982 Tenn. LEXIS 413 (Tenn. 1982), cert. denied, Simon v. Tennessee, 459 U.S. 1055, 103 S. Ct. 473, 74 L. Ed. 2d 621 (1982).

Fact that trial judge erroneously prohibited counsel for codefendants from consulting and thereby may have caused premature exhaustion of appellant's peremptory challenges did not require reversal where no juror who was actually seated was shown to have been legally disqualified, biased or prejudiced. State v. Simon, 635 S.W.2d 498, 1982 Tenn. LEXIS 413 (Tenn. 1982), cert. denied, Simon v. Tennessee, 459 U.S. 1055, 103 S. Ct. 473, 74 L. Ed. 2d 621 (1982).

Where the offense charged is punishable by imprisonment for more than one year, and the death penalty question is not submitted for the jury's consideration, then a defendant is entitled to only eight peremptory challenges. State v. Atkins, 681 S.W.2d 571, 1984 Tenn. Crim. App. LEXIS 2906 (Tenn. Crim. App. 1984), cert. denied, Atkins v. Tennessee, 470 U.S. 1028, 105 S. Ct. 1395, 84 L. Ed. 2d 784, 1985 U.S. LEXIS 1261 (1985).

Although unorthodox jury selection procedure which consisted in part of selecting 18 prospective jurors instead of the normal 12 did not result in prejudice to the individual defendant, any further deviations from the rule could constitute prejudice to the entire judicial process and require reversal. State v. Coleman, 865 S.W.2d 455, 1993 Tenn. LEXIS 381 (Tenn. 1993), superseded by statute as stated in, State v. Osborne, — S.W.3d —, 2001 Tenn. Crim. App. LEXIS 437 (Tenn. Crim. App. June 14, 2001).

Defendant waived any failure of a trial court to grant required peremptory challenges because defendant did not object to the trial court's jury selection procedure and did not raise the issue in a new trial motion. State v. Lane, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 600 (Tenn. Crim. App. Sept. 20, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 111 (Tenn. Feb. 19, 2020).

Defendant was not entitled to relief on his claim that the requirement for him to use a peremptory challenge on a juror who should have been excused for cause deprived him of a fair trial because he acknowledged that his jury was impartial and the court rejected defendant's request to overturn the standard articulated in Howell. State v. Ray, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 320 (Tenn. Crim. App. May 6, 2020).

12. Effect of Discharging Juror.

The discharge of a juror does not break up the entire panel. The other jurors remain a part of the jury panel and are not subject again to challenge, nor are they to be resworn after a replacement is seated. State v. Max, 714 S.W.2d 289, 1986 Tenn. Crim. App. LEXIS 2673 (Tenn. Crim. App. 1986).

The discharge of a juror in a criminal case during the progress of a trial, after which another (or alternate) juror is impaneled will not authorize a plea of double jeopardy. State v. Max, 714 S.W.2d 289, 1986 Tenn. Crim. App. LEXIS 2673 (Tenn. Crim. App. 1986).

Even if the trial judge arbitrarily discharges a juror, the remedy will not be acquittal, but rather a new trial. State v. Max, 714 S.W.2d 289, 1986 Tenn. Crim. App. LEXIS 2673 (Tenn. Crim. App. 1986).

The replacement of a regular juror who was found to be disqualified because of an improper statement made during deliberations with a previously discharged alternate was a violation of statutory guidelines and rules of criminal procedure. State v. Bobo, 814 S.W.2d 353, 1991 Tenn. LEXIS 291 (Tenn. 1991).

Although the decision to discharge a juror and to select an alternate juror is left to the discretion of the trial judge, there is no recognized procedure, statutory or otherwise, for discharging a juror, selecting an alternate, and then reinstating the original discharged juror who has missed a portion of the trial, as occurred in this case, and the judge's action was plain error not subject to a harmless error analysis, but rather the only remedy was a new trial. State v. Cleveland, 959 S.W.2d 548, 1997 Tenn. LEXIS 635 (Tenn. 1997).

Defendant's convictions for first-degree murder, attempted first-degree murder, and aggravated arson were proper because the trial court did not err by replacing an ill juror with an alternate juror following the conclusion of the guilt phase but prior to the beginning of sentencing deliberations in his capital trial. The trial court's decision to replace an ill juror with a non-discharged alternate juror did not appear to constitute a plain error under T.C.A. § 39-13-204(a). State v. Hester, 324 S.W.3d 1, 2010 Tenn. LEXIS 897 (Tenn. Oct. 5, 2010), cert. denied, Hester v. Tennessee, 179 L. Ed. 2d 896, 563 U.S. 939, 131 S. Ct. 2096, 2011 U.S. LEXIS 3140 (U.S. 2011), superseded by statute as stated in, State v. Wilson, — S.W.3d —, 2013 Tenn. Crim. App. LEXIS 126 (Tenn. Crim. App. Feb. 13, 2013).

13. Alternate Jurors.

Although the trial court erred in failing to dismiss the alternate jurors at the appropriate

time, defendant did not show that they were present during the jury's deliberations or that their retention in any way affected the deliberations; thus, defendant was not entitled to a motion for a new trial on that basis. State v. Rayfield, 507 S.W.3d 682, 2015 Tenn. Crim. App. LEXIS 780 (Tenn. Crim. App. Sept. 28, 2015), appeal denied, — S.W.3d —, 2016 Tenn. LEXIS 146 (Tenn. Feb. 18, 2016).

14. Prejudicial Error.

Defendant was entitled to a new trial because the trial court's substantial deviations from the Rules of Criminal Procedure—failing to seat replacement jurors in the order of their selection and commingling all 23 prospective jurors from both panels and randomly selecting 10 jurors to excuse from service—resulted in prejudice to the judicial process. State v. Frausto, 463 S.W.3d 469, 2015 Tenn. LEXIS 272 (Tenn. Apr. 1, 2015).

Rule 24.1. Juror Information. —

(a) Notetaking. —

(1) Notetaking Allowed. — The court shall instruct jurors that they may take notes during the trial and deliberations.

(2) Materials. — The court shall provide suitable materials for this purpose.

(3) Access to Notes. — Jurors shall have access to their notes during recesses and deliberations.

(4) Destruction of Notes. — After the jury has rendered a verdict, the notes shall be collected by court personnel who shall destroy them promptly.

(b) Notebooks. —

(1) Allowed in Court's Discretion. — When the court deems it helpful in a particular case, jurors may be provided with notebooks to use in collecting and organizing appropriate materials, including items such as jury instructions, copies of written and other exhibits, and the juror's own notes.

(2) Participation by Counsel. — Counsel should be apprised of this procedure and invited to prepare exhibits and other materials in a way that facilitates their inclusion in the jurors' notebooks.

(3) Disposition of Notebooks. — At the end of the trial, the notebooks shall be collected by court personnel and their contents destroyed, unless the court instructs to the contrary.

(c) Juror Questions of Witnesses. — In the court's discretion, the court may permit a juror to ask a question of a witness. The following procedures apply:

(1) Written Submission of Questions. — The juror shall put the question in writing and submit it to the judge through a court officer at the end of a witness' testimony. A juror's question shall be anonymous and the juror's name shall not be included in the question.

(2) Procedure After Submission. — The judge shall review all such questions and, outside the hearing of the jury, shall consult the parties about whether the question should be asked. The judge may ask the juror's question in whole or part and may change the wording of the question before asking it. The judge may permit counsel to ask the question in its original or amended form in whole or part.

(3) Jury Instructions. — When juror questions are permitted, the court shall instruct jurors early in the trial about the mechanics of asking a question and to give no meaning to the fact that the judge chose not to ask a question or altered the wording of a question submitted by a juror.

(4) Retaining Questions for Record. — All jurors' questions–whether approved or disapproved by the court–shall be retained for the record.

Advisory Commission Comments. This rule permits three procedures designed to assist jurors in the effective performance of their important functions.

Rule 24.1(a) specifically states that jurors are allowed to take notes during the trial and to use those notes during deliberations. The court is to provide the necessary materials and to collect and destroy the notes at the end of the trial. The premise of this rule is that jurors, like judges and lawyers, may find it helpful to take notes during the trial in order to assist in remembering the evidence.

Rule 24.1(b) authorizes the court, in its discretion, to provide jurors with notebooks to use in collecting and organizing the various materials presented to the jury. The notebook might include such items as jury instructions, copies of exhibits (photographs, charts, etc.), basic definitions of words used in the trial, and any other appropriate materials.

The court is given the discretion whether to use notebooks. The court might want to ask counsel to assist in the preparation of the notebooks. The content and financial aspects of the notebooks might be discussed and resolved during pretrial conference. After the trial, the court may collect the notebooks and destroy any contents that will not be used again, although the actual disposition is left to the court's discretion.

Rule 24.1(c) gives the court the discretion to allow jurors to ask questions of witnesses. This rule is designed to assist jurors in their understanding of evidence and to make them feel more involved in the trial process. The procedure in this rule should ensure that improper questions are not propounded to witnesses. After a witness has completed testimony, a juror desiring to ask a question must submit that question in writing to a court officer who will give it to the judge. The question is submitted to the judge without identifying the juror who asked it. The judge then screens the question. Counsel shall be invited to comment on the propriety of the question out of the hearing of the jury. The court is given the discretion to reject or ask the question in whole or in part, to rephrase it, and to have counsel ask the question of the witness. If necessary, the court may accompany the question or the rejection of the question with appropriate jury instructions. All questions are to be retained for the record.

Law Reviews. Better, Happier Juries (Neil P. Cohen), 39 Tenn. B.J. 16 (2003).

NOTES TO DECISIONS

1. Juror-Submitted Questions.

There was no plain error in the trial court examining a child victim's mother by asking jury-submitted questions in the absence of any objection because nothing in the judge's questioning left an improper impression with the jury as to his feelings about the evidence, and the judge made no statements that reflected on the weight or credibility of the evidence, State v. Schiefelbein, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 138 (Tenn. Crim. App. Feb. 8, 2007), modified, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 213 (Tenn. Crim. App. Mar. 7, 2007).

Rule 25. Disability of Judge. —

(a) During Trial. — Any judge regularly presiding in or who is assigned to a court may complete a jury trial if:

(1) the judge before whom a jury trial has commenced is unable to proceed because of death, sickness, or other disability; and

(2) the judge completing the trial certifies that he or she has become familiar with the record of the trial.

(b) After Verdict of Guilt. —

(1) In General. — After a verdict of guilty, any judge regularly presiding in or who is assigned to a court may complete the court's duties if the judge before whom the trial began cannot proceed because of absence, death, sickness, or other disability.

(2) Granting a New Trial. — The successor judge may grant a new trial when that judge concludes that he or she cannot perform those duties because of the failure to preside at the trial or for any other reason.

Advisory Commission Comments. This rule is similar to the current federal rule and is also what the Law Revision Commission proposed in its §§ 40-1941, 40-1942.

NOTES TO DECISIONS

Analysis

1. Familiarization with Record.
2. Error.
3. —Not Harmless.
4. Standard of Review.
5. —Prejudice to Defendant.
6. Successor Judge.
7. —Thirteenth Juror Rule.
8. Other Disability.

1. Familiarization with Record.

Substitute judge did not familiarize himself with the record of the trial to extent required by Tenn. R. Crim. P. 25, and should not have proceeded with the trial. State v. Bilbrey, 858 S.W.2d 911, 1993 Tenn. Crim. App. LEXIS 7 (Tenn. Crim. App. 1993), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 262 (Tenn. July 12, 1993).

2. Error.

3. —Not Harmless.

Where the trial had not proceeded beyond the state's case-in-chief when substitute judge took over case, his error in not properly familiarizing himself with the case prior to substitution was not harmless, for unless the substitute judge listens to or reads all the testimony introduced prior to assuming responsibility for the conduct of the trial, and unless he examines all the existing exhibits as well, he would have, at best, a profoundly fragile basis upon which to evaluate the evidence under Tenn. R. Crim. P. 33(f). State v. Bilbrey, 858 S.W.2d 911, 1993 Tenn. Crim. App. LEXIS 7 (Tenn. Crim. App. 1993), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 262 (Tenn. July 12, 1993).

4. Standard of Review.

5. —Prejudice to Defendant.

Federal courts have consistently held that failure to comply strictly with its Rule 25(a), which is identical to Tenn. R. Crim. P. 25(a), does not mandate reversal absent prejudice to the defendant. State v. Bilbrey, 858 S.W.2d 911, 1993 Tenn. Crim. App. LEXIS 7 (Tenn. Crim. App. 1993), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 262 (Tenn. July 12, 1993).

6. Successor Judge.

Successor judge's consideration of his ability to perform original judge's duties must include assessment of ability to act as thirteenth juror. State v. Nail, 963 S.W.2d 761, 1997 Tenn. Crim. App. LEXIS 474 (Tenn. Crim. App. 1997).

7. —Thirteenth Juror Rule.

In assessing whether the successor judge can act as thirteenth juror, the judge would need to determine the extent to which witness credibility was a factor in the case and the extent to which the judge had sufficient knowledge or records in order to decide whether the credible evidence, as viewed by the judge, adequately supported the verdict; if these determinations could not be made by the successor judge, the verdict could not be approved and a new trial should have been granted. State v. Brown, 53 S.W.3d 264, 2000 Tenn. Crim. App. LEXIS 962 (Tenn. Crim. App. 2000), appeal denied, — S.W.3d —, 2001 Tenn. LEXIS 434 (Tenn. May 14, 2001), review denied, — S.W.3d —, 2002 Tenn. LEXIS 415 (Tenn. Sept. 23, 2002).

A judge whose first exposure to the case was presiding over the motion for new trial could rule on the motion if the record was available so long as witness credibility was not an overriding issue. State v. Brown, 53 S.W.3d 264, 2000 Tenn. Crim. App. LEXIS 962 (Tenn. Crim. App. 2000), appeal denied, — S.W.3d —, 2001 Tenn. LEXIS 434 (Tenn. May 14, 2001), review denied, — S.W.3d —, 2002 Tenn. LEXIS 415 (Tenn. Sept. 23, 2002).

Where the original trial judge was unable to preside over defendant's motion for a new trial, the trial judge's statement in front of jury that it was the judgment of the trial court that he was guilty was not enough to satisfy the judge's role as the thirteenth juror because witness credibility was an overriding issue and under Tenn. R. Crim. P. 25(b), and the successor judge was not at the trial to see any of the witnesses testify; therefore, the successor judge should have granted a new trial pursuant to Tenn. R. Crim. P. 33(d). State v. Biggs, 218 S.W.3d 643, 2006 Tenn. Crim. App. LEXIS 654 (Tenn. Crim. App. 2006), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 1167 (Tenn. 2006).

When witness credibility is the primary issue raised in the motion for new trial, a successor judge under Tenn. R. Crim. P. 25(b) may not approve the judgment and must grant a new trial pursuant to Tenn. R. Crim. P. 33(d). State v. Biggs, 218 S.W.3d 643, 2006 Tenn. Crim. App. LEXIS 654 (Tenn. Crim. App. 2006), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 1167 (Tenn. 2006).

Following defendant's conviction for aggravated robbery, burglary, and other crimes, defendant's motion for a new trial was properly denied because the successor judge correctly determined that he could perform the function of the thirteenth juror and that he indepen-

dently could weigh and assess the evidence adduced at defendant's trial so as to prevent a miscarriage of justice by the jury. State v. Ellis, 453 S.W.3d 889, 2015 Tenn. LEXIS 5 (Tenn. Jan. 13, 2015).

Tennessee Supreme Court held that there is a rebuttable presumption that a successor judge can act as the thirteenth juror and that an appellate court should review de novo a successor judge's decision about acting as the thirteenth juror. State v. Ellis, 453 S.W.3d 889, 2015 Tenn. LEXIS 5 (Tenn. Jan. 13, 2015).

It was unnecessary for the successor judge to act as the thirteenth juror at the time of the delayed appeal because that function had previously been performed by the original judge immediately following the original trial, and it was clear from the record that the original judge approved the verdicts rendered by the jury, and the thirteenth juror ruling made by the original judge was not disturbed on appeal. State v. Hall, 461 S.W.3d 469, 2015 Tenn. LEXIS 241 (Tenn. Mar. 20, 2015), cert. denied, Hall v. Tennessee, 193 L. Ed. 2d 349, 136 S. Ct. 479, 577 U.S. 974, 2015 U.S. LEXIS 7117 (U.S. 2015).

8. Other Disability.

Death in the immediate family of the original trial judge in defendant's capital trial constituted an other disability under Tenn. R. Crim. P. 25(a), such that appointment of a substitute judge was proper. State v. Young, 196 S.W.3d 85, 2006 Tenn. LEXIS 559 (Tenn. 2006), cert. denied, Young v. Tennessee, 549 U.S. 1081, 127 S. Ct. 730, 166 L. Ed. 2d 567, 2006 U.S. LEXIS 9303 (2006).

Rule 26, 26.1. [Reserved.]

Rule 26.2. Production of Statements of Witnesses. —

(a) Motion for Production. — After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the state or the defendant and the defendant's attorney to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter of the witness's testimony.

(b) Production of Statement. —

(1) Entire Statement. — If the entire statement relates to the subject matter of the witness's testimony, the court shall order that the statement be delivered to the moving party.

(2) Redacted Statement. —

(A) Delivery to Court. — If the other party claims that the statement contains matter that does not relate to the subject matter of the witness's testimony, the court shall order that it be delivered to the court in camera.

(B) Redaction of Unrelated Portions. — Upon inspection, the court shall redact the portions of the statement that do not relate to the subject matter of the witness's testimony. The remaining parts of the statement shall be delivered to the moving party. Any portion of the statement that is withheld from the defendant over the defendant's objection must be preserved by the attorney for the state. In the event of a conviction and an appeal by the defendant, this preserved portion shall be made available to the appellate court for the purpose of determining the correctness of the decision to excise the portion of the statement.

(c) Recess for Examination of Statement. — The court may recess the proceedings to allow time for a party to examine the statement and prepare for its use.

(d) Sanction for Failure to Produce Statement. — If the party who called the witness disobeys an order to deliver a statement, the court shall strike the witness's testimony from the record and order the trial to proceed. If the attorney for the state disobeys the order, the court shall declare a mistrial if required in the interest of justice.

(e) Production of Statements at Pretrial Hearing. — Except as otherwise provided by law, this rule shall apply at a motion hearing under Rule 12(b).

(f) Definition of "Statement." — As used in this rule, a witness's "statement" means:

(1) A written statement that the witness makes and signs, or otherwise adopts or approves; or

(2) A substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in a stenographic, mechanical, electrical, or other recording or a transcription of such a statement.

Advisory Commission Comments. The language of Rule 26.2 is similar to the language in Rule 26.2 of the Federal Rules of Criminal Procedure. There are, however, two differences that deserve comment.

First, the Committee deliberately did not incorporate that provision of subdivision (e)(3) of the federal Jenck's Act, 18 U.S.C. § 3500, which applies to statements of witnesses before a grand jury, and such statements are not meant to be obtainable simply because a grand jury witness testifies for the state. Such statements may only be obtained under the limited provisions of existing law now contained in Rule 6(k)(2).

Second, Rule 26.2(e) now makes it clear that this rule applies not only to trial situations, but also to pretrial testimony such as might be given at a suppression hearing. There would be little logic in requiring statement production only at trial, and not at pretrial hearings where testimony as to the facts of the case is being given under oath. This provision is similar to language found in Rule 12(i) of the Federal Rules of Criminal Procedure, but the Tennessee rules commission elected to treat all witness statements in one rule. However, the Tennessee rule applies to all pretrial motions under Rule 12(b). Further, the Federal rule treats law enforcement officials as witnesses called by the state, but the commission elected not to adopt this provision. Obviously, Rule 26.2(b) applies to such pretrial motion hearings. Thus, only part of a witness' statement may be relevant to the hearing. The remainder may then be disclosed at trial under the provisions of Rule 26.2(a).

The commission desires to make clear that this entire rule in no way applies to a preliminary hearing or any other hearing conducted in general sessions court. Rather, Rule 26.2 applies only in criminal court.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 3-0-2, 3-26.2-2.

Law Reviews. Hospital Records as Evidence: New Rules and Old Statutes (Donald F. Paine), 26 Tenn. B.J. 33 (1990).

NOTES TO DECISIONS

Analysis

1. Purpose of Rule.
2. Criminal Records of Witnesses.
3. Time for Producing Statements.
4. Notes from Criminal Investigation.
5. Department of Human Services Report.
6. Plain Error Review.
7. Harmless Error.

1. Purpose of Rule.

The purpose of Tenn. R. Crim. P. 26.2 is to enable counsel to examine a witness's statements in order to test the credibility of that witness at trial. State v. Caughron, 855 S.W.2d 526, 1993 Tenn. LEXIS 189 (Tenn. 1993), cert. denied, Caughron v. Tennessee, 510 U.S. 979, 114 S. Ct. 475, 126 L. Ed. 2d 426, 1993 U.S. LEXIS 7207 (1993).

2. Criminal Records of Witnesses.

State has no duty to produce criminal records of the witnesses the state intends to call. State v. Newsome, 744 S.W.2d 911, 1987 Tenn. Crim. App. LEXIS 2697 (Tenn. Crim. App. 1987).

3. Time for Producing Statements.

There is no constitutional requirement that the state provide witnesses' statements prior to trial and Tenn. R. Crim. P. 26.2 is clear that the state has no obligation to produce statements of a witness until the conclusion of the witness' testimony on direct examination. State v. Taylor, 771 S.W.2d 387, 1989 Tenn. LEXIS 135 (Tenn. 1989), rehearing denied, — S.W.2d —, 1989 Tenn. LEXIS 255 (Tenn. May 30, 1989), cert. denied, Taylor v. Tennessee, 497 U.S. 1031, 110 S. Ct. 3291, 111 L. Ed. 2d 799, 1990 U.S. LEXIS 3552 (1990).

4. Notes from Criminal Investigation.

Notes of criminal investigation for public defender's office, taken during interviews with defendant, were not "Jencks material" to which the state was entitled under Tenn. R. Crim. P. 26.2(g). State v. Payton, 782 S.W.2d 490, 1989

Tenn. Crim. App. LEXIS 627 (Tenn. Crim. App. 1989).

5. Department of Human Services Report.

In rape prosecution, plaintiff was entitled to all materials contained in report of department of human services investigator pertaining to statements of those interviewed which were substantially verbatim of summarized and otherwise met requirements enunciated in State v. Robinson, 618 S.W.2d 754, 1981 Tenn. Crim. App. LEXIS 353 (Tenn. Crim. App. 1981), superseded by statute as stated in, State v. Finney, — S.W.2d —, 1987 Tenn. Crim. App. LEXIS 2739 (Tenn. Crim. App. Nov. 6, 1987). State v. Brown, 871 S.W.2d 492, 1993 Tenn. Crim. App. LEXIS 661 (Tenn. Crim. App. 1993).

6. Plain Error Review.

Plain error review was not appropriate regarding the trial court's refusal to allow defense counsel, during trial, to take home a witness's statements because defendant failed to establish that a substantial right was adversely affected. Defense counsel was given the statements, reviewed the statements, and was allowed to extensively voir dire the witness about the statements. State v. Colvett, 481 S.W.3d 172, 2014 Tenn. Crim. App. LEXIS 1142 (Tenn. Crim. App. Dec. 19, 2014), appeal denied, — S.W.3d —, 2015 Tenn. LEXIS 302 (Tenn. Apr. 10, 2015).

7. Harmless Error.

Although a trial court erred by requiring that defendant disclose to the State of Tennessee defense counsel's notes taken during counsel's interview of a witness, as Jencks material, in that the notes were not a statement. Furthermore, the error was harmless because the appellate court did not believe that it could be said that the error more probably than not affected the judgment. State v. Buckingham, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 637 (Tenn. Crim. App. Aug. 20, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 70 (Tenn. Jan. 16, 2019).

Rule 26.3. Order of Expert Testimony. —

In a trial involving conflicting expert testimony and with the consent of all parties, the court may reorder the ordinary proof process to increase the likelihood that jurors will be able to comprehend and evaluate expert testimony.

Advisory Commission Comments. This rule is designed to assist jurors in understanding conflicting expert testimony by providing judges and lawyers with considerable flexibility in the scheduling and mode of that testimony. There are many possible methods that can be used pursuant to this rule. On rare occasions, it may be helpful if expert testimony on the same subject be given in the same block of time rather than separated by days or weeks and given during each party's proof process. For example, in a criminal homicide case where both sides will present expert testimony on causation, jurors may benefit if the prosecution's causation experts testify, followed immediately by the defendant's causation experts. This procedure may give the jurors a better way of resolving the critical issue of causation. Because of the tactical, financial, scheduling, and procedural issues raised by this new procedure, it can only be utilized with the consent of the court and all parties.

Law Reviews. Better, Happier Juries (Neil P. Cohen), 39 Tenn. B.J. 16 (2003).

Rule 27. [Reserved.]

Rule 28. Interpreters. —

The court may appoint an interpreter pursuant to section 3 of Tennessee Supreme Court Rule 42. Costs associated with an interpreter's services shall be assessed pursuant to Supreme Court Rule 42. All interpreter costs not covered by Supreme Court Rule 42 shall be taxed as costs. [As amended by order filed December 18, 2012, effective July 1, 2013.]

Advisory Commission Comments [2013]. Tenn. Sup. Ct. R. 42 was revised (effective July 1, 2012) to govern the payment of costs for services of interpreters used in proceedings covered by that rule. Rule 28 was amended to provide that payment for interpreters' services is governed by Tenn. Sup. Ct. R. 42, but that any such costs not covered by that rule shall be taxed as costs.

Compiler's Notes. The amendment of Rule 28, which rewrote the rule, deleted the 2006 Advisory Commission Comments and added

the 2013 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 18, 2012, was ratified and approved by House Resolution 33 and Senate Resolution 11. The order promulgating the amendment of Rule 28 provided that it take effect July 1, 2013.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), No. 3-28-1.

Law Reviews. Confrontation and the Law of Evidence: Can the Language Conduit Theory Survive in the Wake of Crawford? 67 Vand. L. Rev. 1497 (2014).

Attorney General Opinions. Cost of interpreters for indigent defendants in general sessions court, OAG 99-211 (10/20/99).

NOTES TO DECISIONS

1. In General.

It is the duty of the court to provide the necessary means for the defendant to understand the nature of the charges against him, the testimony of the witnesses, and to communicate to the court; failure to do so would be a violation of one's constitutional right to be heard, to know the nature and cause of the accusation, and to be confronted by the witnesses. State v. Thien Duc Le, 743 S.W.2d 199, 1987 Tenn. Crim. App. LEXIS 2648 (Tenn. Crim. App. 1987).

Rule 29. Motion for Judgment of Acquittal. —

(a) Directed Verdict Abolished. — Motions for directed verdict are abolished and are replaced by motions for judgment of acquittal.

(b) Grounds for Judgment of Acquittal. — On defendant's motion or its own initiative, the court shall order the entry of judgment of acquittal of one or more offenses charged in the indictment, presentment, or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

(c) Proof After Denial of Motion. — If–at the close of the state's proof–the court denies a defendant's motion for judgment of acquittal, the defendant may offer evidence without having reserved the right to do so.

(d) Reserving Decision on Motion at Close of Evidence. — If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury, and decide the motion:

(1) before the jury returns a verdict;

(2) after it returns a verdict of guilty; or

(3) after it is discharged without having returned a verdict.

(e) Motion After Guilty Verdict or Discharge of Jury. —

(1) Timing of Motion. — If the jury returns a verdict of guilty, a defendant may move for a judgment of acquittal, or renew such a motion, within 30 days of the date the order of sentence is entered or within such further time as the court sets during the 30-day period. If the jury is discharged without having returned a verdict, the 30-day period begins to run from the date the jury is discharged.

(2) Setting Aside Guilty Verdict. — If the defendant moves for a judgment of acquittal after the jury returns a verdict of guilty, the court may set aside the guilty verdict, dispose of a motion for new trial, and grant the judgment of acquittal. The state may appeal when the court sets aside a verdict of guilty and enters a judgment of acquittal.

Advisory Commission Comments. Thirty days are allowed after the date the order of sentence is entered within which to move for a judgment of acquittal. This time period was selected to conform to that allowed for filing a motion for a new trial, and it is permissible to

file the two together; indeed, the commission anticipates that this will be the case. The same time period of thirty days applies to motions for judgment of acquittal, motions for new trials, and motions in arrest of judgment. They may be filed in any order or together, without any waiver, but all must come within the thirty days after the date the order of sentence is entered.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), No. 3-29-1.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, § 83; 17 Tenn. Juris., Jury, § 7; 24 Tenn. Juris., Verdict, § 19.

Law Reviews. The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure, II. Initiation of An Appeal (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 4.

NOTES TO DECISIONS

ANALYSIS

1. Authority of Trial Judge.
2. Standard for Review.
3. Acquittal Required Before Retrial.
4. Motion Under Advisement.
5. Motion at Close of All Evidence.
6. Denial of Motion at Conclusion of State's Proof.
7. State's Appeal of Set Aside Guilty Verdict.
8. Judgment Notwithstanding Verdict.
9. Distinction Between Rules 29 and 33.
10. Motion Properly Denied.
11. Motion Properly Granted.
12. Waiver.
13. State Closed Its Proof.

1. Authority of Trial Judge.

Tenn. R. Crim. P. 29 empowers the trial judge to direct a judgment of acquittal when the evidence is insufficient to warrant a conviction either at the time the state rests or at the conclusion of all the evidence. At the point the motion is made, the trial court must favor the state with the strongest legitimate view of the evidence, including all reasonable inferences, and discard any countervailing evidence. State v. Anderson, 880 S.W.2d 720, 1994 Tenn. Crim. App. LEXIS 34 (Tenn. Crim. App. 1994).

Tennessee Supreme Court held that there is a rebuttable presumption that a successor judge can act as the thirteenth juror and that an appellate court should review de novo a successor judge's decision about acting as the thirteenth juror. State v. Ellis, 453 S.W.3d 889, 2015 Tenn. LEXIS 5 (Tenn. Jan. 13, 2015).

Trial court erred in granting defendant, a corrections officer, judgments of acquittal on three counts of official misconduct because, while he had no relationship with the three inmates at issue, did not try to confer a benefit or do harm to them, and did not receive anything from them in exchange for entering unearned work credits, the benefit was not required to accrue to defendant, but could benefit "any other person in whose welfare" he had an interest, and whether he "was interested" in the welfare of a third party for whom a benefit was obtained was a question for a properly instructed jury. State v. Stoner, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 390 (Tenn. Crim. App. July 3, 2019).

2. Standard for Review.

Sufficiency or insufficiency to convict would seem to be the appropriate test or standard by which both trial and appellate courts must view the adequacy of the evidence. State v. Cabbage, 571 S.W.2d 832, 1978 Tenn. LEXIS 653 (Tenn. 1978), superseded by statute as stated in, State v. Barone, 852 S.W.2d 216, 1993 Tenn. LEXIS 69, 38 A.L.R.5th 897 (Tenn. 1993), superseded by statute as stated in, State v. Dankworth, 919 S.W.2d 52, 1995 Tenn. Crim. App. LEXIS 632 (Tenn. Crim. App. 1995), superseded by statute as stated in, State v. Rhodes, — S.W.2d —, 1995 Tenn. Crim. App. LEXIS 890 (Tenn. Crim. App. Nov. 14, 1995), superseded by statute as stated in, State v. Polk, —S.W.2d—, 1995 Tenn. Crim. App. LEXIS 921 (Tenn. Crim. App. Nov. 21, 1995), superseded by statute as stated in, Bellamy v. Cracker Barrel Old Country Store, Inc., — S.W.3d —, 2008 Tenn. App. LEXIS 794 (Tenn. Ct. App. Dec. 30, 2008).

When the evidence is insufficient to support a conviction, the trial judge has no alternative but to direct a verdict of acquittal. Mathis v. State, 590 S.W.2d 449, 1979 Tenn. LEXIS 520 (Tenn. 1979).

On appeal, the state is entitled to the strongest legitimate view of the evidence and any reasonable inferences which might be drawn therefrom. State v. Anderson, 880 S.W.2d 720, 1994 Tenn. Crim. App. LEXIS 34 (Tenn. Crim. App. 1994).

When the trial court is presented with a motion for judgment of acquittal, the only concern is the legal sufficiency, as opposed to the weight, of the evidence. State v. Blanton, 926 S.W.2d 953, 1996 Tenn. Crim. App. LEXIS 67 (Tenn. Crim. App. 1996).

The standard by which the trial court is to determine a motion for judgment of acquittal is the same standard applicable on appeal when the court is called upon to determine the sufficiency of the evidence after a conviction; on appeal, the state is entitled to the strongest legitimate view of the evidence and any reasonable inferences which might be drawn therefrom. State v. Price, 46 S.W.3d 785, 2000 Tenn. Crim. App. LEXIS 597 (Tenn. Crim. App. 2000),

review or rehearing denied, — S.W.3d —, 2001 Tenn. LEXIS 146 (Tenn. Feb. 26, 2001).

3. Acquittal Required Before Retrial.

A trial judge may no longer set aside a jury verdict upon grounds of preponderance of evidence alone and direct a retrial of the action without entering judgment of acquittal. State v. Cabbage, 571 S.W.2d 832, 1978 Tenn. LEXIS 653 (Tenn. 1978), superseded by statute as stated in, State v. Barone, 852 S.W.2d 216, 1993 Tenn. LEXIS 69, 38 A.L.R.5th 897 (Tenn. 1993), superseded by statute as stated in, State v. Dankworth, 919 S.W.2d 52, 1995 Tenn. Crim. App. LEXIS 632 (Tenn. Crim. App. 1995), superseded by statute as stated in, State v. Rhodes, — S.W.2d —, 1995 Tenn. Crim. App. LEXIS 890 (Tenn. Crim. App. Nov. 14, 1995), superseded by statute as stated in, State v. Polk, —S.W.2d—, 1995 Tenn. Crim. App. LEXIS 921 (Tenn. Crim. App. Nov. 21, 1995), superseded by statute as stated in, Bellamy v. Cracker Barrel Old Country Store, Inc., — S.W.3d —, 2008 Tenn. App. LEXIS 794 (Tenn. Ct. App. Dec. 30, 2008).

When the evidence is insufficient to warrant a conviction the trial judge has no alternative but to direct a verdict of acquittal; in such a situation, it is no longer permissible for him to deny the motion for a judgment of acquittal and, after verdict, to grant a new trial instead. Overturf v. State, 571 S.W.2d 837, 1978 Tenn. LEXIS 654 (Tenn. 1978).

The 13th juror rule, whereby a trial judge could set aside a jury verdict upon grounds of preponderance alone and direct a retrial of the action, without entering judgment of acquittal, has not been reinstated in State v. Adkins, 786 S.W.2d 642, 1990 Tenn. LEXIS 119 (Tenn. 1990), superseded by statute as stated in, State v. Loftin, — S.W.2d —, 1991 Tenn. Crim. App. LEXIS 594 (Tenn. Crim. App. July 30, 1991), superseded by statute as stated in, State v. Harris, — S.W.2d —, 1994 Tenn. Crim. App. LEXIS 225 (Tenn. Crim. App. Apr. 13, 1994), superseded by statute as stated in, State v. Dankworth, 919 S.W.2d 52, 1995 Tenn. Crim. App. LEXIS 632 (Tenn. Crim. App. 1995), superseded by statute as stated in, Ray v. Holland, — F.3d —, 2000 U.S. App. LEXIS 22725 (6th Cir. Tenn. Sept. 5, 2000).

4. Motion Under Advisement.

There is no authority in practice or procedure in a criminal case for the trial judge to take under advisement a motion for a judgment of acquittal made at the conclusion of all the state's proof. Mathis v. State, 590 S.W.2d 449, 1979 Tenn. LEXIS 520 (Tenn. 1979).

5. Motion at Close of All Evidence.

It is only when a motion for acquittal is made "at the close of all the evidence" that the trial judge "may reserve decision on the motion, submit the case to the jury and decide the motion" either before or after jury or its discharge without having returned a verdict. Mathis v. State, 590 S.W.2d 449, 1979 Tenn. LEXIS 520 (Tenn. 1979).

Trial court did not err by failing to inform the jury that defendant had been acquitted under Tenn. R. Crim. P. 29 of the robbery charges after those charges were dismissed at the conclusion of all the proof. When presented with a procedural posture such as in the instant case, it was sufficient for the trial court to inform the jury that the dismissed charges had been removed from the indictment, that no instruction concerning the dismissed charges would be provided, and that the jury should not speculate as to the removal of the dismissed charges or the absence of instructions on the dismissed charges; moreover, the trial court, if requested to do so, should also provide an appropriate limiting instruction as to the purpose of the evidence related to the dismissed charges. State v. Little, 402 S.W.3d 202, 2013 Tenn. LEXIS 309 (Tenn. Mar. 22, 2013).

6. Denial of Motion at Conclusion of State's Proof.

When the court overrules, or does not act, upon a motion for an acquittal made at the conclusion of the state's proof, if counsel is convinced as to the validity of the motion, he or she must then and there take affirmative action to confine the controversy to the proof already presented. He or she should announce that the defendant stands on his motion, will present no proof, disclaims any benefit of any evidence introduced by his codefendant, disavows any detriment, and should state that the evidence presented by the codefendant will not be binding upon him, and he should participate no further in the trial until after the conclusion of all the proof. Mathis v. State, 590 S.W.2d 449, 1979 Tenn. LEXIS 520 (Tenn. 1979).

7. State's Appeal of Set Aside Guilty Verdict.

Where the trial court granted defendant's motion for judgment of acquittal and set the jury's verdict aside, but the evidence established beyond a reasonable doubt defendant's guilt, the court set aside the trial court's judgment of acquittal and remanded those counts so that the error could be corrected by the trial court entering judgment of conviction upon the jury verdict. State v. McMahan, 614 S.W.2d 83, 1981 Tenn. Crim. App. LEXIS 326 (Tenn. Crim. App. 1981).

8. Judgment Notwithstanding Verdict.

A motion for judgment notwithstanding the verdict is unknown to the rules and practice of criminal law; the only motion that could bring about a similar result in criminal proceedings is a motion for judgment of acquittal. State v. Smith, 695 S.W.2d 527 (Tenn. 1985).

9. Distinction Between Rules 29 and 33.

See State v. Gillon, 15 S.W.3d 492, 1997 Tenn. Crim. App. LEXIS 1024 (Tenn. Crim. App. 1997).

10. Motion Properly Denied.

Where defendant provided demonstrably false information to a loan officer and a county clerk within hours of a break-in, the trial judge properly denied a motion for judgment of acquittal as to a burglary charge and permitted the jury to consider the issues drawn; during regular business hours on the day immediately following the night-time burglary, defendant had possession of keys, the stolen vehicle, and the car title. State v. James, 315 S.W.3d 440, 2010 Tenn. LEXIS 570 (Tenn. June 24, 2010).

In an aggravated statutory rape case, the victim's testimony and the other evidence adduced at trial that demonstrated multiple incidents of sexual penetration between the fourteen-year-old victim and the forty-two-year-old defendant was sufficient to establish the elements of the offense. The trial court did not err by denying defendant's motion for a judgment of acquittal because no corroboration of the victim's testimony was required. State v. Collier, 411 S.W.3d 886, 2013 Tenn. LEXIS 636 (Tenn. Aug. 12, 2013), cert. denied, Collier v. Tennessee, 188 L. Ed. 2d 128, 134 S. Ct. 1034, 571 U.S. 1180, 2014 U.S. LEXIS 967 (U.S. 2014).

Defendant's motion for judgment of acquittal was properly denied as the evidence was sufficient to sustain his convictions for aggravated burglary, vandalism, theft of property, and evading arrest by motor vehicle and on foot as he was the perpetrator of the offenses because the victim's front door was pried open, and a crowbar was near the door; the victim's garage door was open, and several tools from her garage were strewn on the lawn; a deputy testified that a man matching defendant's description approached the scene of the burglary, had words with the deputies, and fled in a van registered to defendant's wife; the van crashed into a ditch, and no one was present in the van; and defendant subsequently confessed to the offenses. State v. Simmons, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 804 (Tenn. Crim. App. Dec. 22, 2020).

11. Motion Properly Granted.

Judgment of acquittal for aggravated child neglect was properly granted as the evidence was insufficient to prove that defendant knowingly did not feed the child or knowingly neglected her because defendant steadfastly claimed that she fed the child; the daycare provider testified that, when she saw the child a few days before her death, the child was sick but that she did not look like she did in the autopsy pictures; defendant's mother testified that the child was sick with a cold but otherwise appeared to be okay; and a medical examiner testified that she was not provided with a history of the child's being sick during the week before her death when she performed the autopsy and issued her report stating the cause of death was homicide. State v. Weems, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 8 (Tenn. Crim. App. Jan. 10, 2020).

12. Waiver.

In an aggravated statutory rape case, defendant waived any issue as to the denial of his motion for a judgment of acquittal made at the close of the state's proof because he chose to call witnesses and presented proof. State v. Collier, 411 S.W.3d 886, 2013 Tenn. LEXIS 636 (Tenn. Aug. 12, 2013), cert. denied, Collier v. Tennessee, 188 L. Ed. 2d 128, 134 S. Ct. 1034, 571 U.S. 1180, 2014 U.S. LEXIS 967 (U.S. 2014).

13. State Closed Its Proof.

Because the State advised the trial court that it did not intend to call any additional witnesses and advised the trial court that it was resting its case-in-chief, and defense counsel made, and the trial court entertained, a motion for judgment of acquittal, the State had closed its proof even though it had not done so formally in front of the jury. State v. Sexton, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 707 (Tenn. Crim. App. Nov. 5, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 209 (Tenn. Mar. 26, 2020), cert. denied, Sexton v. Tennessee, 208 L. Ed. 2d 291, — S. Ct. —, — U.S. —, 2020 U.S. LEXIS 5300 (U.S. Nov. 2, 2020).

Rule 29.1. Closing Argument. —

(a) State's First Closing Argument; Waiver. —

(1) State's First Closing Argument. — At the close of the evidence, the state has the right to make the first closing argument to the trier of facts.

(2) Waiver. — If the state desires that all closing argument be waived, it may offer to waive such argument. If the defendant agrees, then no argument will be made. The state may not waive the first closing argument unless all closing argument is waived.

(3) Scope of State's Opening Argument. — The state's first closing argument shall cover the entire scope of the state's theory.

(b) Defendant's Closing Argument; Waiver. —

(1) Defendant Argues after State. — Each defendant shall be allowed to make a closing argument following the state's first closing argument. If the defendant waives this closing argument, the state is not permitted to make a final closing argument.

(2) Scope of Defendant's Argument. — Defendant's closing argument may address any relevant and proper subject and is not limited to matters actually argued by the state.

(c) State's Final Closing Argument. —

(1) State's Final Closing Argument. — The state shall be allowed a final closing argument following the defendant's closing arguments, unless the defendant has waived closing argument or the state has waived all argument or its final argument.

(2) Scope of State's Final Closing Argument. — The state's final closing argument is limited to the subject matter covered in the state's first closing argument and the defendant's intervening argument.

(d) Court's Discretion to Control Closing Arguments. —

(1) Discretion to Regulate Arguments. — The court has discretion to set:

(A) the number of closing arguments permitted on behalf of the state beyond the first and final closing arguments;

(B) the number of closing arguments in excess of one permitted each defendant; and

(C) the order and length of closing arguments.

(2) Policies. — The court shall allow adequate but not excessive time for closing arguments to make a full presentation of the theory of the case. If more than two arguments are made for the state, the court shall ensure that no defendant is deprived of the opportunity to answer a new argument made by the state against that defendant. It is the purpose of this rule to ensure that all argument be waived only with the consent of both sides; that the defendant shall be permitted to waive all remaining argument after the state's first closing argument; and that while the state, having the burden of proof, has the right to open and close the argument, this right shall not be exercised in such way as to deprive the defendant of the opportunity to fully answer all state argument. The court, on motion, shall enforce this purpose.

Advisory Commission Comments. This rule reflects the generally-followed philosophy of controlling summation in this state. However, the commission is aware of variances in local practice and therefore deems it necessary to spell out both the philosophy and the mechanics in order to assure fairness and uniformity of procedure.

Law Reviews. Better, Happier Juries (Neil P. Cohen), 39 Tenn. B.J. 16 (2003).

NOTES TO DECISIONS

Analysis

1. Waiver.
2. Argument Proper.

1. Waiver.

On appeal from his criminal convictions, defendant's argument under Tenn. R. Crim. P. 29.1(d)(1)(B) that the trial court erred by denying his request for both defense counsel to deliver separate portions of the closing argument sandwiched between the State's two arguments was waived because the defense acquiesced when the trial court explained its practice of allowing closing argument from only one counsel. Even if not waived, defendant failed to show that the trial court abused its discretion in denying defendant's last-minute request to change the trial court's established practice of allowing argument by only one de-

fense counsel. State v. Trusty, 326 S.W.3d 582, 2010 Tenn. Crim. App. LEXIS 339 (Tenn. Crim. App. Apr. 23, 2010), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 906 (Tenn. Sept. 27, 2010).

2. Argument Proper.

In an action for aggravated assault, vandalism, and domestic assault, the State's rebuttal, which included that defendant used a pipe not a gun to assault the victim, was in direct response to defendant's closing argument that he could not be guilty of aggravated assault because he used a pipe, not a gun as alleged in the indictment, and thus, was not a new theory. State v. Hurt, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 213 (Tenn. Crim. App. Apr. 1, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 385 (Tenn. Aug. 11, 2020).

Rule 29.2. Interim Commentary. —

During the course of the trial, the court may permit counsel to address the jury to assist jurors in understanding the evidence that has been presented or will be presented. The trial court may place reasonable time limits on such statements and shall permit all counsel to respond to the remarks of any one lawyer.

Advisory Commission Comments. This rule gives the court the discretion to allow counsel to speak directly to the jury during the trial in order to assist the jurors in understanding the context of the evidence. For example, the court may allow counsel to make a short explanation of what legal issue the next two witnesses will address. The court is given the discretion to place time and content limits on these statements, but each counsel must be given a chance to respond to the interim commentary of any lawyer.

Law Reviews. Better, Happier Juries (Neil P. Cohen), 39 Tenn. B.J. 16 (2003).

Rule 30. Instructions. —

(a) Special Requests. —

(1) Filing Request. — At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court may also entertain requests for instructions at any time before the jury retires to consider its verdict.

(2) Copy to Adversary Counsel. — Counsel requesting a jury instruction shall furnish a copy to adversary counsel at the same time the request is filed with the court.

(3) Decision on Request. — Prior to counsels' closing jury arguments, the court shall inform counsel of its proposed action on:

(A) the requests for jury instructions; and

(B) any other portion of the instructions concerning which inquiries are made.

(b) Objections to Instructions. — After the court instructs the jury, the parties shall be given an opportunity to object–out of hearing of the jury–to the content of an instruction that was given or to the failure to give a requested instruction. Counsel's failure to object does not prejudice the right of a party to assign the basis of the objection as error in a motion for a new trial.

(c) Form, Use, and Disposition of Instructions. — In the trial of all felonies–except where pleas of guilty have been entered–every word of the judge's instructions shall be reduced to writing before being given to the jury. The written charge shall be read to the jury and taken to the jury room by the jury when it retires to deliberate. The jury shall have possession of the written charge during its deliberations. After the jury's deliberations have concluded,

the written charge shall be returned to the judge and filed with the record, but it need not be copied in the minutes.

(d) TIMING OF JURY INSTRUCTIONS. —

(1) AT BEGINNING OF TRIAL. — Immediately after the jury is sworn, the court shall instruct the jury concerning its duties, its conduct, the order of proceedings, the general nature of the case, and the elementary legal principles that will govern the proceeding.

(2) BEFORE AND AFTER CLOSING ARGUMENT. — The court may instruct the jury on the applicable law before or after closing argument. After closing argument the court may repeat all or part of the instructions that were given before closing argument. The court may also give additional instructions concerning organizational and related matters after closing argument.

Advisory Commission Comments. This rule generally assures that counsel will know what the charge will contain before making the summation argument to the jury.

The requirement that a written charge be used in felony cases, which must be taken by the jury to the jury room, returned to the judge, and filed with the other papers, reiterates present law.

Rule 30(d) deals with the timing of jury instructions.

Rule 30(d)(1) requires the court to give basic instructions on procedures and law at the beginning of the trial. This requirement should better enable jurors to understand the evidence and apply the proof to the applicable law. With this background, jurors will be able to put the proof in the context of the legal rules involved in the dispute.

Rule 30(d)(2) provides the court the option of giving the bulk of the final jury instructions before closing argument. This procedure may improve the utility of counsel's closing argument by enabling the lawyers to make specific reference to the law at issue in the case. This option should greatly assist jurors in their efforts to apply the facts to the law. If such instructions are given before closing argument, the court should provide additional housekeeping instructions after that argument. The court may also repeat some of the substantive instructions already given before the closing argument.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), No. 3-30-3.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, § 189; 15 Tenn. Juris., Instructions, §§ 4, 6-17, 23.

Law Reviews. Better, Happier Juries (Neil P. Cohen), 39 Tenn. B.J. 16 (2003).

New Procedure Amendments (Donald F. Paine), 31 Tenn. B.J. 5 (1995).

Reasonable and Other Doubts: The Problem of Jury Instructions, 66 Tenn. L. Rev. 45 (1999).

NOTES TO DECISIONS

ANALYSIS

1. Special Request.
2. —Effect on Appeal.
3. Judge's Duty to Inform Counsel.
4. Form of Charge.
5. Content of Charge.
6. Instructions Not Within Rule.
7. Repeated Instructions.
8. Waiver.
9. Erroneous Instructions.
10. Instructions Proper.

1. Special Request.

Where the instructions as given were correct and covered the case, if the appellant desired further instructions, he should have submitted a special request. Lackey v. State, 578 S.W.2d 101, 1978 Tenn. Crim. App. LEXIS 284 (Tenn. Crim. App. 1978); State v. Tyson, 603 S.W.2d 748, 1980 Tenn. Crim. App. LEXIS 288 (Tenn. Crim. App. 1980).

Where the trial judge's instructions on a matter are proper, his denial of a special request is not error. State v. Story, 608 S.W.2d 599, 1980 Tenn. Crim. App. LEXIS 333 (Tenn. Crim. App. 1980).

Trial court did not err by denying defendant's motions for special jury instructions because the 2018 amendment defining when an individual had a reasonable expectation of privacy was not what the law when defendant committed his alleged offense of unlawful photography in 2016; and the record showed that the trial court gave a complete and accurate charge of the law. State v. Lambert, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 303 (Tenn. Crim. App. Apr. 28, 2020).

2. —Effect on Appeal.

Mere meagerness of an instruction is not reversible error, in the absence of a special request for an additional charge. State v.

Rollins, 605 S.W.2d 828, 1980 Tenn. Crim. App. LEXIS 300 (Tenn. Crim. App. 1980).

Where the charge which defendant protests incorporated a portion of one of his own special requests, he will not be heard to complain on appeal. State v. McKinney, 605 S.W.2d 842, 1980 Tenn. Crim. App. LEXIS 305 (Tenn. Crim. App. 1980).

Defendant did not submit a written request to the trial court for a jury instruction on a missing witness and failed to submit a transcript of the jury instructions as part of the record on appeal, as the record submitted to the appellate court contained only the written jury instructions. Accordingly, the appellate court found that there was no plain error pertaining to the jury instruction as defendant pointed to no unequivocal rule of law that had been breached. State v. Buford, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 40 (Tenn. Crim. App. Jan. 27, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 345 (Tenn. June 3, 2020).

3. Judge's Duty to Inform Counsel.

Tenn. R. Crim. P. 30(a) does not require that the judge give the precise wording of his charge before the fact; it merely mandates that he inform the parties of his proposed action on special requests and portions of the instructions about which inquiries are made. State v. McKinney, 605 S.W.2d 842, 1980 Tenn. Crim. App. LEXIS 305 (Tenn. Crim. App. 1980).

4. Form of Charge.

It was not error that part of the charge was in handwritten form while the remainder of the charge was typewritten. State v. Tyson, 603 S.W.2d 748, 1980 Tenn. Crim. App. LEXIS 288 (Tenn. Crim. App. 1980).

The requirement that the judge's charges be reduced to writing before given to the jury is mandatory. State v. Hamm, 611 S.W.2d 826, 1981 Tenn. LEXIS 408 (Tenn. 1981).

It was error requiring reversal of defendant's conviction for the trial judge to violate the requirements of Tenn. R. Crim. P. 30(c) in failing to submit "every word" of his charge to the jury in written form. State v. Gorman, 628 S.W.2d 739, 1982 Tenn. LEXIS 388 (Tenn. 1982).

The trial court's failure, in response to a jury question, to give the instruction answering the question in open court, was harmless error because the error did not more probably than not affect the jury's judgment. State v. Bowers, 77 S.W.3d 776, 2001 Tenn. Crim. App. LEXIS 693 (Tenn. Crim. App. 2001), review or rehearing denied, — S.W.3d —, 2002 Tenn. LEXIS 71, (Tenn. 2002).

5. Content of Charge.

Where words and terms are in common use and can be understood by persons of ordinary intelligence, it is not necessary, in the absence of anything in the charge to obscure their meaning, for the trial court to define or explain them. State v. Rollins, 605 S.W.2d 828, 1980 Tenn. Crim. App. LEXIS 300 (Tenn. Crim. App. 1980).

During defendant's criminal trial for four counts of aggravated robbery, slight variance between trial court's written identity charge and verbal identity charge was insubstantial; jury was adequately instructed under Tenn. R. Crim. P. 30(c). State v. Dotson, 254 S.W.3d 378, 2008 Tenn. LEXIS 277 (Tenn. Apr. 28, 2008).

6. Instructions Not Within Rule.

Admonition, explanation, curative instructions and the like when given during the course of a trial are not "jury instructions" within the meaning of Tenn. R. Crim. P. 30. State v. Gorman, 628 S.W.2d 739, 1982 Tenn. LEXIS 388 (Tenn. 1982).

Repetition of jurors' oath is not a supplemental instruction. State v. Chestnut, 643 S.W.2d 343, 1982 Tenn. Crim. App. LEXIS 467 (Tenn. Crim. App. 1982).

7. Repeated Instructions.

Repeated instructions must be: (1) Appropriately indicated by questions or statements from jurors, or from the circumstances surrounding the deliberative and decisional process; (2) Comprehensively fair to all parties; and (3) Not unduly emphatic upon certain portions of the law to the exclusion of other parts equally applicable to the area of jury misunderstanding or confusion. Berry v. Conover, 673 S.W.2d 541, 1984 Tenn. App. LEXIS 2797 (Tenn. Ct. App. 1984).

It is not error for a court to repeat certain portions of the charge in response to a jury's request. State v. Barnard, 899 S.W.2d 617, 1994 Tenn. Crim. App. LEXIS 567 (Tenn. Crim. App. 1994).

8. Waiver.

Alleged omissions in the charge must be called to the trial judge's attention at trial or be regarded as waived. State v. Haynes, 720 S.W.2d 76, 1986 Tenn. Crim. App. LEXIS 2699 (Tenn. Crim. App. 1986).

During defendant's criminal trial, he did not object to either the inclusion of the "obtaining" element in the theft jury instruction or the omission of an accomplice jury instruction; because defendant failed to raise the issue in his motion for new trial, it was deemed waived under Tenn. R. Crim. P. 30(b). State v. Bowman, 327 S.W.3d 69, 2009 Tenn. Crim. App. LEXIS 35 (Tenn. Crim. App. Jan. 14, 2009), appeal denied, — S.W.3d —, 2009 Tenn. LEXIS 395 (Tenn. June 15, 2009), cert. denied, Bowman v. Tennessee, 175 L. Ed. 2d 388, 130 S. Ct. 559, 2009 U.S. LEXIS 8080 (U.S. 2009).

Although defendant did not ask the trial court to instruct the jury that a witness was an accomplice, and offered no argument in favor of the instruction when prompted by the trial

court, defendant did raise the issue in a motion for new trial. Waiver notwithstanding, the trial court did not err by not giving the instruction because the evidence established that the witness was not an accomplice in the victim's murder. State v. Massengale, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 290 (Tenn. Crim. App. May 2, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 390 (Tenn. Aug. 14, 2019).

Defendant had no objection to the trial court's instruction on the inference of unsatisfactorily explained possession of recently stolen property, nor did defendant file a motion for a new trial; consequently, defendant waived any challenge to the inference instruction itself. State v. Foster, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 114 (Tenn. Crim. App. Mar. 26, 2021).

9. Erroneous Instructions.

Although a contemporaneous objection must be raised to an incomplete jury charge to be used as the basis of a motion for a new trial, there is no requirement for an objection to the inclusion of an erroneous instruction or otherwise inaccurate charge. State v. Eldridge, 951 S.W.2d 775, 1997 Tenn. Crim. App. LEXIS 441 (Tenn. Crim. App. 1997).

During defendant's trial for aggravated robbery charged under a theory of criminal responsibility, the trial court plainly erred by failing to read to the jury the written instructions defining the terms intentionally and knowingly because the mens rea was an essential element of the offense and was a contested issue at trial. State v. Brewer, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 157 (Tenn. Crim. App. Mar. 11, 2019).

Although the trial court prematurely instructed the jury prior to swearing in the jury panel, the error was harmless because defendant presented no proof or argument that the timing of the preliminary instructions affected the outcome of the trial in any way. State v. Merrilees, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 91 (Tenn. Crim. App. Feb. 14, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 376 (Tenn. June 3, 2020).

Evidence did not support an instruction for child neglect because the State did not present evidence of conduct constituting neglect by defendant; therefore, the trial court should not have instructed the jury on child abuse or child neglect as a lesser included offense of aggravated sexual battery. State v. Walkington, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 734 (Tenn. Crim. App. Nov. 19, 2020).

State did not present any evidence of any injury, harm, or deleterious effect to the victim; because the evidence presented at trial was legally insufficient to support a conviction for either child abuse or child neglect, the trial court should not have instructed the jury on either offense. State v. Walkington, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 734 (Tenn. Crim. App. Nov. 19, 2020).

10. Instructions Proper.

Defendant's petition for postconviction relief was properly denied as trial counsel was not ineffective for failing to object to the jury instruction because the trial court provided complete preliminary instructions that it was the jury's job to determine what the facts of the case were, and that the jury would apply the law that the trial court gave the jury to the facts in the case; and nothing in the challenged preliminary instruction misstated the constitutional principle that the jury were the judges of the facts and of the law as it applied to the facts. Cartwright v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 239 (Tenn. Crim. App. Apr. 14, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 430 (Tenn. Aug. 7, 2020).

Rule 30.1. Exhibits in Jury Room. —

Unless for good cause the court determines otherwise, the jury shall take to the jury room for examination during deliberations all exhibits and writings, except depositions, that have been received in evidence.

Advisory Commission Comments. This rule changes the long-standing practice in Tennessee of not allowing the jury in criminal cases to take the exhibits to the jury room for their study and examination during deliberations.

This rule, applicable in criminal cases, is mandatory unless the judge, either on motion of a party or sua sponte, determines that an exhibit should not be submitted to the jury. Among the reasons why a particular exhibit might not be submitted are that the exhibit may endanger the health and safety of the jurors, the exhibit may be subjected to improper use by the jury, or a party may be unduly prejudiced by submission of the exhibit to the jury.

NOTES TO DECISIONS

Analysis

1. In General.
2. Tape Recordings.

1. In General.

The specific exclusion of depositions by Tenn. R. Crim. P. 30.1, and the lack of reference to other types of evidence, necessarily requires that all other evidence be treated as within the scope of this rule. State v. Long, 45 S.W.3d 611, 2000 Tenn. Crim. App. LEXIS 409 (Tenn. Crim. App. 2000).

2. Tape Recordings.

A tape recording submitted as an exhibit is not analogous to testimony given via deposition; thus, where the jury asked to rehear defendant's audiotape recording during its deliberations, the trial court erred by not following the guidelines set forth in Tenn. R. Crim. P. 30.1 and there was no good cause to keep the tape from the jury. State v. Long, 45 S.W.3d 611, 2000 Tenn. Crim. App. LEXIS 409 (Tenn. Crim. App. 2000).

Appellate court could not say that a trial court abused its discretion by allowing the jurors to review a surveillance video recording of an alleged aggravated robbery in the jury room because it appeared that the jury was provided with a laptop to review the recording, that they were provided with the CD of the video, and that there was an information technology guy available to assist if needed. State v. Bingham, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 760 (Tenn. Crim. App. Oct. 8, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 61 (Tenn. Jan. 17, 2019).

Rule 31. Verdict. —

(a) Unanimity. — The jury's verdict shall be unanimous.

(b) Return in Open Court. — The jury shall return the verdict to the judge in open court.

(c) Multiple Defendants. — If there are multiple defendants, the jury may return a verdict at any time during its deliberations as to any defendant about whom it has agreed. If the jury cannot agree on all defendants, the state may try again any defendant on whom the jury was not in agreement.

(d) Conviction of Lesser Offense. —

(1) Definition of Lesser Included Offense. — The defendant may be found guilty of:

(A) an offense necessarily included in the offense charged; or

(B) an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

(2) Procedures When No Unanimous Verdict. — If the court instructs the jury on one or more lesser included offenses and the jury reports that it cannot unanimously agree on a verdict, the court shall address the foreperson and inquire whether there is disagreement as to the charged offense and each lesser offense on which the jury was instructed. The following procedures apply:

(A) The court shall begin with the charged offense and, in descending order, inquire as to each lesser offense until the court determines at what level of the offense the jury has disagreed;

(B) The court shall then inquire if the jury has unanimously voted not guilty to the charged offense.

(i) If so, at the request of either party, the court shall poll the jury as to their verdict on the charged offense.

(ii) If it is determined that the jury found the defendant not guilty of the charged offense, the court shall enter a not guilty verdict for the charged offense.

(C) The court shall then inquire if the jury unanimously voted not guilty as to the next, lesser instructed offense.

(i) If so, at the request of either party the court shall poll the jury as to their verdict on this offense.

(ii) If it is determined that the jury found the defendant not guilty of the lesser offense, the court shall enter a not guilty verdict for that offense.

(D) The court shall continue this inquiry for each lesser instructed offense in descending order until the inquiry comes to the level of the offense on which the jury disagreed.

(E) The court may then declare a mistrial as to that lesser offense, or the court may direct the jury to deliberate further as to that lesser offense as well as any remaining offenses originally instructed to the jury.

(e) POLL OF JURY. — After a verdict is returned but before the verdict is recorded, the court shall—on a party's request or on the court's own initiative—poll the jurors individually. If the poll indicates that there is not unanimous concurrence in the verdict, the court may discharge the jury or direct the jury to retire for further deliberations.

Advisory Commission Comments. This rule is similar to the federal rule, except that it contains no provision dealing with criminal forfeiture.

In cases where the court instructs the jury on the charged offense and one or more lesser offenses, and the jury reports an inability to reach a verdict, it is not always apparent on which offense the jury disagreed. The practice in Tennessee is to give sequential jury instructions that require a jury to consider guilty of the greatest charged offense before moving on to consider the lesser offenses. In some cases, the jury may acquit the defendant of the greater offense but be unable to reach a unanimous verdict on one or more lesser offenses. If the court grants a mistrial as to all offenses because of the jury's failure to reach agreement on a lesser offense, the double jeopardy clause is implicated if the jury actually acquitted the defendant of one or more of the greater offenses but disagreed on a lesser one.

Subdivision (d) is intended to minimize double jeopardy issues and avoid releasing a jury without determining whether it reached agreement on some degree of the charged offense.

The rule provides for a sequential inquiry by the trial court, beginning with the greatest charged offense and continuing in descending order of offenses until the court determines at what level the jury has disagreed. The court must then determine whether the jury unanimously found the defendant not guilty of any greater offense. To eliminate ambiguity, the rule also provides for jury polling on a party's request. Rule 30(e) also permits the court to poll the jury on the court's own initiative.

Textbooks. Tennessee Jurisprudence. 3 Tenn. Juris., Assault and Battery, § 3; 17 Tenn. Juris., Jury, § 44; 18 Tenn. Juris., Merger, § 1.

Law Reviews. Adjudicating Claims of Innocence for the Capitally Condemned in Tennessee: Embracing a Truth Forum (Dwight Aarons), 76 Tenn. L. Rev. 511 (2009).

New Rules Regarding Lesser Included Offense Instructions (David L. Raybin), 37 Tenn. B.J. 32 (2001).

NOTES TO DECISIONS

ANALYSIS

1. Multiple Counts.
2. Lesser Included Offenses.
3. Poll of Jury.

1. Multiple Counts.

There is no requirement that a verdict on a multiple count indictment be consistent as to each count, because each count is considered a separate indictment. State v. Gautney, 607 S.W.2d 907, 1980 Tenn. Crim. App. LEXIS 326 (Tenn. Crim. App. 1980).

2. Lesser Included Offenses.

While charging the greater and lesser offenses is not necessary, case law allows joinder in separate counts of the same indictment. State v. Banes, 874 S.W.2d 73, 1993 Tenn. Crim. App. LEXIS 718 (Tenn. Crim. App. 1993).

The offenses of facilitation and solicitation were found to be lesser-included offenses of criminal responsibility for first-degree murder as charged in defendant's indictment. State v. Burns, 6 S.W.3d 453, 1999 Tenn. LEXIS 572 (Tenn. 1999), superseded by statute as stated in, State v. Campbell, — S.W.3d —, 2015 Tenn.

Crim. App. LEXIS 860 (Tenn. Crim. App. Oct. 20, 2015), superseded by statute as stated in, State v. Whitehair, — S.W.3d —, 2016 Tenn. Crim. App. LEXIS 171 (Tenn. Crim. App. Mar. 8, 2016), superseded by statute as stated in, State v. Harris, — S.W.3d —, 2016 Tenn. Crim. App. LEXIS 331 (Tenn. Crim. App. May 3, 2016), superseded by statute as stated in, State v. Beaty, — S.W.3d —, 2016 Tenn. Crim. App. LEXIS 842 (Tenn. Crim. App. Nov. 8, 2016).

The trial court's duty to instruct the jury on all lesser included offenses, if the evidence is legally sufficient to support a conviction for the lesser offense, applies whether or not a defendant requests such an instruction. State v. Rush, 50 S.W.3d 424, 2001 Tenn. LEXIS 587 (Tenn. 2001).

Because the inmate affirmatively requested a jury instruction on the offense of aggravated assault, even though he was in error in believing that it was a lesser-included offense of attempted first-degree murder, he effectively agreed to amend the indictment to include aggravated assault; therefore, the trial court had jurisdiction to convict the inmate of aggravated assault, his conviction was not void, and he was not entitled to habeas corpus relief. Demonbreun v. Bell, 226 S.W.3d 321, 2007 Tenn. LEXIS 452 (Tenn. May 8, 2007), rehearing denied, — S.W.3d —, 2007 Tenn. LEXIS 529 (Tenn. May 25, 2007).

3. Poll of Jury.

Double jeopardy barred defendant's retrial because the court discharged the jury without determining whether the jury was hopelessly deadlocked, without finding that termination of the trial was manifestly necessary, and without actually declaring a mistrial; rather than clarifying the unorthodox verdicts, the court polled the jury, accepted the verdicts as rendered, and dismissed the jury. State v. Houston, 328 S.W.3d 867, 2010 Tenn. Crim. App. LEXIS 197 (Tenn. Crim. App. Mar. 3, 2010).

Petitioner failed to show that his trial counsel was ineffective for failing to poll the jury at the conclusion of the trial, and therefore he was properly denied postconviction relief, because there was no indication that the jury verdict was not unanimous. Whitehair v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 138 (Tenn. Crim. App. Feb. 26, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 463 (Tenn. July 17, 2020).

VII. JUDGMENT.

Rule 32. Sentence and Judgment. —

(a) Sentence for Offense Committed Before July 1, 1982. — Upon a verdict or plea of guilty, sentence shall be set as provided by law. In any case wherein an appeal lies, and the law permits a suspended sentence, if the defendant desires to petition for a suspended sentence, the defendant may do so within five (5) days after the overruling of his or her motion for a new trial or motion in arrest of judgment, whichever comes last. A record shall be made of the hearing upon the petition. The filing of the petition is no waiver of the right of appeal, whether the petition be granted or not. The judgment of the trial judge upon the petition is reviewable upon appeal by either the defendant or the state. A petition for a suspended sentence may not be filed after appeal. The trial judge shall hear all petitions for suspended sentences which have already been filed before the notice of appeal, and, in those cases wherein a notice of appeal of the convictions is filed before a petition for a suspended sentence is filed, the trial judge shall hold a hearing upon the petition within the time previously allowed for the filing of the transcript so as to make possible the inclusion in the transcript upon the petition for a suspended sentence.

(b) Sentence for Offense Committed On or After July 1, 1982. — After a verdict or plea of guilty, the court shall set the sentence except as to habitual criminal charges or capital cases where notice has previously been given. When the court imposes sentence, the sentence shall be fixed as provided by law.

(c) Concurrent or Consecutive Sentences. —

(1) Multiple Sentences from One Trial. — If the defendant pleads guilty or is convicted in one trial of more than one offense, the trial judge shall

determine whether the sentences will be served concurrently or consecutively. The order shall specify the reasons for this decision and is reviewable on appeal. Unless it affirmatively appears that the sentences are consecutive, they are deemed to be concurrent.

(2) PRIOR SENTENCE NOT FULLY SERVED. —

(A) PRIOR TENNESSEE SENTENCE. —

(i) PRIOR TENNESSEE SENTENCE KNOWN. —If the defendant has additional sentences not yet fully served as the result of convictions in the same court or in other courts of Tennessee and if this fact is made known to the court prior to sentencing, the court shall recite this fact in the judgment setting sentence, and the sentence imposed is deemed to be concurrent with the prior sentence or sentences, unless it affirmatively appears that the new sentence being imposed is to be served consecutively to the prior sentence or sentences. The judgment to make the sentences consecutive or concurrent shall explicitly relate the judge's reasons and is reviewable on appeal.

(ii) PRIOR TENNESSEE SENTENCE UNKNOWN. —When prior unserved Tennessee sentences are not called to the attention of the trial judge by or on behalf of the defendant at the time of sentencing and are not included in the judgment setting the new sentence, the new sentence is deemed to be consecutive to any such undisclosed prior unserved sentence or sentences.

(iii) PAROLE REVOCATION. —The new sentence is consecutive when the defendant is convicted of a misdemeanor while on parole from an undisclosed prior sentence, and the parole is subsequently revoked.

(B) PRIOR NON-TENNESSEE SENTENCE. — If, as the result of conviction in another state or in federal court, the defendant has any additional sentence or portion thereof to serve, the court shall impose a sentence that is consecutive to any such unserved sentence unless the court determines in the exercise of its discretion that good cause exists to run the sentences concurrently and explicitly so orders.

(3) MANDATORY CONSECUTIVE SENTENCES. — When a defendant is convicted of multiple offenses from one trial or when the defendant has additional sentences not yet fully served as the result of convictions in the same or other courts and the law requires consecutive sentences, the sentence shall be consecutive whether the judgment explicitly so orders or not. This rule shall apply:

(A) to a sentence for a felony committed while on parole for a felony;

(B) to a sentence for escape or for a felony committed while on escape;

(C) to a sentence for a felony committed while the defendant was released on bail and the defendant is convicted of both offenses; and

(D) for any other ground provided by law.

(d) RELEASE AFTER CONVICTION, PENDING FURTHER PROCEEDINGS. —

(1) MISDEMEANOR. — A person convicted of a misdemeanor has a right to have bail set or to be released on recognizance pending the exhaustion of all direct appellate procedure in the case.

(2) FELONY. —

(A) APPLICATION BEFORE APPEAL PENDING. — When the law permits release on bail or recognizance after return of a guilty verdict for a felony, the trial judge may order such release pending further proceedings in a trial court or

on direct appeal. If in a felony case the trial judge refuses to release the defendant who has applied for release, the trial judge shall enter in the minutes the reasons for the ruling. This decision is reviewable.

(B) Application When Appeal Pending. — After the case is pending in an appellate court, the defendant may apply for release either to the trial court where the conviction was entered or to the appellate court where the appeal is pending.

(e) Judgment. —

(1) Signed and Entered. — A judgment of conviction shall be signed by the judge and entered by the clerk.

(2) Content of Judgment of Conviction. — A judgment of conviction shall include:

(A) the plea;

(B) the verdict or findings; and

(C) the adjudication and sentence.

(3) Judgment of Not Guilty or Discharge. — If the defendant is found not guilty or for any other reason is entitled to be discharged, the court shall enter judgment accordingly.

(f) Withdrawal of Guilty Plea. —

(1) Before Sentence Imposed. — Before sentence is imposed, the court may grant a motion to withdraw a guilty plea for any fair and just reason.

(2) After Sentence But Before Judgment Final. — After sentence is imposed but before the judgment becomes final, the court may set aside the judgment of conviction and permit the defendant to withdraw the plea to correct manifest injustice.

(g) Revocation of Probation. — The court may revoke probation only after a hearing conducted according to law. The losing party may appeal the judgment resulting from this hearing. The defendant may be released pursuant to applicable law pending such hearing and/or such appeal.

Advisory Commission Comments. Subdivision (a) applies to cases arising under the law prior to the judge-sentencing provisions. Essentially, the defendant had a right to jury sentencing prior to 1982.

Subdivision (b) conforms to the judge sentencing laws of 1982 and 1989. A capital case requires notice under Rule 12.3(b). Fines are governed by T.C.A. Section 40-35-301.

Subdivision (c) deals with circumstances where sentences are to run concurrently or consecutively. The former rule is retained except that the state may appeal concurrent sentences as provided in T.C.A. Section 40-35-402.

Subdivision (e) deals with judgments. Counsel should be aware that Rule 17 of the Rules of the Tennessee Supreme Court provides for a Uniform Judgment Document.

Cross-References. Enhancement factors, felonies committed while on escape, T.C.A. § 40-35-114.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 3-32-1, 3-32-5.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 83, 84, 87; 8 Tenn. Juris., Criminal Procedure, §§ 43, 47.

Law Reviews. The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 4, 23.

Attorney General Opinions. Release on bond of misdemeanant on de novo appeal, OAG 87-161 (10/5/87).

Revocation of probation not a direct procedure, OAG 98-0142 (8/7/98).

Duty to set bond on misdemeanant's appeal of probation revocation or denial, OAG 98-0142 (8/7/98), OAG 98-0170 (8/28/98).

Review of revocation of probationary sentence — Reconsideration of Opinion No. 99-080, OAG 99-199 (9/29/99).

The District Attorney General may bring an illegal judgment to the trial court's attention through a motion under the rule requesting that the trial court correct the illegal judgment and enter the sentence as provided by law, OAG 00-074 (4/17/00).

A defendant who has entered a guilty plea in general sessions court may file a motion to

withdraw that plea under the provisions of Tenn. R. Crim. P. 32(f), OAG 07-072 (5/16/07).

NOTES TO DECISIONS

Analysis

1. Jurisdiction.
2. Consecutive Sentences.
3. —Effect of Parole.
4. Mandatory Consecutive Sentences.
5. Withdrawal of Guilty Plea.
6. Delayed Hearing.
7. Discretion of Judge.
8. Clerical Error.
9. Certified Question.
10. Compliance with Rule.
11. Bail.
12. Judgment of Conviction.
13. Credit.
14. Counsel.

1. Jurisdiction.

Trial court did not lose jurisdiction to decide question of probation even though 30 days from entering judgment had passed without the filing of a petition for probation where the trial court had ordered a presentence report beyond the 30-day period, then reset the date to an even later time, and the evidence showed the court did not intend its order to become final. State v. Bryce, 669 S.W.2d 713, 1984 Tenn. Crim. App. LEXIS 2315 (Tenn. Crim. App. 1984).

Any motion by defendant to withdraw defendant's guilty pleas based on manifest injustice was not timely because such a motion could have been granted after sentence was imposed but before the judgment became final thirty days after entry. The trial court lost jurisdiction to amend a judgment at that time. Wade v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 132 (Tenn. Crim. App. Feb. 21, 2020).

2. Consecutive Sentences.

The trial court did not abuse its discretion in fixing consecutive sentences on conviction of defendant on two counts of rape and one count of first-degree burglary where the violence and threats accompanying the entire episode, in which the jury found defendant a full participant, were sufficient to constitute aggravating circumstances justifying such sentences. Seelbach v. State, 572 S.W.2d 267, 1978 Tenn. Crim. App. LEXIS 326 (Tenn. Crim. App. 1978).

Since burglary and rape both carry indicia of high risk to human life and since appellant threatened to kill the prosecutrix, an order of consecutive sentences was not an abuse of discretion. State v. Black, 618 S.W.2d 526, 1981 Tenn. Crim. App. LEXIS 352 (Tenn. Crim. App. 1981).

In making the determination to impose consecutive sentencing the court is not limited to consideration of criminal activity or conduct occurring after one reaches the age of eighteen years. A juvenile record of criminal conduct may properly be considered in assessing a suitable sentence upon a felony conviction by an adult. State v. Stockton, 733 S.W.2d 111, 1986 Tenn. Crim. App. LEXIS 2529 (Tenn. Crim. App. 1986).

Where defendant's prior unserved in-state sentences were not called to the attention of the trial judge on behalf of defendant at the time of sentencing, the trial judge properly determined that defendant's second sentence was deemed to be consecutive to his prior sentences. State v. Leach, 914 S.W.2d 104, 1995 Tenn. Crim. App. LEXIS 442 (Tenn. Crim. App. 1995).

Where defendant pled guilty to burglary and theft offenses committed while he was on intensive probation for robbery, an order that he serve the robbery sentence and the burglary and theft sentences consecutive thereto was appropriate. State v. Moore, 942 S.W.2d 570, 1996 Tenn. Crim. App. LEXIS 686 (Tenn. Crim. App. 1996).

The legislature did not intend a community corrections sentence and a probation sentence to be equivalents for purposes of consecutive sentencing under T.C.A. § 40-35-115(b)(6). State v. Pettus, 986 S.W.2d 540, 1999 Tenn. LEXIS 44 (Tenn. 1999).

Tenn. R. Crim. P. 32(c)(3) did not require inmate's sentences to be served consecutive to each other, and there was no other basis for requiring consecutive sentences for these offenses; accordingly, concurrent forty-year sentences for convictions for robbery and murder were not illegal, and the inmate was not entitled to habeas corpus relief. Hogan v. Mills, 168 S.W.3d 753, 2005 Tenn. LEXIS 599 (Tenn. 2005), rehearing denied, — S.W.3d —, 2005 Tenn. LEXIS 634 (Tenn. July 25, 2005).

Inmate was not entitled to relief in habeas proceeding on the ground that judgments for 1985 robbery and murder convictions did not explicitly provide that sentences were to be served consecutive to sentence for 1981 conviction, for which he was on parole at the time of the later crimes; Tenn. R. Crim. P. 32(c)(3) mandated that new sentences run consecutively to the prior sentence whether the judgment explicitly so ordered or not. Hogan v. Mills, 168 S.W.3d 753, 2005 Tenn. LEXIS 599 (Tenn. 2005), rehearing denied, — S.W.3d —, 2005 Tenn. LEXIS 634 (Tenn. July 25, 2005).

Trial court did not err by ordering defendant's three-year sentences for theft and vehicular assault to be served concurrently to each other but consecutively to defendant's

21-year sentence for aggravated vehicular homicide, resulting in a 24-year sentence; defendant had a record of criminal activity which was extensive for purposes of Tenn. R. Crim. P. 32(c)(1) and there was enough evidence of convictions to show that defendant had engaged in criminal activity for most of his adult life. State v. Bowman, 327 S.W.3d 69, 2009 Tenn. Crim. App. LEXIS 35 (Tenn. Crim. App. Jan. 14, 2009), appeal denied, — S.W.3d —, 2009 Tenn. LEXIS 395 (Tenn. June 15, 2009), cert. denied, Bowman v. Tennessee, 175 L. Ed. 2d 388, 130 S. Ct. 559, 2009 U.S. LEXIS 8080 (U.S. 2009).

Court of criminal appeals did not err in remanding a case for a proper determination of whether defendant's sentences had to be served consecutively or concurrently because the trial court failed to address the factors required to impose consecutive sentences based on the dangerous offender classification; it did not demonstrate that the imposition of consecutive sentences reasonably related to the severity of the offenses or the total sentence was necessary to protect the public from defendant. State v. Pollard, 432 S.W.3d 851, 2013 Tenn. LEXIS 1011 (Tenn. Dec. 20, 2013).

Because the dangerous offender classification is the most subjective to apply, the record must also establish the aggregate sentence reasonably relates to the severity of the offenses and that the total sentence is necessary for the protection of the public from further crimes by the defendant; thus, when trial courts fail to include the two additional findings before classifying a defendant as a dangerous offender, they fail to adequately provide reasons on the record to support the sentences. State v. Pollard, 432 S.W.3d 851, 2013 Tenn. LEXIS 1011 (Tenn. Dec. 20, 2013).

When a trial court places findings on the record to support its sentencing decision the applicable standard of appellate review for a challenge to the imposition of consecutive sentences is abuse of discretion with a presumption of reasonableness. State v. Pollard, 432 S.W.3d 851, 2013 Tenn. LEXIS 1011 (Tenn. Dec. 20, 2013).

Where a trial court fails to provide adequate reasons for imposing consecutive sentences, an appellate court should neither presume that consecutive sentences are reasonable nor defer to the trial court's exercise of its discretionary authority; an appellate court has two options: conduct a de novo review to determine whether there is an adequate basis for imposing consecutive sentences, or remand for the trial court to consider the factors in determining whether to impose consecutive sentences. State v. Pollard, 432 S.W.3d 851, 2013 Tenn. LEXIS 1011 (Tenn. Dec. 20, 2013).

Trial court followed the mandate of the court of criminal appeals and committed no error in imposing consecutive sentences because it made additional findings and stated facts to support such findings; the trial court found that the circumstances surrounding the commission of the offense were aggravated and that confinement for an extended period of time was necessary to protect society, and it determined that the aggregate length of the sentences reasonably relates to the offense. State v. Henderson, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 254 (Tenn. Crim. App. Apr. 18, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 316 (Tenn. July 17, 2019).

Trial court properly imposed consecutive sentences to each other and to a prior sentence for defendant's guilty-pleaded convictions of aggravated burglary and theft of property valued at $60,000 or more but less than $250,000 because defendant's presentence investigation report showed a lengthy criminal history of at least 30 convictions spanning most of the defendant's adult life, and the trial court's finding of an extensive criminal history, which was amply supported by the record, was a sufficient basis for the imposition of consecutive sentences. State v. Cuevas, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 320 (Tenn. Crim. App. May 20, 2019).

Trial court did not err in ordering defendant to serve his 10-year sentence for aggravated assault consecutively to his outstanding federal sentence, as consecutive sentencing was warranted pursuant to Tenn. R. Crim. P. 32(c)(2)(B), as good cause did not exist to run the sentences concurrently; defendant had an extensive criminal history that included convictions for violent offenses, had been on probation on multiple occasions, and had his probation revoked multiple times. State v. Sweeney, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 644 (Tenn. Crim. App. Oct. 11, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 116 (Tenn. Feb. 19, 2020).

3. —Effect of Parole.

Appellate court reformed judgment in trial court which directed that sentence be served "at the expiration of" a previous sentence for which the defendant was on parole at the time the instant offense was committed, by deleting the words "said sentence to run at the expiration of his present sentence," so that the instant sentence would be served consecutively as a matter of law, in conformity with T.C.A. § 40-28-123 permitting parole from portion of former sentence and Tenn. R. Crim. P. 32(b). State v. Venable, 606 S.W.2d 298, 1980 Tenn. Crim. App. LEXIS 299 (Tenn. Crim. App. 1980).

Inmate was not entitled to habeas relief on grounds a trial court lacked jurisdiction to clarify the inmate's sentence was consecutive because the inmate's sentence for a felony committed while on parole for a felony was consecutive whether or not a trial court's judgment so provided. Yates v. Perry, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 142 (Tenn. Crim. App. Feb. 26, 2020).

4. Mandatory Consecutive Sentences.

The trial court properly imposed consecutive sentences for defendant's conviction of aggravated sexual battery and a prior conviction of second degree murder, committed while defendant was on bail for the sexual battery. State v. Blanton, 926 S.W.2d 953, 1996 Tenn. Crim. App. LEXIS 67 (Tenn. Crim. App. 1996).

Under Tenn. R. Crim. P. 32(c)(3)(C) and T.C.A. § 40-20-111(b), consecutive sentencing is mandatory when a defendant commits a felony while on bond and the defendant is subsequently convicted of both offenses. State v. Hastings, 25 S.W.3d 178, 1999 Tenn. Crim. App. LEXIS 1312 (Tenn. Crim. App. 1999).

In a habeas corpus proceeding based upon defendant's contention that his concurrent sentence for escape and the underlying crimes was illegal and therefore resulted in a void judgment, although the judgment on defendant's escape conviction stated that the sentence was to be served concurrently with his sentences for the underlying crimes, the judgment was silent as to whether defendant committed the escape while being held for the other charges, and therefore no illegality of the sentence was evident on the face of the judgment; because the escape judgment was facially valid and defendant failed to support his factual assertions with pertinent documents from the record of the underlying proceedings, summary dismissal was proper. Summers v. State, 212 S.W.3d 251, 2007 Tenn. LEXIS 15 (Tenn. 2007).

Where the trial court ordered defendant to serve his sentence for escape concurrently to his sentences for voluntary manslaughter and aggravated arson, in direct contravention of T.C.A. § 39-16-605(c) and Tenn. R. Crim. P. 32(c)(3)(B), but defendant made a threshold showing that he was entitled to habeas corpus relief, the trial court erred by dismissing his petition for writ of habeas corpus. Summers v. Fortner, 267 S.W.3d 1, 2008 Tenn. Crim. App. LEXIS 117 (Tenn. Crim. App. Feb. 6, 2008).

Sentence of eleven months and twenty-nine days was not an authorized term of imprisonment for a Class D felony under T.C.A. § 40-35-111(b)(4) and was therefore an illegal sentence pursuant to Tenn. R. Crim. P. 36.1(2), and because defendant was convicted of a felony in one count, the sentence would be mandated to be served consecutively to the effective sentence for the other felony convictions pursuant to § 40-20-111(b) and this rule. State v. Menke, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 398 (Tenn. Crim. App. May 21, 2018), rev'd, 590 S.W.3d 455, 2019 Tenn. LEXIS 513 (Tenn. Nov. 27, 2019).

Trial court did not abuse its discretion by imposing consecutive sentencing because it was mandatory, as the presentence report showed that defendant was under parole supervision when he committed the instant offense. State v. Delosh, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 120 (Tenn. Crim. App. Feb. 22, 2019).

Trial court ordered defendant to serve his 10-year sentence for aggravated assault consecutively to his outstanding federal sentence, finding that consecutive sentencing was mandatory pursuant to Tenn. R. Crim. P. 32(c)(3)(A); however, defendant was on supervised release for a federal felony conviciton when he committed the instant offenses, and because federal supervised release was not analogous to parole, Rule 32(c)(3)(A) did not apply. State v. Sweeney, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 644 (Tenn. Crim. App. Oct. 11, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 116 (Tenn. Feb. 19, 2020).

Trial court did not abuse its discretion by imposing within-range consecutive sentences when defendant was convicted of possession of heroin with the intent to sell and possession with intent to deliver 0.5 gram or more of cocaine because defendant's Alabama felony drug convictions were committed after defendant was released on bond in the case before the Tennessee court. State v. Johnson, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 545 (Tenn. Crim. App. Aug. 7, 2020).

5. Withdrawal of Guilty Plea.

A defendant does not have the unilateral right to withdraw a guilty plea once submitted where the plea has been voluntarily and intelligently made. State v. Anderson, 645 S.W.2d 251, 1982 Tenn. Crim. App. LEXIS 479 (Tenn. Crim. App. 1982).

The decision whether to grant a motion to withdraw a plea of guilty rests within the sound discretion of the trial judge and is not subject to reversal unless it clearly appears that there was an abuse of discretion. State v. Drake, 720 S.W.2d 798, 1986 Tenn. Crim. App. LEXIS 2753 (Tenn. Crim. App. 1986).

The accused has the burden of establishing that the plea of guilty should be withdrawn to prevent "manifest injustice." In determining whether the accused has carried this burden, the trial court must determine whether the accused and any witnesses presented to establish this standard are credible. State v. Turner, 919 S.W.2d 346, 1995 Tenn. Crim. App. LEXIS 779 (Tenn. Crim. App. 1995).

Tenn. R. Crim. P. 32(f) makes clear that a trial court has the power to set aside a guilty plea after the plea is accepted by the court; however, after judgment has been entered, a trial court does not have the inherent power to withdraw its acceptance of the plea and the only avenue available to a defendant is a collateral proceeding under the Post-Conviction Procedure Act, T.C.A. § 40-30-201 et seq. (now 40-30-101 et seq.) State v. Burris, 40 S.W.3d 520, 2000 Tenn. Crim. App. LEXIS 545 (Tenn. Crim. App. 2000).

Trial court judge might not have had the discretion to sentence petitioner concurrently

for aggravated rape, rape and burglary when one of the offenses might have been committed when petitioner was released on bail; as such, petitioner should have been allowed to withdraw the guilty pleas. McLaney v. Bell, 59 S.W.3d 90, 2001 Tenn. LEXIS 764 (Tenn. 2001), overruled in part, Summers v. State, 212 S.W.3d 251, 2007 Tenn. LEXIS 15 (Tenn. 2007), overruled in part, Brown v. Lewis, — S.W.3d —, 2007 Tenn. Crim. App. LEXIS 155 (Tenn. Crim. App. Feb. 22, 2007), overruled in part, Nevilles v. United States, — F. Supp. 2d —, 2015 U.S. Dist. LEXIS 40237 (W.D. Tenn. Mar. 30, 2015), overruled in concurring opinion at State v. Taylor, — S.W.3d —, 2015 Tenn. Crim. App. LEXIS 849 (Tenn. Crim. App. Oct. 13, 2015).

Trial court had jurisdiction to hear defendant's motion to withdraw his guilty plea, which was filed 28 days after defendant was sentenced, as the judgment of conviction based upon defendant's plea did not become final until 30 days after its entry. State v. Green, 106 S.W.3d 646, 2003 Tenn. LEXIS 326 (Tenn. 2003).

State v. Hall, 983 S.W.2d 710, 1998 Tenn. Crim. App. LEXIS 902 (Tenn. Crim. 1998) is overruled so that each defendant who enters a plea agreement regardless of whether there has been a waiver of the right to appeal, has 30 days within which to determine whether circumstances exist that may prompt the filing of a motion to withdraw the previously entered plea pursuant to Tenn. R. Crim. P. 32(f). State v. Green, 106 S.W.3d 646, 2003 Tenn. LEXIS 326 (Tenn. 2003).

Defendant's guilty pleas were not knowingly, voluntarily, and understandingly entered, and the pleas were entered through a misunderstanding as to their effects, because the transcript of the plea submission hearing reflected that even though the trial court and parties participating in the plea submission hearing made a valiant effort to explain to defendant the ramifications of his pleas as they related to his place of confinement and concurrent sentences, there was a misunderstanding as to their effects; testimony at the plea submission hearing clearly reflected that defendant entered his pleas with the intent of serving his sentences concurrently at a federal facility. State v. Virgil, 256 S.W.3d 235, 2008 Tenn. Crim. App. LEXIS 94 (Tenn. Crim. App. Feb. 14, 2008).

Denial of defendant's motion to withdraw his guilty plea was inappropriate pursuant to T.C.A. § 39-13-524(a) because the trial court failed to warn defendant of the mandatory nature of lifetime community supervision and the state was unable to establish that the error was harmless beyond a reasonable doubt. Defendant demonstrated manifest injustice under Tenn. R. Crim. P. 32(f)(2) and should be afforded the opportunity to withdraw his guilty plea. State v. Nagele, 353 S.W.3d 112, 2011 Tenn. LEXIS 762 (Tenn. Aug. 25, 2011).

Trial court did not abuse its discretion in denying defendant's motion to withdraw defendant's guilty plea because, after considering each of the relevant factors in determining what constituted any fair and just reason supporting the withdrawal of a guilty plea prior to a sentence being imposed, the trial court determined that defendant entered the plea agreement voluntarily and intelligently and that defendant merely wished that the dismissal of a civil suit was part of the plea agreement. State v. Stevison, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 602 (Tenn. Crim. App. Sept. 26, 2019).

Trial court did not abuse its discretion in determining there was no fair and just reason for allowing defendant to withdraw his guilty plea because during the four-month period between his guilty pleas and the filing of his motion to withdraw, defendant failed to show up for the sentencing hearing; defendant's failure to move to withdraw earlier weighed against setting aside his pleas because the turnover in counsel was not a valid reason for his failure to move to withdraw earlier. State v. Birdwell, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 711 (Tenn. Crim. App. Nov. 7, 2019).

Trial court did not abuse its discretion in determining there was no fair and just reason for allowing defendant to withdraw his guilty plea because during the four-month period between his guilty pleas and the filing of his motion to withdraw, defendant failed to show up for the sentencing hearing; defendant's failure to move to withdraw earlier weighed against setting aside his pleas because the turnover in counsel was not a valid reason for his failure to move to withdraw earlier. State v. Birdwell, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 711 (Tenn. Crim. App. Nov. 7, 2019).

Trial court erred by summarily dismissing defendant's motion to withdraw his guilty pleas; the trial court did not explain how the issue of defendant not being advised of community supervision for life could have been previously litigated when no court ever held a hearing to address it. State v. Jackson, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 32 (Tenn. Crim. App. Jan. 24, 2020).

Petitioner was not entitled to post-conviction relief and counsel was not ineffective for failing to request withdrawal of petitioner's guilty plea; he communicated to counsel that he wished to go forward with sentencing following the entry of his plea and he never raised his desire to withdraw his plea during the sentencing hearing. As petitioner failed to provide a just reason to withdraw his plea, he failed to show that, but for counsel's inaction, the trial court would have granted a request to withdraw his plea, Talley v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 71 (Tenn. Crim.

App. Feb. 6, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 338 (Tenn. June 3, 2020).

Evidence did not preponderate against the post-conviction court's finding that counsel made a strategic decision not to pursue the withdrawal of the guilty plea, and counsel's multiple discussions with petitioner dealt with his sentencing exposure if he withdrew his guilty plea and went to trial; counsel's strategy included a decision not to explain the further difficulties involved of withdrawing the plea after sentencing, which was not second guessed on review, and petitioner was not entitled to post-conviction relief. Talley v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 71 (Tenn. Crim. App. Feb. 6, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 338 (Tenn. June 3, 2020).

Trial court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea because defendant was faced with a choice of going to trial where there were multiple eyewitnesses who would place a gun in his hand at the time of the assault including one of his own close relatives, and face the possibility of up to six years confinement or he could plead guilty in exchange for an agreed upon up-front probation, and nothing showed his choice was involuntary. State v. Parnell, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 112 (Tenn. Crim. App. Feb. 19, 2020).

Trial court did not abuse its discretion by denying defendant's motion to withdraw defendant's no contest plea because defendant failed to demonstrate that a manifest injustice occurred as the court concluded that defense counsel's performance in not requesting a change of venue was not deficient and that defendant voluntarily and knowingly entered defendant's plea. State v. Barnett, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 227 (Tenn. Crim. App. Apr. 9, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 499 (Tenn. Sept. 16, 2020).

Trial court did not abuse its discretion by denying defendant's motion to withdraw his guilty plea because defendant testified that he was not pressured to enter his guilty pleas, he offered no proof that his medical condition or prescription medication prevented him from knowingly entering his guilty pleas, and the trial court specifically found that defendant's testimony regarding a promise by drug task force agents was not credible. State v. Capps, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 414 (Tenn. Crim. App. June 16, 2020).

Defendant's claims that his guilty pleas should be set aside to correct manifest injustice because he was denied the effective assistance of counsel in connection with the entry of his pleas lacked merit because defendant knowingly, voluntarily, and understandingly entered his pleas after informing the trial court that counsel had gone over the plea agreement forms with him and advised him of his rights, and defendant did not call trial counsel to testify about whether he provided defendant with discovery even though trial counsel was in the courtroom. State v. Duckett, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 703 (Tenn. Crim. App. Oct. 30, 2020).

Trial court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea. Defendant provided no argument or authority as to why the moot issue of restitution or the trial court's failure to give him a third opportunity for a mental evaluation supported his assertion that the trial court erred in not allowing him to withdraw his plea. State v. Strode, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 84 (Tenn. Crim. App. Mar. 11, 2021).

Trial court did not abuse its discretion by denying defendant's motion to withdraw his guilty pleas because defendant was familiar with the court system, he was aware of his own criminal record, and trial counsel informed him of the nature of the charges against him as well as the potential sentences that could be imposed upon conviction; defendant knew exactly what he was doing when he pleaded guilty; and the evidence presented at the motion hearing, far from indicating that defendant should be permitted to withdraw his pleas to prevent a manifest injustice, established that defendant moved to withdraw his pleas as part of a scheme concocted by defendant. State v. Grassia, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 143 (Tenn. Crim. App. Apr. 13, 2021).

6. Delayed Hearing.

Where trial judge held a probation hearing more than 30 days after judgments against defendants had become final, and no written petition for probation had been filed on their behalf to toll the running of the time, his order in which he attempted partial suspensions of their sentences was void for lack of jurisdiction, and defendants' appeal from denial of their petitions for suspended sentences, although filed within 30 days of the judge's order, would be dismissed for lack of jurisdiction. State v. Hamlin, 655 S.W.2d 200, 1983 Tenn. Crim. App. LEXIS 348 (Tenn. Crim. App. 1983), superseded by statute as stated in, State v. Roach, — S.W.2d —, 1992 Tenn. Crim. App. LEXIS 320 (Tenn. Crim. App. Apr. 9, 1992).

7. Discretion of Judge.

Whether sentences are to be served concurrently or consecutively is a matter addressed to the sound discretion of the trial court. State v. James, 688 S.W.2d 463, 1984 Tenn. Crim. App. LEXIS 2703 (Tenn. Crim. App. 1984).

8. Clerical Error.

Under the unique facts of the case, the omitted date from the judgment was not an error of such nature as to make the judgment void. State v. Tipton, 13 S.W.3d 397, 1999 Tenn. Crim. App. LEXIS 822 (Tenn. Crim. App. 1999),

appeal denied, — S.W.3d —, 2000 Tenn. LEXIS 77 (Tenn. Feb. 22, 2000).

9. Certified Question.

An appeal of a dispositive certified question of law may be made as a matter of right in two situations: (1) Upon the entry of a judgment of conviction, which by definition sets forth the plea, the verdict or findings and the adjudication and sentence pursuant to Tenn. R. Crim. P. 32(e); or (2) Upon the entry of an order denying or revoking probation, from a judgment in a criminal contempt, habeas corpus, extradition, or a post-conviction proceeding. State v. Norris, 47 S.W.3d 457, 2000 Tenn. Crim. App. LEXIS 437 (Tenn. Crim. App. 2000).

10. Compliance with Rule.

Defendant's motion for a new trial was timely filed because the order of sentence was entered on the date the uniform judgment document was filed with the court clerk, and the motion was filed less than one month later. State v. Stephens, 264 S.W.3d 719, 2007 Tenn. Crim. App. LEXIS 748 (Tenn. Crim. App. Sept. 21, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 300 (Tenn. Apr. 14, 2008), overruled in part, State v. Beaty, — S.W.3d —, 2016 Tenn. Crim. App. LEXIS 842 (Tenn. Crim. App. Nov. 8, 2016).

Effective date for entry of a judgment or order of sentence is the date of its filing with the court clerk after being signed by the judge. State v. Stephens, 264 S.W.3d 719, 2007 Tenn. Crim. App. LEXIS 748 (Tenn. Crim. App. Sept. 21, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 300 (Tenn. Apr. 14, 2008), overruled in part, State v. Beaty, — S.W.3d —, 2016 Tenn. Crim. App. LEXIS 842 (Tenn. Crim. App. Nov. 8, 2016).

Judgment documents in defendant's case were correct because, when defendant's conviction of aggravated assault merged with his conviction for attempted second degree murder, the trial court correctly reflected the merged conviction on two separate uniform judgment documents. State v. Berry, 503 S.W.3d 360, 2015 Tenn. LEXIS 925 (Tenn. Nov. 16, 2015).

Defendant was not entitled to post-conviction relief when defendant alleged that defendant's guilty plea should have been withdrawn to correct manifest injustice because the record was devoid of any indication that defendant ever filed a motion to withdraw the plea within 30 days of entry of the judgment of conviction and defendant failed to assert in defendant's brief that defendant ever filed such a motion. The post-conviction proceeding also was not the appropriate avenue to seek relief from a denial of such a motion. Mitchell v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 682 (Tenn. Crim. App. Oct. 16, 2020).

11. Bail.

Defendant who has been convicted of a crime does not have a constitutional right to bail. A trial court, however, in its discretion and pursuant to applicable law, may grant bail to a defendant in a probation revocation proceeding. State v. Burgins, 464 S.W.3d 298, 2015 Tenn. LEXIS 285 (Tenn. Apr. 7, 2015).

12. Judgment of Conviction.

Even though a defendant's state felony conviction was pending on direct appeal at the time of the defendant's alleged possessions of firearms, the defendant was nonetheless a prohibited person under 18 U.S.C.S. § 922(g)(1) because the defendant was "convicted" under both possible definitions of "conviction" in Tennessee law. United States v. Houston, 813 F.3d 282, 2016 U.S. App. LEXIS 2121, 2016 FED App. 31P (6th Cir.) (6th Cir. Tenn. 2016).

State introduced a certified copy of defendant's 2008 judgment of conviction into evidence, which showed that he had pleaded guilty to driving under the influence (DUI), and thus the evidence was sufficient to support defendant's conviction of DUI, second offense; the 2008 judgment met all requirements of Tenn. R. Crim. P. 32(e), and as the judgment was not facially void, the trial court properly ruled it could be used to enhance defendant's sentence to DUI, second offense. State v. Groseclose, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 675 (Tenn. Crim. App. Oct. 15, 2020).

Trial court did not abuse its discretion when it admitted over defendant's objection a copy of a New York State sentence and commitment judgment form because the New York judgment was a foreign conviction rather than one originating in Tennessee; and defendant cited nothing in support of the proposition that this rule required evidence of foreign convictions to be signed by a judge. State v. Sullivan, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 22 (Tenn. Crim. App. Jan. 14, 2021).

13. Credit.

Defendant's contention that he was entitled to the time he served in the Tennessee Department of Correction (TDOC) on a probation violation as pretrial jail credit on the instant case was rejected because defendant's sentences were not concurrent as the probation violation sentence had expired prior to defendant's plea in the instant case and therefore he had no sentences not yet fully served at the time he was sentenced in the instant case. In addition, defendant's time in TDOC did not arise out of the instant case because even if defendant had posted bond in the instant case after his transport to TDOC on the probation violation, he would not have been released from TDOC. State v. Bly, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 31 (Tenn. Crim. App. Jan. 23, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 351 (Tenn. July 20, 2020).

14. Counsel.

Defendant was represented at a hearing to withdraw defendant's guilty pleas by the same

attorneys who had advised defendant that defendant would be eligible for diversion and who argued in the motions to withdraw and during the hearing that but for their incorrect advice that defendant was diversion eligible, defendant would not have entered the guilty pleas. Accordingly, defendant was entitled to a new hearing with new counsel as both of the attorneys had a clear conflict of interest in the hearing on the motions to withdraw and should have requested to withdraw. State v. Ruben, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 116 (Tenn. Crim. App. Feb. 19, 2020).

Rule 33. New Trial. —

(a) Motion for a New Trial. — On its own initiative or on motion of a defendant, the court may grant a new trial as required by law. If trial was by the court without a jury, the court on motion of a defendant for new trial may vacate the judgment if entered, take additional testimony, and direct the entry of a new judgment.

(b) Time for Motion; Amendments. — A motion for a new trial shall be in writing or, if made orally in open court, be reduced to writing, within thirty days of the date the order of sentence is entered. The court shall liberally grant motions to amend the motion for new trial until the day of the hearing on the motion for a new trial.

(c) Procedures. —

(1) Testimony. — The court may allow testimony in open court on issues raised in the motion for a new trial.

(2) Affidavits. —

(A) Affidavits in Support of Motion. — Affidavits in support of a motion for a new trial may be filed with the motion or an amended motion. The court shall consider any such affidavits as evidence.

(B) Opposing Affidavits. — The state shall have ten days after the filing of affidavits within which to file opposing affidavits. This period may be extended for not more than an additional twenty days by the court for good cause or by the parties' written stipulation. The court shall also consider opposing affidavits as evidence.

(C) Reply Affidavits. — The court may permit reply affidavits.

(3) Findings and Conclusions. — In ruling on the motion for a new trial, the court–on motion by either party–shall make and state in the record findings of fact and conclusions of law to explain its ruling on any issue not determined by the jury.

(d) New Trial Where Verdict Is Against the Weight of the Evidence. — The trial court may grant a new trial following a verdict of guilty if it disagrees with the jury about the weight of the evidence. Upon request of either party, the new trial shall be conducted by a different judge.

(e) Motion in Arrest of Judgment Not Waived. — A motion for a new trial is not a waiver of the right to make a motion in arrest of judgment.

Advisory Commission Comments. It is important to note that a motion for a new trial must be filed within thirty days of the date the order of sentence is entered, without regard to when judgment is entered upon the verdict. This time period applies whether or not any other motion or petition is filed.

Some attorneys seek to "reserve the right to amend" a motion for a new trial, and subsequently file such amendments without a court order permitting it. Clearly the philosophy of the rule is to permit timely amendments, and for that reason the rule does not close that time frame until the motion is heard. However, the fact that the trial judge "shall allow amendments liberally" does not mean that the judge shall allow all such amendments, and counsel must not make a regular practice of filing only

a skeletal motion with the intention of bringing all of their substantive grounds in an amendment carried to the hearing. The trial judge retains the power to deny amendments, and strong consideration should be given to whether the new ground being raised was promptly brought to the court's attention.

Affidavits provide a method for resolving factual issues, if the trial judge is satisfied that they adequately serve the purpose. The judge is not required to believe an incredible affidavit and may always require an evidentiary hearing with witnesses.

Under subdivision (e), neither the filing nor the denial of a motion for a new trial waives the right to make a motion in arrest of judgment, so long as it is filed within thirty days of verdict.

Rule 33(d) changes the holdings in *State v. Johnson*, 692 S.W.2d 412 (Tenn. 1985), and *State v. Adkins*, 786 S.W.2d 642 (Tenn. 1990), which had abolished the thirteenth juror rule in criminal cases. One should distinguish a new trial granted because the verdict is against the weight of the evidence from a granted motion for judgment of acquittal under Tenn. R. Crim. P. 29(b) for insufficiency of evidence to convict. In the latter situation, retrying the defendant would result in double jeopardy, while in the former situation it would not. *See Tibbs v. Florida*, 457 U.S. 31 (1982).

The second sentence of Rule 33(d) requires that upon request a different judge preside at retrial if the original judge granted a new trial as thirteenth juror.

Cross-References. New trial after death or insanity of judge, T.C.A. §§ 17-1-305, 17-1-306.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 3-33-1, 3-33-2.

Tennessee Jurisprudence. 20 Tenn. Juris., New Trials, §§ 25, 28-32, 34.

Law Reviews. A Noble Ideal Whose Time Has Come (Penny J. White), 18 Mem. St. U.L. Rev. 223 (1989).

Adjudicating Claims of Innocence for the Capitally Condemned in Tennessee: Embracing a Truth Forum (Dwight Aarons), 76 Tenn. L. Rev. 511 (2009).

Perfecting the Criminal Appeal in Tennessee (Joe B. Jones), 18 Tenn. B.J. 9.

NOTES TO DECISIONS

Analysis

1. Sufficiency.
2. Burden of Proof.
3. Improper Substitution of Judges.
4. Proper Substitution of Judges.
5. Affidavits.
6. Necessity of Bill of Exceptions.
7. Nature of Motion.
8. Necessity of Objection.
9. Assignments of Error.
10. Time Requirement.
11. Amendment of Motion.
12. Petitions Not Provided For.
13. Thirteenth Juror Rule.
14. Distinction Between Rules 29 and 33.
15. Appeal.

1. Sufficiency.

Where defendant was convicted of robbery, new evidence tending to impeach the testimony of a witness concerning defendant's purchase of gloves similar to ones found at the scene of the robbery did not entitle defendant to a new trial. Hicks v. State, 571 S.W.2d 849, 1978 Tenn. Crim. App. LEXIS 324 (Tenn. Crim. App. 1978).

2. Burden of Proof.

To show the existence of evidence for a new trial, proof must be offered by the moving party. Hicks v. State, 571 S.W.2d 849, 1978 Tenn. Crim. App. LEXIS 324 (Tenn. Crim. App. 1978).

3. Improper Substitution of Judges.

Where the trial had not proceeded beyond the state's case-in-chief when substitute judge took over case, his error in not properly familiarizing himself with the case prior to substitution was not harmless, for unless the substitute judge listens to or reads all the testimony introduced prior to assuming responsibility for the conduct of the trial, and unless he examines all the existing exhibits as well, he has, at best, a profoundly fragile basis upon which to evaluate the evidence under Tenn. R. Crim. P. 33. State v. Bilbrey, 858 S.W.2d 911, 1993 Tenn. Crim. App. LEXIS 7 (Tenn. Crim. App. 1993), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 262 (Tenn. July 12, 1993).

4. Proper Substitution of Judges.

A successor to the trial judge who began the proceeding could, if sufficiently familiar with the record, preside until the conclusion of the case. State v. Gillon, 15 S.W.3d 492, 1997 Tenn. Crim. App. LEXIS 1024 (Tenn. Crim. App. 1997).

5. Affidavits.

To grant relief only on affidavits in support of a motion for new trial would deny the opposing party an opportunity to test the accuracy or veracity of the information contained therein by confrontation or by evidence contrary to this assertion. Hicks v. State, 571 S.W.2d 849, 1978 Tenn. Crim. App. LEXIS 324 (Tenn. Crim. App. 1978).

6. Necessity of Bill of Exceptions.

The trial court properly denied a motion for new trial where the alleged new evidence was contained only in the affidavit attached to the motion and contained in the technical record

since the evidence to support such a complaint must be preserved in a bill of exceptions. Hicks v. State, 571 S.W.2d 849, 1978 Tenn. Crim. App. LEXIS 324 (Tenn. Crim. App. 1978).

7. Nature of Motion.

A motion for a new trial is only a pleading. An affidavit is merely an exhibit to such motion. Hicks v. State, 571 S.W.2d 849, 1978 Tenn. Crim. App. LEXIS 324 (Tenn. Crim. App. 1978).

Original trial judge denied defendant's original motion for new trial in 1992, nearly 20 years before his death, such that the only motion for new trial that was filed during the effective date of the prior statute was not undisposed of at the time of the original judge's death. State v. Hall, 461 S.W.3d 469, 2015 Tenn. LEXIS 241 (Tenn. Mar. 20, 2015), cert. denied, Hall v. Tennessee, 193 L. Ed. 2d 349, 136 S. Ct. 479, 577 U.S. 974, 2015 U.S. LEXIS 7117 (U.S. 2015).

8. Necessity of Objection.

Improper argument affords no ground for a new trial when no objection is made at the time of argument. Farmer v. State, 574 S.W.2d 49, 1978 Tenn. Crim. App. LEXIS 329 (Tenn. Crim. App. 1978).

9. Assignments of Error.

Where defendant did not assign the introduction of an oral statement as error in his motion for a new trial, if there were error in the admission of this statement, it was waived. Hayslett v. State, 577 S.W.2d 211, 1978 Tenn. Crim. App. LEXIS 347 (Tenn. Crim. App. 1978).

10. Time Requirement.

The 30 days' time requirement of Tenn. R. Crim. P. 33 is mandatory and jurisdictional. Massey v. State, 592 S.W.2d 333, 1979 Tenn. Crim. App. LEXIS 299 (Tenn. Crim. App. 1979).

Failure to follow the mandate of Tenn. R. Crim. P. 33(b) does not preempt an appellate court of jurisdiction; however, it constitutes waiver of new trial and also of the right to argue on appeal those issues that should have been presented in the motion for new trial. State v. Givhan, 616 S.W.2d 612, 1980 Tenn. Crim. App. LEXIS 359 (Tenn. Crim. App. 1980).

It is not sufficient that the defendant file some document within 30 days of the date of the sentence order; he must file a motion for a new trial containing specific grounds for relief. State v. Blunkall, 731 S.W.2d 72, 1987 Tenn. Crim. App. LEXIS 2103 (Tenn. Crim. App. 1987).

Defendant's good faith efforts within the 30-day period cannot alter a mandatory rule of procedure, and the state cannot waive it. State v. Davis, 748 S.W.2d 206, 1987 Tenn. Crim. App. LEXIS 2427 (Tenn. Crim. App. 1987).

A trial judge does not have jurisdiction to hear and determine the merits of a motion for a new trial that has not been timely filed, and failure to file a timely motion not only results in defendant losing the right to a hearing on the motion, but also deprives defendant of the opportunity to argue on appeal any issues that were or should have been presented in the motion. State v. Martin, 940 S.W.2d 567, 1997 Tenn. LEXIS 131 (Tenn. 1997).

Defendant's motion for a new trial was timely filed because the order of sentence was entered on the date the uniform judgment document was filed with the court clerk, and the motion was filed less than one month later. State v. Stephens, 264 S.W.3d 719, 2007 Tenn. Crim. App. LEXIS 748 (Tenn. Crim. App. Sept. 21, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 300 (Tenn. Apr. 14, 2008), overruled in part, State v. Beaty, — S.W.3d —, 2016 Tenn. Crim. App. LEXIS 842 (Tenn. Crim. App. Nov. 8, 2016).

Effective date for entry of a judgment or order of sentence is the date of its filing with the court clerk after being signed by the judge. State v. Stephens, 264 S.W.3d 719, 2007 Tenn. Crim. App. LEXIS 748 (Tenn. Crim. App. Sept. 21, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 300 (Tenn. Apr. 14, 2008), overruled in part, State v. Beaty, — S.W.3d —, 2016 Tenn. Crim. App. LEXIS 842 (Tenn. Crim. App. Nov. 8, 2016).

Thirty-day time period at issue began when defendant's judgment of conviction was filed by trial court; thus, his motion for a new trial was timely filed 30 days later, and all the issues appealed from were properly before the appellate court. State v. Vaughn, 279 S.W.3d 584, 2008 Tenn. Crim. App. LEXIS 442 (Tenn. Crim. App. June 16, 2008).

New and amended motions for new trial, filed in 2009 and 2011, would not satisfy the plain language of the 1980 statute because those motions were not filed within the time provided by rule of the court; the motions were not presented to the original judge within 30 days of the order of defendant's sentences because these motions existed only by virtue of the delayed appeal, and because none of defendant's motions for new trial fell within the scope of the prior statute, its terms were inapplicable and did not afford a basis for relief. State v. Hall, 461 S.W.3d 469, 2015 Tenn. LEXIS 241 (Tenn. Mar. 20, 2015), cert. denied, Hall v. Tennessee, 193 L. Ed. 2d 349, 136 S. Ct. 479, 577 U.S. 974, 2015 U.S. LEXIS 7117 (U.S. 2015).

Defendant's motion for new trial was filed well-beyond the 30-day time limit and thus his notice of appeal was also untimely; however, in the interests of justice, the court waived the timely filing of the notice of appeal. Still, because the new trial motion was untimely, defendant waived his issues except sufficiency of the evidence and sentencing. State v. Chaves-Abrego, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 422 (Tenn. Crim. App. June 18, 2020),

appeal denied, State v. Chaves-Abrego, — S.W.3d —, 2020 Tenn. LEXIS 519 (Tenn. Oct. 7, 2020).

Defendant did not file his motion for new trial until more than one year after the judgments were entered, and because his motion for new trial was untimely, his notice of appeal was also untimely; he also did not provide any explanation for the untimely filings, and the absence of the sentence hearing transcript from the record precluded review of the sentence. The interest of justice did not require waiver of the timely notice of appeal requirement and the appeal was dismissed. State v. Cooke, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 460 (Tenn. Crim. App. July 2, 2020).

11. Amendment of Motion.

Tenn. R. Crim. P. 33 does not prevent a judge, in his discretion, from allowing an amendment to a motion for a new trial at any time the trial judge has jurisdiction of the case. State v. Butler, 626 S.W.2d 6, 1981 Tenn. LEXIS 519 (Tenn. 1981); State v. Roberts, 755 S.W.2d 833, 1988 Tenn. Crim. App. LEXIS 172 (Tenn. Crim. App. 1988), rehearing denied, 755 S.W.2d 833, 1988 Tenn. Crim. App. LEXIS 384 (Tenn. Crim. App. 1988).

Trial court should not have permitted the defense to amend its motion for new trial after the new trial hearing had been held and an order denying a new trial had been entered. State v. Hatcher, 310 S.W.3d 788, 2010 Tenn. LEXIS 419 (Tenn. May 4, 2010).

After defendant's trial counsel filed a new trial motion which stated no grounds for relief and then withdrew, the trial court had jurisdiction to consider new counsel's motion to amend the new trial motion because the new trial motion complied with Tenn. R. Crim. P. 33(b) as the motion (1) was timely filed within thirty days after the trial court entered judgment, (2) referenced a motion for new trial, and (3) specifically requested relief in the form of a new trial, so it was error to hold the motion was a nullity for failing to state grounds for relief, thus depriving the trial court of jurisdiction to consider the motion to amend. State v. Lowe-Kelley, 380 S.W.3d 30, 2012 Tenn. LEXIS 619 (Tenn. Aug. 28, 2012).

Defendant's timely motion requesting a new trial meets the requirements of Tenn. R. Crim. P. 33 despite the motion's failure to allege specific grounds for relief, and it is within the discretion of a trial court to permit an amendment to the motion to allege specific grounds for relief. State v. Lowe-Kelley, 380 S.W.3d 30, 2012 Tenn. LEXIS 619 (Tenn. Aug. 28, 2012).

Defendant was not denied the opportunity to file an amended new trial motion because defendant filed no such motion and sought no leave to file such a motion but sought an extension of time to file the motion, which the rules of criminal procedure did not contemplate. State v. Lane, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 600 (Tenn. Crim. App. Sept. 20, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 111 (Tenn. Feb. 19, 2020).

12. Petitions Not Provided For.

There is no provision in the Tennessee Rules of Criminal Procedure for a "petition to reconsider" or a "petition to rehear." State v. Ryan, 756 S.W.2d 284, 1988 Tenn. Crim. App. LEXIS 292 (Tenn. Crim. App. 1988).

13. Thirteenth Juror Rule.

Where case was pending on direct appeal when the 1991 amendment to Tenn. R. Crim. P. 33(f) (now Tenn. R. Crim. P. 33(d)) restoring the thirteenth juror rule became effective, and where the issue had been properly preserved on appeal, Tenn. R. Crim. P. 33 applied. State v. Barone, 852 S.W.2d 216, 1993 Tenn. LEXIS 69, 38 A.L.R.5th 897 (Tenn. 1993), rehearing denied, — S.W.2d —, 1993 Tenn. LEXIS 175 (Tenn. 1993).

In acting under Tenn. R. Crim. P. 33, the trial judge must disagree with the jury's finding on the question of the defendant's guilt; the trial judge cannot simply substitute his finding for the jury's on this question, in part or in whole, because such authority would negate the fundamental right to a trial by jury. State v. Hill, 856 S.W.2d 155, 1993 Tenn. Crim. App. LEXIS 20 (Tenn. Ct. App. 1993).

Remand of case to trial court was not required to determine whether the court, as the 13th juror, would grant new trial where it could be presumed from the court's order denying defendant's motion for new trial and post-trial judgment of acquittal that the court approved the verdicts returned by the jury. State v. Braden, 867 S.W.2d 750, 1993 Tenn. Crim. App. LEXIS 355 (Tenn. Crim. App. 1993), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 387 (Tenn. Nov. 1, 1993).

Under Tenn. R. Crim. P. 33(f) (now Tenn. R. Crim. P. 33(d)), assessment of propriety of jury verdict by trial court, acting as thirteenth juror, is prerequisite of valid judgment. State v. Burlison, 868 S.W.2d 713, 1993 Tenn. Crim. App. LEXIS 282 (Tenn. Crim. App. 1993).

New trial may be granted on appeal in circumstances in which the trial court absolved itself of its responsibility to consider the evidence as a thirteenth juror. State v. Burlison, 868 S.W.2d 713, 1993 Tenn. Crim. App. LEXIS 282 (Tenn. Crim. App. 1993).

On appeal, where record reflected that trial court considered evidence in its role as thirteenth juror and denied request for new trial, and where defendant's sole contention was that weight of evidence was contrary to verdict of first degree murder, appellate court could not overturn decision of trial court. State v. Burlison, 868 S.W.2d 713, 1993 Tenn. Crim. App. LEXIS 282 (Tenn. Crim. App. 1993).

A trial judge has the mandatory duty to function as the thirteenth juror in criminal cases, and an appellate court may presume that the trial court has acted as the thirteenth juror and approved the jury's verdict where the trial court simply overrules a motion for new trial without any explicit statement that it has independently weighed the evidence and agrees with the jury's verdict. State v. Carter, 896 S.W.2d 119, 1995 Tenn. LEXIS 97 (Tenn. 1995).

An appellate court must grant a new trial when the record contains statements by the trial court expressing dissatisfaction or disagreement with the weight of the evidence or the jury's verdict, or statements indicating that the trial court misunderstand its responsibility or authority to act as the thirteenth juror. State v. Moats, 906 S.W.2d 431, 1995 Tenn. LEXIS 506 (Tenn. 1995).

Appellate courts may only affirm the proper exercise of the thirteenth juror function or reverse the improper exercise and remand for a new trial. State v. Dankworth, 919 S.W.2d 52, 1995 Tenn. Crim. App. LEXIS 632 (Tenn. Crim. App. 1995).

Trial judges exercising their thirteenth juror function are acting as jurors and, while they are at liberty to assess credibility, weigh evidence, and balance testimony, they may not consider information that was not presented to the jury. State v. Dankworth, 919 S.W.2d 52, 1995 Tenn. Crim. App. LEXIS 632 (Tenn. Crim. App. 1995).

When a trial judge overrules a motion for new trial, the court of criminal appeals may presume the trial judge has served as the thirteenth juror and approved the jury's verdict. State v. Blanton, 926 S.W.2d 953, 1996 Tenn. Crim. App. LEXIS 67 (Tenn. Crim. App. 1996).

Lack of adequate record of trial will prevent successor judge from functioning as thirteenth juror and from entering valid judgment. State v. Nail, 963 S.W.2d 761, 1997 Tenn. Crim. App. LEXIS 474 (Tenn. Crim. App. 1997).

The purpose of the thirteenth juror rule is to be a safeguard against a miscarriage of justice by the jury. State v. Price, 46 S.W.3d 785, 2000 Tenn. Crim. App. LEXIS 597 (Tenn. Crim. App. 2000), review or rehearing denied, — S.W.3d —, 2001 Tenn. LEXIS 146 (Tenn. Feb. 26, 2001).

There is no requirement that an explicit statement be on the record that the trial court performed its duty; rather, compliance with the rule is presumed when the trial court simply overrules a motion for a new trial without comment. State v. Brown, 53 S.W.3d 264, 2000 Tenn. Crim. App. LEXIS 962 (Tenn. Crim. App. 2000), appeal denied, — S.W.3d —, 2001 Tenn. LEXIS 434 (Tenn. May 14, 2001), review denied, — S.W.3d —, 2002 Tenn. LEXIS 415 (Tenn. Sept. 23, 2002).

The court of criminal appeals has no independent authority to act as a thirteenth juror; thus, the remedy for the trial judge's failure to properly function as thirteenth juror was to remand the case for a new trial. State v. Brown, 53 S.W.3d 264, 2000 Tenn. Crim. App. LEXIS 962 (Tenn. Crim. App. 2000), appeal denied, — S.W.3d —, 2001 Tenn. LEXIS 434 (Tenn. May 14, 2001), review denied, — S.W.3d —, 2002 Tenn. LEXIS 415 (Tenn. Sept. 23, 2002).

Where the record contains statements by the trial judge expressing dissatisfaction or disagreement with the weight of the evidence or the jury's verdict, or statements indicating that the trial court absolved itself of its responsibility to act as the thirteenth juror, an appellate court may reverse the trial court's judgment. State v. Brown, 53 S.W.3d 264, 2000 Tenn. Crim. App. LEXIS 962 (Tenn. Crim. App. 2000), appeal denied, — S.W.3d —, 2001 Tenn. LEXIS 434 (Tenn. May 14, 2001), review denied, — S.W.3d —, 2002 Tenn. LEXIS 415 (Tenn. Sept. 23, 2002).

The purpose of the thirteenth juror rule is to safeguard against a miscarriage of justice by the jury. State v. Brown, 53 S.W.3d 264, 2000 Tenn. Crim. App. LEXIS 962 (Tenn. Crim. App. 2000), appeal denied, — S.W.3d —, 2001 Tenn. LEXIS 434 (Tenn. May 14, 2001), review denied, — S.W.3d —, 2002 Tenn. LEXIS 415 (Tenn. Sept. 23, 2002).

In a robbery and murder case, a court did not err by denying defendant's motion for judgment of acquittal or new trial, where the trial judge explicitly discharged her duty as thirteenth juror and announced her agreement with the verdict returned. State v. Winters, 137 S.W.3d 641, 2003 Tenn. Crim. App. LEXIS 944 (Tenn. Crim. App. 2003), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 298 (Tenn. Mar. 22, 2004).

Where the original trial judge was unable to preside over defendant's motion for a new trial, the trial judge's statement in front of jury that it was the judgment of the trial court that he was guilty was not enough to satisfy the judge's role as the thirteenth juror because witness credibility was an overriding issue and under Tenn. R. Crim. P. 25(b), and the successor judge was not at the trial to see any of the witnesses testify; therefore, the successor judge should have granted a new trial pursuant to Tenn. R. Crim. P. 33(d). State v. Biggs, 218 S.W.3d 643, 2006 Tenn. Crim. App. LEXIS 654 (Tenn. Crim. App. 2006), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 1167 (Tenn. 2006).

When witness credibility is the primary issue raised in the motion for new trial, a successor judge under Tenn. R. Crim. P. 25(b) may not approve the judgment and must grant a new trial pursuant to Tenn. R. Crim. P. 33(d). State v. Biggs, 218 S.W.3d 643, 2006 Tenn. Crim. App. LEXIS 654 (Tenn. Crim. App. 2006), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 1167 (Tenn. 2006).

Court properly accepted the jury's guilty verdict and did not abdicate its role as the thir-

teenth juror because the court did more than simply deny defendant's motion for new trial without comment; it reviewed the evidence as well as the applicable law. Therefore, the court fulfilled its duty as the thirteenth juror. State v. Leath, 461 S.W.3d 73, 2013 Tenn. Crim. App. LEXIS 461 (Tenn. Crim. App. June 3, 2013), appeal denied, — S.W.3d —, 2013 Tenn. LEXIS 981 (Tenn. Nov. 13, 2013), cert. denied, Leath v. Tennessee, 189 L. Ed. 2d 173, 134 S. Ct. 2292, — U.S. —, 2014 U.S. LEXIS 3508 (U.S. 2014).

Tennessee Supreme Court held that there is a rebuttable presumption that a successor judge can act as the thirteenth juror and that an appellate court should review de novo a successor judge's decision about acting as the thirteenth juror. State v. Ellis, 453 S.W.3d 889, 2015 Tenn. LEXIS 5 (Tenn. Jan. 13, 2015).

Following defendant's conviction for aggravated robbery, burglary, and other crimes, defendant's motion for a new trial was properly denied because the successor judge correctly determined that he could perform the function of the thirteenth juror and that he independently could weigh and assess the evidence adduced at defendant's trial so as to prevent a miscarriage of justice by the jury. State v. Ellis, 453 S.W.3d 889, 2015 Tenn. LEXIS 5 (Tenn. Jan. 13, 2015).

It was unnecessary for the successor judge to act as the thirteenth juror at the time of the delayed appeal because that function had previously been performed by the original judge immediately following the original trial, and it was clear from the record that the original judge approved the verdicts rendered by the jury, and the thirteenth juror ruling made by the original judge was not disturbed on appeal. State v. Hall, 461 S.W.3d 469, 2015 Tenn. LEXIS 241 (Tenn. Mar. 20, 2015), cert. denied, Hall v. Tennessee, 193 L. Ed. 2d 349, 136 S. Ct. 479, 577 U.S. 974, 2015 U.S. LEXIS 7117 (U.S. 2015).

Defendant's contention that the trial court failed to fulfill its duty as the thirteenth juror was rejected because the trial court expressly stated at the conclusion of defendant's motion for new trial hearing that it approved the jury's verdicts as the thirteenth juror, the trial court denied defendant's motion for new trial, and defendant's claim was merely an attack on the sufficiency of the convicting evidence. State v. Thomas, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 270 (Tenn. Crim. App. Apr. 25, 2019).

Defendant did not show a trial judge did not satisfy the judge's obligation to act as a thirteenth juror because (1) the judge stated no disagreement with a jury verdict and did not expressly refuse to so act, and (2) sufficient evidence supported defendant's conviction. State v. Lane, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 600 (Tenn. Crim. App. Sept. 20, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 111 (Tenn. Feb. 19, 2020).

14. Distinction Between Rules 29 and 33.

See State v. Gillon, 15 S.W.3d 492, 1997 Tenn. Crim. App. LEXIS 1024 (Tenn. Crim. App. 1997).

15. Appeal.

Because an issue was not reduced to writing in defendant's motion for a new trial, the issue had been waived. State v. Atha, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 588 (Tenn. Crim. App. Sept. 20, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 41 (Tenn. Jan. 15, 2020).

Rule 34. Arrest of Judgment. —

(a) Grounds. — The court on motion of a defendant shall arrest judgment if:

(1) the indictment, presentment or information does not charge an offense; or

(2) the court was without jurisdiction of the charged offense.

(b) Procedures. — The motion to arrest judgment may be made orally in open court, but it shall be reduced to writing and filed within thirty days of the date the order of sentence is entered.

(c) Motion for New Trial Not Waived. — A motion to arrest judgment is not a waiver of the right to make a motion for a new trial.

Advisory Commission Comments. There is no requirement as to the order in which motions for judgment of acquittal after a verdict of guilty, motions for a new trial, and motions in arrest of judgment are made. Each must be made within thirty days after the order of sentence is entered.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), No. 3-34-1.

Tennessee Jurisprudence. 8 Tenn. Juris., Criminal Procedure, § 43.

Law Reviews. The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure, II. Initiation of An Appeal (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 4.

NOTES TO DECISIONS

1. Timeliness.

Defendant's notice of appeals was timely because defendant's timely motion for arrest of judgment, which motion challenged the trial court's jurisdiction, effectively continued the trial court's jurisdiction until 30 days after it disposed of that motion via its order. State v. Contreras, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 642 (Tenn. Crim. App. Oct. 9, 2019).

Rule 35. Reduction of Sentence. —

(a) Timing of Motion. — The trial court may reduce a sentence upon motion filed within 120 days after the date the sentence is imposed or probation is revoked. No extensions shall be allowed on the time limitation. No other actions toll the running of this time limitation.

(b) Limits of Sentence Modification. — The court may reduce a sentence only to one the court could have originally imposed.

(c) Hearing Unnecessary. — The trial court may deny a motion for reduction of sentence under this rule without a hearing.

(d) Appeal. — The defendant may appeal the denial of a motion for reduction of sentence but shall not be entitled to release on bond unless already under bond. If the court modifies the sentence, the state may appeal as otherwise provided by law.

Advisory Commission Comments. This rule is somewhat similar to its federal counterpart. Under T.C.A. § 40-35-212, the trial judge retains jurisdiction to modify any sentence which is to be served in the jail or workhouse. However, the statute deprives the court of authority to modify a sentence to the department of corrections once the judgment is final in the trial court.

The motion to modify a sentence must be filed within 120 days of the date of the trial court's imposition of sentence. This time period may not be extended or tolled. Unlike the federal rule which also allows a modification after appeal, the 120 days run immediately after the sentence is imposed by the trial judge and *not* from the mandate of the appellate court.

While the judge may grant a hearing and modify the sentence, there is no requirement that a hearing even be held in the discretion of the court. If the judge denies relief and the defendant is already incarcerated, the defendant is not entitled to a bail pending an appeal of an adverse action under this rule. The policy behind the denial of bail is to prevent a motion to modify and an appeal taken for the sole purpose of keeping the defendant on bond.

The intent of this rule is to allow modification only in circumstances where an alteration of the sentence may be proper in the interests of justice. The modification permitted by this rule is any modification otherwise permitted by the law when the judge originally imposed sentence including but not limited to a transfer to the workhouse or probation to otherwise eligible defendants. If there is a modification, the state may appeal.

This rule does not alter the authority of the court to modify sentences to the jail or workhouse. These modifications are governed by statute. *See* T.C.A. §§ 40-35-306, 40-35-307, 40-35-311, and 40-35-312.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), No. 3-35-1.

Law Reviews. Tennessee Rule of Criminal Procedure 36.1's New Clothes: How the Tennessee Supreme Court's Opinion in State v. Brown Limited the Inherent Authority of Trial Courts To Correct Illegal Sentences by Overlooking the Plain Language of Rule 36.1 and the "Jurisprudential Context" from which Rule 36.1 Developed, 12 Tenn. J. L. & Pol'y 33 (2017).

NOTES TO DECISIONS

Analysis

1. In General.
2. —Effect of Filing Notice of Appeal.
3. Guilty Pleas.
4. Probation Orders.
5. Restitution Orders.
6. Sentence Held Proper.
7. Standard of Review.
8. Authority of Court.
9. Denial Proper.
10. Timeliness.

11. Appeal.

1. In General.

There is no connection between the plea bargaining procedures prescribed in Tenn. R. Crim. P. 11 and the correction or reduction of sentence provisions of Tenn. R. Crim. P. 35. The respective trial judges set sentencing hearings in each of these cases in accordance with T.C.A. § 40-35-203. State v. Hodges, 815 S.W.2d 151, 1991 Tenn. LEXIS 321 (Tenn. 1991).

Tenn. R. Crim. P. 35 permits modification of sentences and applies in cases where the conviction was based on a guilty plea and is extensive enough to grant probation in lieu of imprisonment as a reduction of sentence. State v. Hodges, 815 S.W.2d 151, 1991 Tenn. LEXIS 321 (Tenn. 1991).

The denial of a Tenn. R. Crim. P. 35 motion is not sentencing, but amounts to a simple reaffirmation of the sentence previously imposed. State v. Bilbrey, 816 S.W.2d 71, 1991 Tenn. Crim. App. LEXIS 555 (Tenn. Crim. App. 1991), superseded by statute as stated in, State v. Grissom, 956 S.W.2d 514, 1997 Tenn. Crim. App. LEXIS 676 (Tenn. Crim. App. 1997); State v. McDonald, 893 S.W.2d 945, 1994 Tenn. Crim. App. LEXIS 431 (Tenn. Crim. App. 1994).

Defendant was not entitled to be sentenced under the 1989 Sentencing Act, T.C.A. § 40-35-101 et seq. even though his motion under Tenn. R. Crim. P. 35 was pending on November 1, 1989, the Act's effective date. The action of the trial court on a motion under Tenn. R. Crim. P. 35 relates back to the date of sentencing, in this case, July 7, 1989, so as to require any modification to comply with the law existing as of that date. State v. Bilbrey, 816 S.W.2d 71, 1991 Tenn. Crim. App. LEXIS 555 (Tenn. Crim. App. 1991), superseded by statute as stated in, State v. Grissom, 956 S.W.2d 514, 1997 Tenn. Crim. App. LEXIS 676 (Tenn. Crim. App. 1997).

Defendant, who had received a specific sentence under a plea bargain agreement, was not entitled to a reduction of sentence where he could not show post-sentencing information or developments that warranted such action. State v. McDonald, 893 S.W.2d 945, 1994 Tenn. Crim. App. LEXIS 431 (Tenn. Crim. App. 1994).

2. —Effect of Filing Notice of Appeal.

The filing of a notice of appeal from the trial court's judgment does not divest the trial court of jurisdiction to entertain a motion under Tenn. R. Crim. P. 35. Conversely, the filing of such a motion does not toll the time within which to appeal from the judgment. State v. Bilbrey, 816 S.W.2d 71, 1991 Tenn. Crim. App. LEXIS 555 (Tenn. Crim. App. 1991), superseded by statute as stated in, State v. Grissom, 956 S.W.2d 514, 1997 Tenn. Crim. App. LEXIS 676 (Tenn. Crim. App. 1997).

3. Guilty Pleas.

Aside from any agreement which may exist between the state and a defendant in reference to the entry of a guilty plea, the ultimate decision to accept or reject any such plea is to be made by the trial court and, if so accepted and received by the court, the final determination on the extent of the punishment to be meted out is the province of the trial court. State v. Hodges, 815 S.W.2d 151, 1991 Tenn. LEXIS 321 (Tenn. 1991).

Where defendant appealed a sentencing issue, the court of criminal appeals erred in vacating defendant's conviction of incest on the grounds that incest was not a lesser included offense of child rape and because the record failed to reflect that the indictment had been amended from "rape of a child." Studdard v. State, 182 S.W.3d 283, 2005 Tenn. LEXIS 1046 (Tenn. 2005), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 518 (Tenn. 2006).

Defendant is only required to provide post-sentencing information or developments warranting a reduction of the initial sentence if defendant's reduction of sentence motion seeks reduction of a specific sentence imposed in exchange for a guilty plea. State v. Patterson, 564 S.W.3d 423, 2018 Tenn. LEXIS 735 (Tenn. Dec. 10, 2018).

Court of criminal appeals erred in reversing the trial court's decision on defendant's reduction of sentence motion, and in reinstating the initial aggregate 31-year sentence because, where a defendant pleaded guilty without an agreement as to sentencing, a defendant was not required to present post-sentencing information or developments warranting a reduction of sentence to prevail on a reduction of sentence motion; thus, the trial court did not apply an incorrect legal standard or abuse its discretion in any other way when it determined, upon reflection, that the initial aggregate sentence was excessive and granted defendant's reduction of sentence motion. State v. Patterson, 564 S.W.3d 423, 2018 Tenn. LEXIS 735 (Tenn. Dec. 10, 2018).

4. Probation Orders.

The trial judge's order placing the defendant on probation for 24 years was inappropriate and an abuse of discretion. State v. Irick, 861 S.W.2d 375, 1993 Tenn. Crim. App. LEXIS 322 (Tenn. Crim. App. 1993), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 299 (Tenn. Aug. 2, 1993).

In order to preserve the public's confidence in judicial neutrality, the judgment had to be reversed, and the case remanded for a new probation revocation hearing before a different trial judge, because the trial court performed an independent internet search of the facts; the trial court's finding that it did not have the jurisdiction to hear a motion to reconsider after defendant was transferred to the department of correction was erroneous and deprived defendant of the ability to seek relief. State v. Murphy, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 679 (Tenn. Crim. App. Oct. 23, 2019).

5. Restitution Orders.

Where, contrary to the clear mandates of the statute, the trial judge did not specify the amount of restitution to be paid by the defendant, but instead ordered defendant to pay any civil damages as a condition of probation, such restitution order was in error and a new sentencing hearing was required on the issue of restitution. State v. Irick, 861 S.W.2d 375, 1993 Tenn. Crim. App. LEXIS 322 (Tenn. Crim. App. 1993), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 299 (Tenn. Aug. 2, 1993).

6. Sentence Held Proper.

The trial judge did not abuse his discretion at sentencing as to the issues of enhancement, consecutive sentences or refusal to suspend part of defendant's sentence. State v. Irick, 861 S.W.2d 375, 1993 Tenn. Crim. App. LEXIS 322 (Tenn. Crim. App. 1993), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 299 (Tenn. Aug. 2, 1993).

7. Standard of Review.

In contrast to the de novo standard of review applicable to sentencing appeals perfected under T.C.A. § 40-35-401(d), appellate review of Tenn. R. Crim. P. 35 rulings is governed by the "abuse of discretion" standard. State v. Irick, 861 S.W.2d 375, 1993 Tenn. Crim. App. LEXIS 322 (Tenn. Crim. App. 1993), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 299 (Tenn. Aug. 2, 1993).

8. Authority of Court.

Trial court did not lose jurisdiction to modify defendant's sentence under Tenn. R. Crim. P. 35 as a result of defendant being in the physical custody of the Tennessee Department of Correction because his motion to modify was filed within 120 days after the date the sentence was imposed. In contrast to Tenn. R. Crim. P. 35, T.C.A. § 40-35-212 only permitted the trial court to modify a Tennessee Department of Correction sentence for a defendant who was held locally and had not been transferred to the penitentiary. State v. Edenfield, 299 S.W.3d 344, 2009 Tenn. Crim. App. LEXIS 290 (Tenn. Crim. App. Apr. 21, 2009).

While defendant claimed that defendant had found a new treatment program which defendant believed would help defendant, the trial court did not abuse its discretion in denying defendant's motion for modification of defendant's sentence because defendant's claim that defendant would seek intensive rehabilitation treatment if released was not an unforeseen, post-sentencing development permitting modification of defendant's sentence in the interest of justice. State v. Smith, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 258 (Tenn. Crim. App. Apr. 15, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 551 (Tenn. Sept. 16, 2020).

9. Denial Proper.

The trial court did not abuse its discretion in denying defendant's motion for correction or reduction of sentence because defendant entered his guilty plea pursuant to Tenn. R. Crim. P. 11(c)(1)(C) and defendant and the State agreed to a specific sentence of six years, which was accepted and placed into effect by the trial court, and Rule 35 did not grant the trial court the authority to modify the plea agreement. State v. Demonbreum, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 885 (Tenn. Crim. App. Dec. 6, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 185 (Tenn. Apr. 11, 2019).

Trial court did not abuse its discretion by denying defendant's motion to modify his sentence because his argument that the trial court failed to take into account that he had turned a corner in his willingness to address his addiction, took it upon himself to complete a substance abuse treatment program while in custody, and enlisted the help of an established treatment program upon release to help him in his efforts were precisely the type of facts that the court had held could not serve as the basis for a modification of a sentence. State v. Hall, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 69 (Tenn. Crim. App. Feb. 5, 2019).

Trial court properly revoked defendant's probation and denied his motion to reduce his sentence because defendant conceded in the trial court and on appeal that he violated the terms of his probation, an accused, already on probation, was not entitled to a second grant of probation or another form of alternative sentencing, and defendant's motion merely rehashed the arguments he made at the probation revocation hearing. Tenn. v. Fawver, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 734 (Tenn. Crim. App. Nov. 14, 2019).

Defendant's motion to reduce his sentence was properly denied because the disparity between his sentence and his co-defendants' sentences did not violate the purpose of the Sentencing Reform Act as it was not unforeseen that defendant's co-defendants would receive lesser sentences because, when defendant entered into the memorandum of understanding, he could not anticipate whether his co-defendants would be charged, convicted, or what their sentences would be; he did not enter his negotiated plea agreement with the understanding that both co-defendants would receive the same sentence defendant received; and defendant received the benefit of his plea agreement by having his remaining charges dismissed and by avoiding a life sentence. State v. Hendry, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 761 (Tenn. Crim. App. Nov. 30, 2020).

Defendant's motion requesting a reduced sentence was properly denied, as the court's findings at the sentencing hearing were supported by the record, and a maximum-length sentence was justified based upon the circumstances of the offense. State v. Hawkins, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 33 (Tenn. Crim. App. Jan. 29, 2021).

10. Timeliness.

Trial court properly denied defendant's motion to suspend the balance of his sentences because defendant's motion was filed approximately twenty-four years too late for consideration. State v. Montague, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 251 (Tenn. Crim. App. Apr. 22, 2019).

11. Appeal.

Although no right of direct appeal lied for the State of Tennessee, because a trial court's application of an amended sentencing statute to defendant's case and the resulting modification of defendant's sentence exceeded the court's authority, the appellate court elected to treat the State of Tennessee's improperly-filed appeal as of right as a petition for the common law writ of certiorari and reviewed the matter. State v. Tolle, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 203 (Tenn. Crim. App. Mar. 19, 2018), aff'd, 591 S.W.3d 539, 2019 Tenn. LEXIS 514 (Tenn. Nov. 27, 2019).

Rule 36. Clerical Mistakes. —

After giving any notice it considers appropriate, the court may at any time correct clerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission. Upon filing of the corrected judgment or order, or upon the court's denial of a motion filed pursuant to this rule, the defendant or the state may initiate an appeal as of right pursuant to Rule 3, Tennessee Rules of Appellate Procedure. [As amended by order filed January 13, 2012, effective July 1, 2012; and by order filed December 21, 2016, effective July 1, 2017.]

Advisory Commission Comments. This rule conforms to the corresponding federal rule.

Advisory Commission Comments [2012]. Tenn. R. Crim. P. 36 is amended to provide for an appeal as of right from the trial court's filing of a corrected judgment or order. A corresponding amendment to Tenn. R. App. P. 3 is also adopted.

Tenn. R. App. P. 24(a) lists the items which must be included in the record on appeal. In an appeal as of right from the entry of a corrected judgment or order pursuant to Tenn. R. Crim. P. 36, the record on appeal should include the listed items (e.g., papers filed in the trial court, exhibits, transcript or statement of the evidence or proceedings, etc.) pertaining to the original judgment or order, as well as those items pertaining to the corrected judgment or order. As provided by Tenn. R. App. P. 24(a), however, the parties may designate that only certain items be included "[i]f less than the full record on appeal...is deemed sufficient to convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal[.]"

Advisory Commission Comments [2017]. The rule is amended to provide that an appeal as of right is available following the trial court's *denial* of a motion filed pursuant to Tenn. R. Crim. P. 36, in addition to cases in which the trial court files a corrected judgment or order. Although Tenn. R. App. P. 3 was amended in 2012 to accomplish this result, the text of Tenn. R. Crim. P. 36 was not changed at that time; additionally, the 2012 Advisory Commission Comment to Tenn. R. App. P. 3(b) and (c) failed to convey the intent behind the 2012 amendment to Tenn. R. App. P. 3. As a result, amended Tenn. R. App. P. 3(b) and (c) were not consistent with the text of Tenn. R. Crim. P. 36. Construing the text of both rules, the Court of Criminal Appeals held that an appeal as of right still was not available in cases in which the trial court denied a Tenn. R. Crim. P. 36 motion, notwithstanding the 2012 amendment to Tenn. R. App. P. 3(b) and (c). *See, e.g., State v. Ross*, No. E2014-02563- CCA-R3-CD, 2015 WL 7567285, at *6 (Tenn. Crim. App. Nov. 24, 2015), *appeal denied, not for citation* (Tenn. Apr. 6, 2016) (stating that "[t]his court has repeatedly held that Tennessee Rule of Appellate Procedure 3(b) provides no appeal as of right from the *denial* of a Rule 36 motion, and this court lacks jurisdiction to entertain such an appeal" and that "[t]his outcome is not changed by any of the recent amendments to Rules 36 and 3(b)") (emphasis in original). This 2017 amendment resolves the inconsistency between the two rules and makes it clear that an appeal as of right is available regardless of whether the trial court grants or denies a Tenn. R. Crim. P. 36 motion.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 13, 2012, was ratified and approved by 2012 House Resolution 192 and Senate Resolution 79. The order promulgating the 2012 amendment of this rule provided that it take effect July 1, 2012.

The amendment of Rule 36, which amended the second sentence of the rule and added the [2017] Advisory Comments, as promulgated and adopted by the Supreme Court in its order dated December 21, 2016, was ratified and approved by 2017 House Resolution 17 and

Senate Resolution 17. The order promulgating the amendment of the second sentence of the rule and the addition of the [2017] Advisory Comments, provided that it take effect July 1, 2017.

Textbooks. Tennessee Jurisprudence. 8 Tenn. Juris., Courts, § 11; 8 Tenn. Juris., Criminal Procedure, § 26.

NOTES TO DECISIONS

Analysis

1. Probation Orders.
2. Error in Final Judgment.
3. Illegal Sentence.
4. Reversible Error.
5. Miscellaneous.
6. Appellate Jurisdiction.
7. Authority of Court.

1. Probation Orders.

If a trial court, in fact, ordered restitution as a condition of probation, but the judgment or probation order failed to reflect such a condition, then the trial court maintains the power to modify such judgment or order because of an oversight or omission subject to correction by the trial court pursuant to Tenn. R. Crim. P. 36. State v. Moore, 814 S.W.2d 381, 1991 Tenn. Crim. App. LEXIS 242 (Tenn. Crim. App. 1991).

Where judgment and probation order failed to address the issue of restitution, the case was remanded for the purpose of allowing the trial judge to correct such orders pursuant to Tenn. R. Crim. P. 36. State v. Moore, 814 S.W.2d 381, 1991 Tenn. Crim. App. LEXIS 242 (Tenn. Crim. App. 1991).

2. Error in Final Judgment.

Trial court's corrective order filed two days after the original order, and entered before the defendant filed his notice of appeal, complied with *Preston* and properly reserved defendant's certified question of law for appeal. State v. Armstrong, 126 S.W.3d 908, 2003 Tenn. LEXIS 68 (Tenn. 2003).

3. Illegal Sentence.

As referenced in T.C.A. § 40-35-501(i)(3), T.C.A.§ 39-13-523 provides that defendants convicted of rape of a child are ineligible to receive the benefit of sentence reduction credits and have to serve their entire sentences undiminished by credits of up to 15 percent; the transcript of petitioner's guilty plea hearing showed the parties acknowledged their expectations that petitioner would receive the benefit of the 15 percent sentence reduction credit provisions, and indeed, the judgment reflected that; thus, the judgments did not contain mere clerical errors and the judgments were void, entitling petitioner to the issuance of a writ of habeas corpus. Coleman v. Morgan, 159 S.W.3d 887, 2004 Tenn. Crim. App. LEXIS 695 (Tenn. Crim. App. 2004), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 1182 (Tenn. Dec. 20, 2004).

Where defendant's four judgment orders designated him as a Multiple 35 percent Range 2 offender, not a Multiple Rapist, defendant's sentences on four aggravated rape convictions, were illegal and void. Pursuant to T.C.A. § 39-13-523(b), (c), defendant's convictions of multiple counts of aggravated rape rendered him ineligible for early release on parole. The Multiple Rapist classification was mandatory rather than discretionary. Thus, defendant's four judgment orders did not correctly reflect his statutorily-required sentencing status, and the error was not clerical. Cantrell v. Easterling, 346 S.W.3d 445, 2011 Tenn. LEXIS 746 (Tenn. Aug. 1, 2011).

4. Reversible Error.

In a criminal prosecution for aggravated rape, trial court erred by admitting evidence of the victim's pantyhose because the state failed to establish a proper chain of custody as required by Tenn. R. Evid. 901, and the error was not harmless under Tenn. R. Crim. P. 36(b); only tangible evidence linking defendant in any way to the victim was DNA analysis derived from semen found on the pantyhose. State v. Cannon, 254 S.W.3d 287, 2008 Tenn. LEXIS 278 (Tenn. Apr. 29, 2008).

5. Miscellaneous.

Defendant did not submit a written request to the trial court for a jury instruction on a missing witness and failed to submit a transcript of the jury instructions as part of the record on appeal, as the record submitted to the appellate court contained only the written jury instructions. Accordingly, the appellate court found that there was no plain error pertaining to the jury instruction as defendant pointed to no unequivocal rule of law that had been breached. State v. Buford, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 40 (Tenn. Crim. App. Jan. 27, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 345 (Tenn. June 3, 2020).

6. Appellate Jurisdiction.

Defendant had a right of appeal from the criminal court's order modifying its order dismissing the indictments filed against him because Tenn. R. App. P. 3(b) afforded in criminal cases an appeal as of right from an order or judgment entered pursuant to Tenn. R. Crim. P. 36; to hold otherwise would exalt form over substance and deprive defendant of an opportunity to obtain the relief to which he was entitled since the criminal court lacked author-

ity to modify its final order. State v. Allen, 593 S.W.3d 145, 2020 Tenn. LEXIS 15 (Tenn. Jan. 29, 2020).

7. Authority of Court.

Criminal court, by its order partially vacating its final order of dismissal of indictments, exceeded the authority the rule provided because the criminal court was not purporting simply to correct a clerical mistake or supply omitted or overlooked information; the State filed neither a timely appeal nor any motion in the criminal court that would have tolled the time for filing an appeal, so the order became final thirty days after its entry. State v. Allen, 593 S.W.3d 145, 2020 Tenn. LEXIS 15 (Tenn. Jan. 29, 2020).

Rule 36.1. Correction of Illegal Sentence. —

(a)

(1) Either the defendant or the state may seek to correct an illegal sentence by filing a motion to correct an illegal sentence in the trial court in which the judgment of conviction was entered. Except for a motion filed by the state pursuant to subdivision (d) of this rule, a motion to correct an illegal sentence must be filed before the sentence set forth in the judgment order expires. The movant must attach to the motion a copy of each judgment order at issue and may attach other relevant documents. The motion shall state that it is the first motion for the correction of the illegal sentence or, if a previous motion has been made, the movant shall attach to the motion a copy of each previous motion and the court's disposition thereof or shall state satisfactory reasons for the failure to do so.

(2) For purposes of this rule, an illegal sentence is one that is not authorized by the applicable statutes or that directly contravenes an applicable statute.

(b)

(1) Notice of any motion filed pursuant to this rule shall promptly be provided to the adverse party. The adverse party shall have thirty days within which to file a written response to the motion.

(2) The court shall review the motion, any response, and, if necessary, the underlying record that resulted in the challenged judgment order. If the court determines that the motion fails to state a colorable claim, it shall enter an order summarily denying the motion.

(3) If the motion states a colorable claim that the unexpired sentence is illegal, the court shall determine if a hearing is necessary. If the court, based on its review of the pleadings and, if necessary, the underlying record, determines that the motion can be ruled upon without a hearing, it may do so in compliance with subdivision (c) of this rule. If the court determines that a hearing is necessary, and if the defendant is indigent and is not already represented by counsel, the court shall appoint counsel to represent the defendant. The court then shall promptly hold a hearing on the motion.

(c)

(1) With or without a hearing, if the court determines that the sentence is not an illegal sentence, the court shall file an order denying the motion.

(2) With or without a hearing, if the court determines that the sentence is an illegal sentence, the court shall then determine whether the illegal sentence was entered pursuant to a plea agreement. If not, the court shall file an order granting the motion and also shall enter an amended uniform judgment document, see Tenn. Sup. Ct. R. 17, setting forth the correct sentence.

(3) With or without a hearing, if the court determines that the illegal sentence was entered pursuant to a plea agreement, the court shall determine whether the illegal aspect of the sentence was a material component of the plea agreement.

(A) If the illegal aspect was not a material component of the plea agreement, the court shall file an order granting the motion and also shall enter an amended uniform judgment document, see Tenn. Sup. Ct. R. 17, setting forth the correct sentence.

(B) If the illegal aspect was a material component of the plea agreement but the illegal aspect was to the defendant's benefit, the court shall enter an order denying the motion.

(C) If the illegal aspect was a material component of the plea agreement and the illegal aspect was not to the defendant's benefit, the court shall give the defendant an opportunity to withdraw his or her plea. If the defendant chooses to withdraw his or her plea, the court shall file an order stating its findings that the illegal aspect was a material component of the plea agreement and was not to the defendant's benefit, stating that the defendant withdraws his or her plea, and reinstating the original charge against the defendant. If the defendant does not withdraw his or her plea, the court shall file an order granting the motion and also shall enter an amended uniform judgment document, see Tenn. Sup. Ct. R. 17, setting forth the correct sentence.

(d) In any case in which the trial court failed to impose a statutorily required sentence of community supervision for life in conjunction with imposing a non-plea-bargained sentence, the state may file a motion under this rule to correct the omission. Any motion filed pursuant to this subdivision (d) must be filed no later than ninety days after the sentence imposed in the judgment order expires.

(e) An order granting or denying a motion filed under this rule shall set forth the court's findings of fact and conclusions of law as to the matters alleged in the motion.

(f) Upon the filing of an amended uniform judgment document in those proceedings in which the court grants a motion filed under this rule, or upon the filing of an order denying a motion filed under this rule, the defendant or the state may initiate an appeal as of right pursuant to Rule 3, Tennessee Rules of Appellate Procedure. [Added by order filed December 18, 2012, effective July 1, 2013 and by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments [2013]. Rule 36.1 was adopted to provide a mechanism for the defendant or the State to seek to correct an illegal sentence. With the adoption of this rule, Tenn. R. App. P. 3 also was amended to provide for an appeal as of right from the trial court's ruling on a motion filed under Rule 36.1 to correct an illegal sentence.

Advisory Commission Comments [2016]. In 1978, the Tennessee Supreme Court stated that "[a]s a general rule, a trial judge may correct an illegal, as opposed to a merely erroneous, sentence at any time, even if it has become final." *State v. Burkhart*, 566 S.W.2d 871,873 (Tenn. 1978). Rule 36.1 was adopted in order to incorporate within the Rules of Criminal Procedure the procedure for correcting illegal sentences, including those arising from plea bargains. Rule 36.1 (a)(2) incorporates the definition of "illegal sentence" set forth in *Cantrell v. Easterling*, 346 S.W.3d 445 (Tenn. 2011).

The former version of subdivision (a) provided that a motion to correct an illegal sentence could be filed "at any time." Subdivision

(a) is amended to clarify that such motions must be filed before the defendant's sentence expires, except as set forth in subdivision (d) (pertaining to the erroneous omission of a sentence of community supervision for life). Subdivision (a) also is amended to require the party seeking to correct an unexpired illegal sentence to include with the motion a copy of the relevant judgment order(s); to permit the movant to also include other supporting documents; and to require the movant to state whether the motion is the first motion to correct the illegal sentence (and, if not, to provide information about each earlier motion).

Subdivision (b) is amended to accord with the revisions to subdivision (a). Subdivision (b) also is amended to permit the summary denial of motions that do not set forth a colorable claim; to provide for the disposition on the merits of motions that do not require a hearing; and to require that any necessary hearing be held "promptly."

Subdivision (c)(3) is revised to limit the circumstances under which relief may be granted where the defendant has entered into a plea bargain which contains an illegal sentence. As revised, the rule provides that the court shall deny the motion if the defendant benefitted from the bargained-for illegal sentence. For example, if the illegal provision was for the sentence to run concurrently with another sentence, when the law actually required a consecutive sentence, the defendant benefitted from the bargained-for illegal sentence; in such cases, relief under this rule is not available. This revision of subdivision (c)(3) essentially incorporates the limitations on habeas corpus relief available for plea-bargained illegal sentences set forth in Tennessee Code Annotated section 29-21-101(b) (2012).

For clarity in the court's decision-making process, the substance of former subdivision (c)(4) is moved to the new subdivision (c)(3)(i).

New subdivision (d) is adopted to address the circumstances under which the state may seek to correct a judgment order that failed to impose a statutorily required sentence of lifetime community supervision. See, e.g., Tenn. Code Ann. § 39-13-524 (2014). Subdivision (d) permits the state to seek such correction of non-plea-bargained sentences to add the community-supervision requirement, so long as the state's motion is filed no later than ninety days after the expiration of the sentence set forth in the judgment order. The reason for allowing the state ninety days from the expiration of the sentence imposed in the judgment is that the state might not realize that the sentence of lifetime community supervision was omitted until the defendant is released from confinement.

To facilitate appellate review, new subdivision (e) requires courts to include their findings of fact and conclusions of law in the orders disposing of motions filed under this rule.

Subdivision (f) clarifies that the time period for filing an appeal commences upon the filing of an amended uniform judgment document in those proceedings in which the court grants relief under this rule, and upon the filing of an order in those proceedings in which the court denies relief under this rule.

Compiler's Notes. The addition of Rule 36.1, as promulgated and adopted by the Supreme Court in its order dated December 18, 2012, was ratified and approved by House Resolution 33 and Senate Resolution 11. The order promulgating the addition of Rule 36.1 provided that it take effect July 1, 2013.

The amendment of Rule 36.1 and the addition of [2016] Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 147 and Senate Resolution 80. The order promulgating the amendment of Rule 36.1 and the addition of [2016] Advisory Commission Comments provided that it take effect July 1, 2016.

NOTES TO DECISIONS

Analysis

1. Construction.
2. Colorable Claim.
3. Motion Denied.
4. Illegal Sentence.
5. Appellate Jurisdiction.

1. Construction.

Definition of "illegal sentence" is coextensive with, and not broader than, the definition of the term in the habeas corpus context. State v. Wooden, 478 S.W.3d 585, 2015 Tenn. LEXIS 932 (Tenn. Dec. 2, 2015).

Just as Tennessee statutes and decisions impose no duty on a sheriff to challenge an improper or potentially improper sentence, Tenn. R. Crim. P. 36.1 also imposes no duty on Tennessee sheriffs to do so. The language of Rule 36.1 very clearly provides a mechanism for only the defendant or the state to seek correction of an illegal sentence. Tenn. R. Crim. P. 36.1(a)(1). Rule 36.1 neither obligates nor permits a Tennessee sheriff to do so. Accordingly, Tennessee sheriffs have no duty to challenge an improper or potentially improper sentence. Ray v. Madison Cty., 536 S.W.3d 824, 2017 Tenn. LEXIS 473 (Tenn. Aug. 16, 2017).

2. Colorable Claim.

Definition of "colorable claim" in Tenn. Sup. Ct. R. 28, § 2(H) applies to the term "colorable claim" in Tenn. R. Crim. P. 36.1; for purposes of

Rule 36.1, "colorable claim" means a claim that, if taken as true and viewed in a light most favorable to the moving party, would entitle the moving party to relief under Rule 36.1. State v. Wooden, 478 S.W.3d 585, 2015 Tenn. LEXIS 932 (Tenn. Dec. 2, 2015).

Petitioner failed to state a colorable claim for relief under this rule, and therefore the trial court properly denied him relief, because the record showed that he entered a knowing and voluntary plea to the revocation of his community corrections. The record showed that the violation of community corrections hearing and the guilty plea hearing were collapsed into one colloquy, upon extensive examination by the trial court petitioner acknowledged the rights he was waiving upon entering the plea, and he acknowledged his intent to accept the negotiated plea agreement that increased his community corrections sentence from six to eight years. State v. Walls, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 319 (Tenn. Crim. App. May 21, 2019).

Circuit court properly denied defendant's petition for sentencing relief because the allegation put forth by defendant did not render his sentences illegal, defendant failed to present a colorable claim, defendant filed his motion well beyond the one year statute of limitations, and the Drug-Free School Zone Act did not apply to facilitation, did not fall within the statutory purview of a motion to reopen a post-conviction petition, and did not apply to facilitation or trigger due process protections. Osborne v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 330 (Tenn. Crim. App. May 11, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 563 (Tenn. Sept. 16, 2020).

Intermediate appellate court erred when it departed from the supreme court's decision that a sentence was not rendered void merely because the statute under which the sentence was imposed was later declared unconstitutional; petitioner's sentence was voidable rather than void and illegal, and, therefore, he was not entitled to relief under the statute because he did not state a colorable claim. State v. Reid, — S.W.3d —, 2020 Tenn. LEXIS 602 (Tenn. Mar. 26, 2021).

3. Motion Denied.

Former inmate was not entitled to relief from an expired illegal sentence because (1) Tenn. R. Crim. P. 36.1 did not expand the relief available for illegal sentence claims to include correcting expired illegal sentences, as such relief was traditionally available by way of habeas corpus, requiring a petitioner to be in custody, and (2) the former inmate's motion alleging a failure to award pretrial jail credit stated no colorable claim for relief from an illegal sentence, as this did not render the sentence illegal. State v. Brown, 479 S.W.3d 200, 2015 Tenn. LEXIS 933 (Tenn. Dec. 2, 2015).

The trial court did not err by summarily dismissing defendant's claim that his sentences were illegal because his claims, taken as true, did not state a colorable claim that his sentences were illegal, as he failed to provide any specificity or details as to how or by whom the alleged fraud and concealment was carried out by the district attorney or that the grand jury was not an independent body with no connection to the district attorney. Reed v. State, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 672 (Tenn. Crim. App. Aug. 31, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 56 (Tenn. Jan. 18, 2019), cert. denied, Reed v. Tennessee, 204 L. Ed. 2d 234, 139 S. Ct. 2035, — U.S. —, 2019 U.S. LEXIS 3289 (U.S. May 13, 2019).

Criminal court properly denied defendant's motion to correct illegal an sentence without a hearing because that relief was not available since his sentence had expired, and defendant did not contest that his sentence had expired. State v. Thomas, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 535 (Tenn. Crim. App. July 30, 2020).

Trial court properly denied defendant's request to withdraw his guilty plea; while the 100 percent service rate for the entire 10-year sentence in count three was illegal because defendant's prior Louisiana armed robbery convictions did not qualify as a dangerous felony, the trial court appropriately found that the illegal aspect of the sentence was not a material component of the plea. The proper remedy was to amend defendant's sentence. State v. Smith, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 141 (Tenn. Crim. App. Apr. 12, 2021).

4. Illegal Sentence.

At a minimum, any motion filed under the rule must state with particularity the factual allegations on which the claim for relief from an illegal sentence is based, and the moving party may support the motion with affidavits; when determining whether a motion to correct an illegal sentence sufficiently states a colorable claim, a trial court may consult the record of the proceeding from which the allegedly illegal sentence emanated. State v. Wooden, 478 S.W.3d 585, 2015 Tenn. LEXIS 932 (Tenn. Dec. 2, 2015).

By requiring motions to correct an illegal sentence to be filed in the trial court in which the judgment of conviction was entered, the rule ensures that a trial court considering a motion would have ready access to the record of the proceedings from which the allegedly illegal sentence(s) arose. State v. Wooden, 478 S.W.3d 585, 2015 Tenn. LEXIS 932 (Tenn. Dec. 2, 2015).

Allegations in defendant's motion to correct an illegal sentence, and the judgment documents he submitted in support of his motion, are sufficient to enable a court to determine whether he stated a colorable claim for relief

because defendant included in his motion sufficiently specific factual allegations describing the basis of his claim for relief from an allegedly illegal sentence; he attached copies of the judgment documents that reflected the sentences he attacked as illegal in his motion State v. Wooden, 478 S.W.3d 585, 2015 Tenn. LEXIS 932 (Tenn. Dec. 2, 2015).

Court of criminal appeals properly affirmed the denial of defendant's motion to correct an illegal sentence because defendant failed to allege a colorable claim for correction of an illegal sentence; the five-year sentence defendant received was statutorily available for the offense of which her was convicted, facilitation of aggravated robbery, even if the trial court erred by concluding the sentence was appropriate for him. State v. Wooden, 478 S.W.3d 585, 2015 Tenn. LEXIS 932 (Tenn. Dec. 2, 2015).

Inmate was not entitled to relief from a death sentence due to intellectual disability under T.C.A. § 39-13-203(b), barring execution of intellectually disabled defendants, because (1) the inmate's punishment was statutorily authorized when imposed, so the sentence was not illegal, and, (2) neither when sentenced nor when filing the inmate's petition was the inmate found intellectually disabled. Ivy v. State, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 64 (Tenn. Crim. App. Jan. 30, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 298 (Tenn. May 18, 2018), cert. denied, Ivy v. Tennessee, 202 L. Ed. 2d 591, 139 S. Ct. 804, — U.S. —, 2019 U.S. LEXIS 528 (U.S. Jan. 7, 2019).

Sentence of eleven months and twenty-nine days was not an authorized term of imprisonment for a Class D felony under T.C.A. § 40-35-111(b)(4) and was therefore an illegal sentence pursuant to this rule, and because defendant was convicted of a felony in one count, the sentence would be mandated to be served consecutively to the effective sentence for the other felony convictions pursuant to § 40-20-111(b) and Tenn. R. Crim. P. 32(c)(3)(C). State v. Menke, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 398 (Tenn. Crim. App. May 21, 2018), rev'd, 590 S.W.3d 455, 2019 Tenn. LEXIS 513 (Tenn. Nov. 27, 2019).

Trial court did not err in dismissing defendant's motion to correct an illegal sentence because defendant acknowledged at the guilty plea hearing that he understood his sentence, the classification, and the applicable range; defendant pleaded guilty to aggravated kidnapping, which was one of five counts for which he had been indicted, and in exchange, the State dismissed the other counts and agreed to a sentence within the range for a Class B felony. State v. Mayes, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 140 (Tenn. Crim. App. Mar. 4, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 267 (Tenn. June 19, 2019).

Defendant's sentence could not be corrected because the statutory prohibition—no defendant with intellectual disability at the time of committing first-degree murder shall be sentenced to death—existed prior to the murder for which he was convicted and a death sentence was clearly authorized for first-degree murder. Dellinger v. State, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 247 (Tenn. Crim. App. Apr. 17, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 394 (Tenn. Aug. 14, 2019), cert. denied, Dellinger v. Tennessee, 206 L. Ed. 2d 947, 140 S. Ct. 2780, U.S. , 2020 U.S. LEXIS 2754 (U.S. May 18, 2020).

Trial court properly dismissed defendant's motion to correct an illegal sentence because defendant failed to state a colorable claim for relief inasmuch as the trial court's error in checking the "TDOC" (The Department of Correction)box on the uniform judgment document constituted a clerical error for which defendant was not entitled to relief, the plea agreement properly ordered the confinement part of the split confinement sentence to be served in the county jail, mentioning "TDOC" was actually surplusage, and defendant's sentence had since expired. State v. Johnson, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 265 (Tenn. Crim. App. Apr. 25, 2019).

Trial court did not err in revoking defendant's probationary sentence because it maintained jurisdiction to correct defendant's original sentence at any time before its expiration since it was illegal; defendant was convicted of aggravated robbery, and, in consequence, was ineligible for probation despite having received a sentence of 10 years or less, and he was not eligible for any form of alternative sentencing. State v. Contreras, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 642 (Tenn. Crim. App. Oct. 9, 2019).

Defendant's was not a case where the original sentence illegality would permit defendant to withdraw his original guilty plea because Although defendant pleaded guilty to aggravated robbery, his plea was "open" and without any sentence having been promised in exchanged for his plea; in consequence, defendant could not establish that, but for the illegal sentence, he would not have pleaded guilty. State v. Contreras, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 642 (Tenn. Crim. App. Oct. 9, 2019).

Trial court did not err in denying defendant relief because he failed to state a cognizable claim relative to his allegations of violations of his right to double jeopardy protection and due process; defendant did not argue a basis for concluding that he was entitled to have the alleged infirmity in the convictions addressed, and he did not challenge his sentences as being unauthorized by statute or in contravention of an applicable statute. State v. Alcorn, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 651 (Tenn.

Crim. App. Oct. 15, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 59 (Tenn. Jan. 15, 2020).

By agreeing to entry of a judgment of conviction sentencing defendant to a six-year sentence for a Class E felony, defendant rendered his argument that the trial court, defense counsel, and prosecutor were confused about the sentence moot; the judgments of conviction did not provide an illegal sentence because defendant's six-year sentence for Class E felony theft is authorized by the applicable statute. State v. Birdwell, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 711 (Tenn. Crim. App. Nov. 7, 2019).

Trial court properly denied the State's Tenn. R. Crim. P. 36.1 motion to correct defendant's sentence for two merged convictions of theft of property valued at $1,000 or more but less than $10,000 where the grading of theft statute had been amended after defendant's conviction, the amended statute, T.C.A. § 39-14-105(a) (2018), was effective at the time of the sentencing hearing, under judicial precedent, the amended version of the grading of theft statute applied even where the offense occurred before the amendment's effective date, as long as the amended version was effective at the time of sentencing, and the record reflected that the trial court imposed Range III sentences for a Class E felony. As a result, the corrected judgments did not reflect illegal sentences, and the trial court did not err by denying the State's Rule 36.1 motion. State v. Jones, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 804 (Tenn. Crim. App. Dec. 27, 2019).

5. Appellate Jurisdiction.

Because defendant's two-year sentence expired and reviewing his claim that his sentence was illegal required relitigating his guilty plea, defendant's claim was not proper for review. State v. Wallen, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 337 (Tenn. Crim. App. May 14, 2020).

VIII. APPEAL.

Rule 37. Appeal. —

(a) Definition of an Appeal. — An "appeal" refers to direct appellate review available as a matter of right, appeals in the nature of writs of error, and all other direct appeals in criminal cases.

(b) When an Appeal Lies. — The defendant or the state may appeal any order or judgment in a criminal proceeding when the law provides for such appeal. The defendant may appeal from any judgment of conviction:

(1) on a plea of not guilty; or

(2) on a plea of guilty or nolo contendere, if:

(A) the defendant entered into a plea agreement under Rule 11(c) but explicitly reserved–with the consent of the state and of the court–the right to appeal a certified question of law that is dispositive of the case, and the following requirements are met:

(i) the judgment of conviction or order reserving the certified question that is filed before the notice of appeal is filed contains a statement of the certified question of law that the defendant reserved for appellate review;

(ii) the question of law as stated in the judgment or order reserving the certified question identifies clearly the scope and limits of the legal issue reserved;

(iii) the judgment or order reserving the certified question reflects that the certified question was expressly reserved with the consent of the state and the trial court; and

(iv) the judgment or order reserving the certified question reflects that the defendant, the state, and the trial court are of the opinion that the certified question is dispositive of the case; or

(B) the defendant seeks review of the sentence and there was no plea agreement under Rule 11(c); or

(C) the errors complained of were not waived as a matter of law by the guilty or nolo contendere plea, or otherwise waived, and if such errors are apparent from the record of the earlier proceedings; or

(D) if there is no plea agreement pursuant to Rule 37(b)(2)(A), the defendant—with the consent of the court—explicitly reserved the right to appeal a certified question of law that is dispositive of the case, and the requirements of Rule 37(b)(2)(A)(i)-(ii) are otherwise met.

(c) Procedure for Advising Defendant of Appellate Rights. — After overruling a motion for a new trial or a motion in arrest of judgment, whichever comes last, the trial judge shall do the following:

(1) Advise of Right to Appeal. — Advise the defendant of the right to appeal; and

(2) Determine Indigency; Ensure Counsel. — Determine–from evidence or stipulation–for the record whether the defendant is indigent. If the defendant is indigent, the court shall advise the defendant that, if he or she has not already retained appellate counsel or if counsel has not previously been appointed, the court will appoint appellate counsel and that a transcript or statement of the evidence will be furnished at state expense.

(d) Pursuing or Waiving an Appeal. — Before the judgment on the guilty verdict becomes final, the following shall be done:

(1) Seeking Appeal. — If an appeal is sought, the defendant in person or by counsel shall file a timely notice of appeal with the clerk in accordance with Rule 4(a), Tennessee Rules of Appellate Procedure; or

(2) Waiving Appeal. — If an indigent or nonindigent defendant who has the right to appeal a conviction chooses to waive the appeal, counsel for the defendant shall file with the clerk, during the time within which the notice of appeal could have been filed, a written waiver of appeal, which must

(A) clearly reflect that the defendant is aware of the right to appeal and voluntarily waives it; and

(B) be signed by the defendant and the defendant's counsel of record.

(e) Duties of Counsel Regarding Appeal. —

(1) Counsel Retained for Trial But Not Appeal. — An attorney retained by the defendant to represent the defendant for the trial but not for appeal, shall timely advise the trial court of this fact at the hearing on the motion for a new trial. Thereupon, such counsel will be permitted to withdraw as counsel of record, except as provided in Rule 37(e)(2).

(A) Appellate Counsel for Non-Indigent Defendant. — If the defendant is not indigent at the time counsel is permitted to withdraw, the court shall advise the defendant of the right of appeal and the time for filing the notice of appeal.

(B) Appellate Counsel for Indigent Defendant. — If the defendant is indigent at the time counsel is permitted to withdraw, the court shall appoint appellate counsel for the defendant.

(2) Retained Counsel Filing Notice of Appeal. — Retained counsel–whether or not fully paid–who files a notice of appeal shall represent the defendant on appeal. Such retained counsel shall fully comply with all appellate rules as to timely filing and appearances. Retained counsel shall be allowed to withdraw as counsel of record only for good cause and only if application is made when not delinquent in his or her duties.

(3) Appointed Counsel for Indigent Defendant. — Pursuant to Tenn. Sup. Ct. Rule 13, § 1(e)(5), counsel appointed in the trial court to represent an indigent defendant shall continue to represent the defendant throughout the proceedings, including any appeals, until the case has been concluded or counsel has been allowed to withdraw by a court. [As amended by order filed December 21, 2010, effective July 1, 2011; and by order filed January 15, 2013, effective July 1, 2013.]

Advisory Commission Comments. This rule retains present law as to when a direct appeal lies, except for the significant provisions addressing appeals from pleas of guilty and nolo contendere. The first provision permits an appeal in the context of a controlling question that needs answering, such as the constitutionality of a statute upon which a charge is grounded or the validity of the search upon which the state's case must be made, and should avoid the necessity for many trials. The rules regarding certified questions of law that are dispositive of the case vary depending on whether there is a plea bargain and whether the state agrees to the appeal. *See* Tenn. R. Crim. P. 37(b)(2)(i) and (iv). In order for an attorney to perfect an appeal of a certified question, the attorney must be certain that the application fully comports with the requirements for this type of an appeal as set forth by the Tennessee Supreme Court in its decision of *State v. Preston*, 759 S.W.2d 647 (Tenn. 1988). Failure to follow the dictates of the *Preston* decision could result in the dismissal of the appeal.

The second situation addressed was arguably always appealable, i.e., a sentence complaint where there was no agreement as to sentence. The third provision will apply in cases where guilt was not contested but the record clearly reflects an invalidating error, such as the clear denial of the right to counsel or a conviction under an invalid statute, wherein it would be judicially inefficient to require a post-conviction collateral attack when the error is apparent upon the face of the existing record.

The Rule requires that the defendant must be advised of pertinent appellate rights. In all cases if an appeal is to be waived, this must be put on record.

The problem of retained attorneys initiating an appeal and doing nothing further is addressed by Rule 12 of the Rules of the Tennessee Court of Criminal Appeals. This rule addresses the same problem. Retained counsel who commence the appellate process are deemed to be fully retained to complete it.

Counsel considering withdrawal or termination of representation should consult Tenn. Sup. Ct. R. 14 (procedure for withdrawal in Court of Appeals and Court of Criminal Appeals) and Tenn. Sup. Ct. R. 8, RPC § 1.16 (declining and terminating representation).

See T.C.A. § 40-26-105, dealing with the expanded circumstances under which the writ of error coram nobis may issue in criminal cases.

Advisory Commission Comments [2011]. The amendment to Rule 37(b)(2)(A) addresses those cases where the certified question of law is not stated in the judgment. In such cases, the amendment removes the requirement that a separate document setting forth the certified question of law be incorporated by reference in the judgment, and it allows the requirements of the Rule to be met by an order entered by the trial court certifying the question.

Advisory Commission Comments [2013]. Rule 37(b)(2) was amended to clarify the provisions regarding the appeal of cases in which the defendant reserves a certified question of law. *See State v. Joseph L. Lands*, No. W2011-00386-CCA-R3-CD, 2012 Tenn. Crim. App. LEXIS 203 (Tenn. Crim. App. March 29, 2012) (discussing history of Rule 37(b)(2) and apparent drafting error in earlier revision of the rule).

Compiler's Notes. The amendment of Rule 37, as promulgated and adopted by the Supreme Court in its order dated December 21, 2010, was ratified and approved by 2011 House Resolution 36 and Senate Resolution 14. The order promulgating the 2011 amendment of Rule 37 provided that it take effect July 1, 2011.

The amendment of Rule 37(b)(2) and addition of the 2013 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 18, 2012, was ratified and approved by House Resolution 33 and Senate Resolution 11. The order promulgating the amendment of Rule 37(b)(2) and addition of the 2013 Advisory Commission Comments provided that it take effect July 1, 2013.

Textbooks. Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, § 19; 8 Tenn. Juris., Criminal Procedure, § 20.

Law Reviews. Criminal Appeals as of Right in Tennessee (W. Mark Ward), 31 Tenn. B.J. 19 (1995).

Guidelines for Juvenile Court Practice (Andrew J. Shookhoff), 19 Tenn. B.J. 5 (1983).

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1. Jurisdiction.

An appellate court will not violate Tenn. R. Crim. P. 37 to assume jurisdiction of a matter on agreement of litigants and the trial court. It will not assume jurisdiction of a question involving the admissibility of evidence when guilty pleas are entered unless the question makes final disposition of the case. State v. Wilkes, 684 S.W.2d 663, 1984 Tenn. Crim. App. LEXIS 2677 (Tenn. Crim. App. 1984).

Order entered by trial court after filing of notice of appeal is not effective to remedy noncompliance with Tenn. R. Crim. P. 37 because trial court no longer has jurisdiction. State v. Irwin, 962 S.W.2d 477, 1998 Tenn. LEXIS 90 (Tenn. 1998).

Trial court erred in denying petitioner's application for a writ of habeas corpus relief because petitioner stated entitlement to habeas corpus relief in the form of the application of pretrial jail credit; petitioner had no direct appeal avenue to challenge the denial of pretrial jail credit. Anderson v. Washburn, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 79 (Tenn. Crim. App. Feb. 5, 2019), rev'd, — S.W.3d —, 2019 Tenn. LEXIS 248 (Tenn. June 27, 2019).

Defendant failed to properly certify the question of law, and therefore the court was without jurisdiction to consider it, because it did not identify clearly the scope and limits of the legal issue reserved, as the trial court denied the defendant's motion to suppress after finding he voluntarily consented to the blood draw and defendant should have asked the court to review only whether the trial court erred in finding the defendant voluntarily consented. In defendant's brief he did not directly address the trial court's ruling on consent and he addressed numerous questions which the trial court did not rule on in its order denying the motion to suppress. State v. Hyberger, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 201 (Tenn. Crim. App. Mar. 26, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 457 (Tenn. July 17, 2020).

2. Presumption of Guilt on Appeal.

On appeal, the appellate court will view the evidence, together with all reasonable and legitimate inferences therefrom, in the strongest light consistent with the state's theory of guilt. Head v. State, 570 S.W.2d 362, 1978 Tenn. Crim. App. LEXIS 321 (Tenn. Crim. App. 1978).

On appeal, a defendant is presumed guilty of the offense for which he was convicted and the appellate court cannot reverse a conviction on the evidence unless it appears that the evidence preponderates against the defendant's guilt and in favor of his innocence. Head v. State, 570 S.W.2d 362, 1978 Tenn. Crim. App. LEXIS 321 (Tenn. Crim. App. 1978).

3. Request for Appeal.

In order to vest an appellate court with jurisdiction of a cause, the appeal must be both prayed and granted. Farmer v. State, 574 S.W.2d 49, 1978 Tenn. Crim. App. LEXIS 329 (Tenn. Crim. App. 1978).

Although no minute entry showed that an appeal was prayed and granted, the court of criminal appeals considered the appeal as indirectly shown and considered all of the assignments of error. Farmer v. State, 574 S.W.2d 49, 1978 Tenn. Crim. App. LEXIS 329 (Tenn. Crim. App. 1978).

4. Dispositive Issues.

An issue is dispositive when the appellate court must either affirm the judgment or reverse and dismiss. A question is never dispositive when the appellate court might reverse and remand for trial as the court would be required to do in a case if it accepted jurisdiction, decided the question on its merits and found in favor of the defendant. State v. Wilkes, 684 S.W.2d 663, 1984 Tenn. Crim. App. LEXIS 2677 (Tenn. Crim. App. 1984).

The court of criminal appeals is not bound by the trial court's determination that an issue is dispositive; rather, the court is required to make an independent determination of the dispositive nature of the question reserved, and appellate review must be denied if the record does not clearly demonstrate how the question is dispositive. State v. Oliver, 30 S.W.3d 363, 2000 Tenn. Crim. App. LEXIS 154 (Tenn. Crim. App. 2000), review or rehearing denied, — S.W.3d —, 2000 Tenn. LEXIS 524 (Tenn. Sept. 18, 2000).

Appeal was dismissed where defendant's issues were not dispositive of the case because if the defendant prevailed in the court of criminal appeals, the case necessarily would be remanded to the trial court for further action on the misdemeanor charge, not reversed and dismissed. Although an argument could be made

that the defendant's issues were dispositive of the "felony case," the rule in State v. Wilkes, 684 S.W.2d 663, 1984 Tenn. Crim. App. LEXIS 2677 (Tenn. Crim. App. 1984) requires either an affirmance or a reversal and dismissal of the entire case. State v. Oliver, 30 S.W.3d 363, 2000 Tenn. Crim. App. LEXIS 154 (Tenn. Crim. App. 2000), review or rehearing denied, — S.W.3d —, 2000 Tenn. LEXIS 524 (Tenn. Sept. 18, 2000).

Question of law that was reserved in the judgment was that defendant was sentenced as driving while intoxicated, third offender, following the denial of defendant's motion to dismiss the indictment for prosecution of a second or subsequent offender under the provisions of T.C.A. § 55-10-403(g)(3) [see now § 55-10-405(d)], by reason of the fact that the defendant was not given a copy of the department of safety printout at the time of arraignment; however, that question of law was not dispositive of the case, as was required for an appeal pursuant to Tenn. R. Crim. P. 37(b)(2)(i) (now Tenn. R. Crim. P. 37(b)(2)(A)). State v. Thompson, 131 S.W.3d 923, 2003 Tenn. Crim. App. LEXIS 889 (Tenn. Crim. App. 2003), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 202 (Tenn. Mar. 8, 2004).

Defendant's certified question on appeal asked whether or not the search of the storage shed predicated on a search warrant was preceded and based upon a prior warrantless search; the appellate court was unable to discern the meaning of the certified question on appeal pursuant to Tenn. R. Crim. P. 37(b)(2) and found that the trial court's findings and stipulation of facts clearly stated that there was no search warrant involved with the search of the portable shed, such that the appellate court did not have an adequate record to address the legality of that search since that search did not form the basis of the conviction. State v. Long, 159 S.W.3d 885, 2004 Tenn. Crim. App. LEXIS 512 (Tenn. Crim. App. 2004).

Defendant's appeal following the entry of a guilty plea was dismissed, because the state did not agree that the certified question was dispositive, as required under Tenn. R. Crim. P. 37(b). State v. Lands, 377 S.W.3d 678, 2012 Tenn. Crim. App. LEXIS 203 (Tenn. Crim. App. Mar. 29, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 534 (Tenn. Aug. 15, 2012).

Certified question related to consent to search was not dispositive because even if defendant's consent to search the home was constitutionally invalid and exigent circumstances did not exist, the evidence would have been inevitably discovered; deputies had probable cause to believe that an individual was inside defendant's home, and the deputies could have obtained a search warrant without defendant's consent in order to search the home for the individual, and the drug-related evidence would have been inevitably discovered. State v. Scott, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 19 (Tenn. Crim. App. Jan. 16, 2020).

Appellate court lacked jurisdiction to consider defendant's appeal because his certified question—whether the State had jurisdiction to prosecute him for the offense because the DUI offense was committed on federal property—was not dispositive of the case where the State had jurisdiction to prosecute him for the crime, and, even if defendant committed DUI on federal property and was arrested on federal property, he commenced driving under the influence in the city limits. State v. Wagner, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 236 (Tenn. Crim. App. Apr. 13, 2020).

Defendant failed to properly reserve certified question of law because, in light of her admission to possession of the pills, her turning over those pills, and her admitted history of selling the pills, the subsequent search of her residence and the question of its legality was not dispositive to her conviction of for possession of controlled substances. In addition, the certified question was overly broad because it was not clearly stated as to identify the scope and limits of the legal issue reserved. State v. Kilgore, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 58 (Tenn. Crim. App. Feb. 24, 2021).

5. Questions of Law.

Where questions of law involve the validity of searches and the admissibility of statements and confessions, etc., the reasons relied upon by defendant in the trial court at the suppression hearing must be identified in the statement of the certified question of law and review by the appellate courts will be limited to those passed upon by the trial judge and stated in the certified question, absent a constitutional requirement otherwise. Also, the order must state that the certified question was expressly reserved as part of a plea agreement, that the state and the trial judge consented to the reservation and that the state and the trial judge are of the opinion that the question is dispositive of the case. State v. Preston, 759 S.W.2d 647, 1988 Tenn. LEXIS 171 (Tenn. 1988).

For an appellate court to consider the merits of a question of law certified pursuant to Tenn. R. Crim. P. 37, the final order or judgment from which the time begins to run to pursue a T.R.A.P. 3 appeal must contain a statement of the dispositive certified question of law reserved by defendant for appellate review and the question of law must be stated so as to clearly identify the scope and the limits of the legal issue reserved. State v. Preston, 759 S.W.2d 647, 1988 Tenn. LEXIS 171 (Tenn. 1988); State v. Bowlin, 871 S.W.2d 170, 1993 Tenn. Crim. App. LEXIS 524 (Tenn. Crim. App. 1993).

Where defendants pled guilty to manufacturing marijuana, an order stating a certified question of law as "That is, the validity of the

search of the defendant's property where the marijuana was found" properly reserved an issue that was dispositive of the case. State v. Harris, 919 S.W.2d 619, 1995 Tenn. Crim. App. LEXIS 448 (Tenn. Crim. App. 1995).

Where defendant's counsel announced that defendant was not giving up his right to contest the constitutionality of the statute under which he was convicted at the time he entered a nolo contendere plea, but there was no mention of the reservation in the plea agreement or judgment of the court, the issue was not reserved for consideration on appeal. State v. Caldwell, 924 S.W.2d 117, 1995 Tenn. Crim. App. LEXIS 983 (Tenn. Crim. App. 1995).

Failure of defendant to explicitly reserve the right to appeal a certified question of law that was dispositive of the case, in accordance with the requirements of Tenn. R. Crim. P. 37 as it was interpreted in State v. Preston, 759 S.W.2d 647, 1988 Tenn. LEXIS 171 (Tenn. 1988), required dismissal of the appeal. State v. Pendergrass, 937 S.W.2d 834, 1996 Tenn. LEXIS 568 (Tenn. 1996).

Where certified question for appeal is based on stipulated facts determined to be inadequate and does not assert failure of indictment to state criminal offense, and where sufficiency of indictment complaint has been waived by withdrawal of motion to dismiss, right to appeal certified question of law is not properly reserved. State v. Irwin, 962 S.W.2d 477, 1998 Tenn. LEXIS 90 (Tenn. 1998).

Tenn. R. Crim. P. 37 and T.R.A.P. 3 provisions for a rightful appeal based upon a judgment of conviction do not authorize an appeal of a certified question where defendant entered a best interest guilty plea and was judicially diverted. State v. Norris, 47 S.W.3d 457, 2000 Tenn. Crim. App. LEXIS 437 (Tenn. Crim. App. 2000).

As the trial court entered a corrective order nunc pro tunc two days after the final judgment, which allowed defendant to appeal the certified question after entering a nolo contendere plea, defendant preserved the certified question for appeal. State v. Armstrong, 126 S.W.3d 908, 2003 Tenn. LEXIS 68 (Tenn. 2003).

6. Appeal from Guilty Plea Convictions.

An appeal does not generally lie from a guilty plea conviction; however, Tenn. R. Crim. P. 37(b)(2)(i) (now Tenn. R. Crim. P. 37(b)(2)(A)) allows an appeal from a guilty plea in certain cases under very narrow circumstances. Patterson v. State, 684 S.W.2d 110, 1984 Tenn. Crim. App. LEXIS 2672 (Tenn. Crim. App. 1984).

If a person has entered a plea of guilty under Tenn. R. Crim. P. 11, then a motion for a new trial cannot be made, but the right to appeal may be preserved pursuant to Tenn. R. Crim. P. 37(b)(2). Failing to preserve an appeal from a plea of guilty generally forecloses any direct attack upon such a plea. State v. McClintock, 732 S.W.2d 268, 1987 Tenn. LEXIS 1063 (Tenn. 1987), superseded by statute as stated in, State v. Alonso, — S.W.2d —, 1991 Tenn. Crim. App. LEXIS 784 (Tenn. Crim. App. Sept. 24, 1991).

Defendant did not have the right to appeal after entering a valid plea of guilty and being sentenced pursuant to the terms of a plea bargain agreement. State v. McKissack, 917 S.W.2d 714, 1995 Tenn. Crim. App. LEXIS 941 (Tenn. Crim. App. 1995).

Tenn. R. Crim. P. 37 and T.R.A.P. 3 did not apply to allow defendant to litigate the issue of the state's rebuttal of the presumption of prosecutorial vindictiveness on appeal since the issue was waived when defendant entered guilty pleas and because the trial court heard evidence, determined the credibility of witnesses, and applied legal principles in reaching its decision on the issue. State v. Turner, 919 S.W.2d 346, 1995 Tenn. Crim. App. LEXIS 779 (Tenn. Crim. App. 1995).

The inquiry necessary for determining whether a defendant knowingly and voluntarily entered a plea may not be possible from "the record of the proceedings already had" as set out in Tenn. R. Crim. P. 37(b)(2)(iii) (now Tenn. R. Crim. P. 37(b)(2)(C)); therefore, post-conviction proceedings are the appropriate forum for challenging guilty pleas on the basis of alleged errors that a plea was not knowingly and voluntarily entered. State v. Wilson, 31 S.W.3d 189, 2000 Tenn. LEXIS 519 (Tenn. 2000).

When defendant's attempt to appeal a certified question was untimely, it was not appropriate to waive the requirement of a timely notice of appeal because defendant did not comply with the strict and mandatory requirements for preserving a certified question, as (1) even if the document defendant filed entitled "Issues Reserved for Appeal" were sufficiently incorporated into the judgment, nothing showed defendant obtained the court's consent to reserve the right to appeal the issue, when the document "advised the court" that the issue was being reserved, (2) no plea hearing transcript showing the court's consent was filed, and (3) defendant did not obtain a ruling on the suppression issue defendant sought to appeal. State v. Bolka, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 279 (Tenn. Crim. App. Apr. 30, 2019).

7. Petitions Not Provided For.

There is no provision in the Tennessee Rules of Criminal Procedure for a "petition to reconsider" or a "petition to rehear." State v. Ryan, 756 S.W.2d 284, 1988 Tenn. Crim. App. LEXIS 292 (Tenn. Crim. App. 1988).

8. Rules of Appellate Procedure.

A Tenn. R. Crim. P. 37(b)(2) appeal cannot be pursued as a T.R.A.P. 9 appeal. State v. Preston, 759 S.W.2d 647, 1988 Tenn. LEXIS 171 (Tenn. 1988).

9. Nolo Contendere Pleas.

For the purposes of an appeal, the nolo contendere plea has the same effect as a guilty plea. In fact, upon the entry of a nolo contendere plea, any issue which might be dispositive of the case must be explicitly reserved with the consent of the state and the trial court, otherwise, it is waived. State v. Bilbrey, 816 S.W.2d 71, 1991 Tenn. Crim. App. LEXIS 555 (Tenn. Crim. App. 1991), superseded by statute as stated in, State v. Grissom, 956 S.W.2d 514, 1997 Tenn. Crim. App. LEXIS 676 (Tenn. Crim. App. 1997).

10. Waiver of Appeal.

Where it was found that defendant told his trial attorney that he did not want to appeal his conviction, the failure of the attorney to file a written waiver of appeal did not, in and of itself, present a ground for relief in a post-conviction proceeding. Rainer v. State, 958 S.W.2d 356, 1997 Tenn. Crim. App. LEXIS 306 (Tenn. Crim. App. 1997).

Petitioner knowingly waived his right to appeal as both the trial court and his attorneys advised him as to what he was doing. Carter v. State, 102 S.W.3d 113, 2002 Tenn. Crim. App. LEXIS 1014 (Tenn. Crim. App. 2002).

Although a defendant may waive his right to appeal, a waiver of appeal, executed as part of a post-verdict sentencing agreement, did not preclude the filing of a petition for post-conviction relief under the Post Conviction Procedure Act; the waiver of appeal executed by defendant simply stated that he waived his "right to appeal," neither the waiver nor the trial judge expressly mentioned that the waiver would preclude the filing of a claim under the Post Conviction Relief Act. Serrano v. State, 133 S.W.3d 599, 2004 Tenn. LEXIS 331 (Tenn. 2004).

Defendant's petition for post-conviction relief was properly denied because he did not show ineffective assistance of counsel as he failed to prove by clear and convincing evidence that he did not know of his right to appeal, and he failed to prove by clear and convincing evidence that he did not waive his right to appeal; and trial counsel's failure to file a written waiver of appeal was a fact that the trial court properly considered in the ineffective assistance of counsel claim, but that fact, in and of itself, was insufficient to show deficient performance. Arroyo v. State, 434 S.W.3d 555, 2014 Tenn. LEXIS 370 (Tenn. May 21, 2014).

11. Certified Questions.

Trial court's order did not reserve a certified question of law in compliance with the guidelines of *Preston* where, although it appeared that the trial court, while still retaining jurisdiction, entered the order containing the second version of the certified question in response to the defendant's motion for new trial, it did not enter an amended judgment form indicating a certified question of law different from the original certification. State v. Bowery, 189 S.W.3d 240, 2004 Tenn. Crim. App. LEXIS 690 (Tenn. Crim. App. 2004).

Tennessee court of criminal appeals erred in dismissing the appeal of the certified question of law reserved in conjunction with defendant's guilty plea under Tenn. R. Crim. P. 37(b)(2) because the certified question was dispositive of the case; defendant's confession was the only proof available to the state with which to prosecute defendant. State v. Dailey, 235 S.W.3d 131, 2007 Tenn. LEXIS 661 (Tenn. Aug. 20, 2007).

When parties entered plea agreement and drafted the certified question under Tenn. R. Crim. P. 37, but failed to include the specific question of whether the traffic stop of defendant was justified under the community caretaking function, the narrow issue certified was whether the stop of defendant's vehicle and seizure of defendant's person was based upon reasonable suspicion that a criminal offense had been or was about to be committed; therefore, court was limited to consideration of that narrow issue. State v. Day, 263 S.W.3d 891, 2008 Tenn. LEXIS 615 (Tenn. Sept. 22, 2008).

In a drug case, although the judgment contained no reference to a certified question of law, the trial court dated and entered an order directing that the recitation of the certified question be attached to the judgment, the defendant filed his notice of appeal and the trial court entered an amended judgment that recited the certified question; the court of appeals treated the order as an amendment to the judgment because it was entered while the trial court still had jurisdiction to amend the judgment, and it contained all of the *Preston* components. State v. Harris, 280 S.W.3d 832, 2008 Tenn. Crim. App. LEXIS 112 (Tenn. Crim. App. Feb. 6, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 629 (Tenn. Aug. 25, 2008).

Defendant's certified questions failed to satisfy the requirements of this rule and the Preston decision, and therefore the court held that it was without jurisdiction to consider defendant's appeal, because they asked only whether defendant was unlawfully detained and searched by the sheriff's department in violation of the Fourth Amendment and Tenn. Const. art. 1, § 7, and neither question identified the nature of the detention or search or articulated the reason defendant argued the detention and search were unlawful. State v. Frazier, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 228 (Tenn. Crim. App. Apr. 10, 2019).

Defendant's issue on appeal met the requirements of this rule as he pleaded guilty; the judgment form referenced the certified question; and the question included on the judgment form was stated so as to identify clearly the scope and limits of the legal issue reserved and was dispositive of the case. State v. Bron-

son, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 288 (Tenn. Crim. App. May 2, 2019).

Defendant's attempt to appeal a certified question of law as to the denial of a motion to suppress was dismissed because the appellate court was without jurisdiction, as defendant did not properly reserve the question when the certified question did not clearly state the actual reasons the trial court denied the motion, since the trial court's ruling was based on an officer's reasonable suspicion to conduct a warrantless investigatory stop, but defendant raised issues that were not part of the trial court's basis for denial or were overbroad and/or vague assertions that it was error to find defendant's detention and search were not unlawful. State v. Mitchell, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 507 (Tenn. Crim. App. Aug. 21, 2019).

Defendant's issue on appeal met the requirements of Tenn. R. Crim. P. 37: he entered a plea of guilt; the judgment form incorporated the certified question; and the certified question was stated so as to identify clearly the scope and limits of the legal issue reserved and was dispositive of the case. Thus, the issue was properly before the appellate court. State v. Cole, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 556 (Tenn. Crim. App. Sept. 6, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 28 (Tenn. Jan. 17, 2020).

Appellate court did not have jurisdiction to address defendant's certified question because it did not meet the requirements of State v. Preston or this rule, as none of the judgments contained a statement of the certified question of law reserved by defendant for appellate review nor did they refer to any other document that contained the certified question and neither the judgments nor the handwritten document attached to the plea paperwork stated that the trial court consented to the reservation of the certified question or that the trial court was of the opinion the question was dispositive of the case. State v. Johnson, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 685 (Tenn. Crim. App. Oct. 23, 2019).

Defendant failed to properly reserve his certified question of law; while the agreed order indicated that defendant had the consent of the State and the trial court to reserve a certified question, it did not indicate that all of the parties were of the opinion that the certified question was dispositive of the case. State v. Parks, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 740 (Tenn. Crim. App. Nov. 13, 2019).

Defendant's certified questions met the Preston requirements because he entered a plea of guilt, the judgment form incorporated the certified questions, and the certified questions were stated so as to identify clearly the scope and limits of the legal issue reserved and were dispositive of the case. State v. Burkhart, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 747 (Tenn. Crim. App. Nov. 18, 2019).

Appellate court lacked jurisdiction to hear defendant's appeal because he failed to properly certify his questions of law where neither the judgment nor the order contained a statement that the certified questions were reserved with the consent of the trial court, neither the judgment nor the order reflected that defendant, the State, and the trial court were of the opinion that the certified questions were dispositive of the case. State v. Wheatley, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 162 (Tenn. Crim. App. Feb. 18, 2020).

Appellate court lacked jurisdiction to address the certified questions presented by defendant because he failed to properly reserve and frame the questions where they failed to clearly identify the scope and limits of the legal issue, did not clearly state the reasons relied upon by defendant at the suppression hearing, or state the actual reasons the trial court denied his motion to suppress. State v. Van Garrett, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 179 (Tenn. Crim. App. Mar. 11, 2020).

Defendant failed to properly preserve a certified question of law, stemming from his denied motion to suppress, as the question failed to clearly identify the scope and limits of the legal issue because defendant did not mention reasonable suspicion, prolonged detention, or even the Fourth amendment, all of which were relied upon in the briefing of the case; and the scope and limits of the legal issue reserved, the reasons relied upon by defendant in the trial court at the suppression hearing, and the trial court's reasoning for denying the motion to suppress should have been, but were not, discernible from the certified question of law without looking at any other portions of the appellate record. State v. Rickman, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 261 (Tenn. Crim. App. Apr. 16, 2020).

Certified questions did not meet the requirements of this rule and the case law, and, as a result, the appellate court was without jurisdiction to consider defendant's appeal because the scope and limits of the legal issue reserved, the reasons relied upon by defendant in the trial court at the suppression hearing, and the trial court's reasoning for denying defendant's motion to suppress should have been, but were not, discernable from the certified questions of law without looking at any other portions of the appellate record. State v. Hall, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 321 (Tenn. Crim. App. May 5, 2020).

12. Preservation for Review.

After entering a conditional guilty plea, defendant properly reserved his issues for appeal in the certified question, because although defendant's certified question would have benefitted from the incorporation of more fact-specific

references, the substance of the question nevertheless satisfied the jurisdictional requirements and the issue of whether the state violated the anti-shuttling provisions of the Interstate Agreement on Detainers was properly before the court. State v. Springer, 406 S.W.3d 526, 2013 Tenn. LEXIS 499 (Tenn. June 24, 2013).

Because the certified question defendant reserved for appeal - whether her arrest for DUI in a private home without a warrant violated T.C.A. § 40-7-103 when defendant was arrested without being seen by an officer operating the vehicle in question and no vehicle accident was involved - was not dispositive, the appeal was dismissed. State v. Campbell, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 592 (Tenn. Crim. App. Sept. 2, 2020).

13. Appeal Dismissed.

Certified questions concerning her arrest, interview, and search of her telephone that defendant preserved after pleading nolo contendere to theft of property valued over $500 were not dispositive, and therefore the court dismissed the appeal, because the record revealed the existence of inculpatory evidence that was not derived from the arrest, interview, or search. The record did not contain a statement from the prosecutor asserting that he would be constrained to dismiss the charges without the disputed evidence, and other evidence connecting defendant to the crime included testimony of the victim which could have identified defendant as the individual who arranged the drug transaction and sent her boyfriend to complete the transaction, which ultimately proved to be a robbery. State v. Anderson, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 884 (Tenn. Crim. App. Dec. 6, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 196 (Tenn. Apr. 11, 2019).

14. Professional Misconduct.

Attorney's contention that his ethical duty never vested was without merit, as the attorney filed a notice of appeal, there was no indication that he filed a motion to withdraw, and even if he had, it likely would have been denied because he was delinquent in his duties as counsel; the attorney's duty of diligence involved continued representation of the client on appeal, which the attorney admittedly did not diligently pursue. Walwyn v. Bd. of Prof'l Responsibility, 481 S.W.3d 151, 2015 Tenn. LEXIS 935 (Tenn. Dec. 3, 2015), cert. denied, Walwyn v. Bd. of Prof'l Responsibility of the Supreme Court of Tenn., 194 L. Ed. 2d 769, 136 S. Ct. 1676, — U.S. —, 2016 U.S. LEXIS 2698 (U.S. 2016).

15. Counsel.

Because defendant's appointed counsel was not permitted to withdraw by the court below when defendant appealed the denial of habeas corpus relief, appointed counsel remained counsel of record on appeal. Fernandez v. State, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 3 (Tenn. Crim. App. Jan. 6, 2021).

Rule 38. Review of Denial of Pre-Trial Diversion. —

(a) CERTIORARI TO TRIAL COURT. — A defendant who seeks and is denied pre-trial diversion pursuant to T.C.A. § 40-15-105 may petition for a writ of certiorari to the trial court for an abuse of prosecutorial discretion.

(b) APPEAL. —

(1) INTERLOCUTORY APPEAL. — If the trial court denies the writ of certiorari and finds that the prosecuting attorney has not committed an abuse of discretion in failing to grant pre-trial diversion, the defendant may pursue an interlocutory appeal of this decision pursuant to either Rule 9 or Rule 10 of the Tennessee Rules of Appellate Procedure.

(2) DIRECT APPEAL. — If the defendant does not pursue an interlocutory appeal of the denial of a writ of certiorari, the defendant may appeal the denial pursuant to Rule 3(b), Tennessee Rule of Appellate Procedure, following the entry of the final judgment in the trial court.

Advisory Commission Comments. This rule provides the methods by which denials of pre-trial diversion can be appealed. A failure to pursue an interlocutory appeal would not result in a waiver of the issue on direct appeal.

NOTES TO DECISIONS

Analysis

1. Construction with Other Law.
2. Waiver of Right to Appeal.

1. Construction with Other Law.

Tennessee Court of Criminal Appeals should not deny a T.R.A.P. 9 or T.R.A.P. 10 application from a denial of pretrial diversion under T.C.A. § 40-15-105(a)(1) simply on the basis that defendant may pursue a direct appeal upon conviction pursuant to Tenn. R. Crim. P. 38, as nothing in the amended text of Rule 38 or in the text of the Advisory Commission Comments thereto indicates that the amendment to Rule 38 was adopted in order to limit or discourage interlocutory appeals from pretrial diversion decisions; as amended, Rule 38 simply gives an unsuccessful defendant another avenue to pursue after trial if, for whatever reason, he or she chooses to forego the interlocutory route. State v. McKim, 215 S.W.3d 781, 2007 Tenn. LEXIS 27 (Tenn. 2007).

When defendant who was indicted for criminally negligent homicide after leaving his infant daughter in a car on a hot day was denied pretrial diversion under T.C.A. § 40-15-105(a)(1), a trial court and the criminal appellate court erred in denying defendant's applications for interlocutory appeals pursuant to T.R.A.P. 9 or T.R.A.P. 10 because: (1) An assistant district attorney general disregarded the guidelines concerning the proper factors to consider in evaluating applications for pretrial diversion; (2) Pretrial diversion would avoid the necessity of a trial; (3) An interlocutory appeal would not have created piecemeal litigation; and (4) The court of criminal appeals should not have denied defendant's application from the denial of pretrial diversion simply on the basis that defendant could pursue a direct appeal upon conviction pursuant to Tenn. R. Crim. P. 38. State v. McKim, 215 S.W.3d 781, 2007 Tenn. LEXIS 27 (Tenn. 2007).

2. Waiver of Right to Appeal.

Defendant waived her right to appeal the denial of her request for pretrial diversion under T.C.A. § 40-15-105 by failing to seek review of the trial court's decision pursuant to T.R.A.P. 9 or 10 prior to pleading guilty to some of the charges. An appeal pursuant to Tenn. R. Crim. P. 38(b) was required to be made under T.R.A.P. 3(b), which had no provision for appeal of the denial of pretrial diversion following a guilty plea. State v. Robinson, 328 S.W.3d 513, 2010 Tenn. Crim. App. LEXIS 268 (Tenn. Crim. App. Mar. 30, 2010).

Rule 39. [Reserved.]

IX. SUPPLEMENTAL AND SPECIAL PROCEEDINGS.

Rule 40. [Reserved.]

Rule 41. Search and Seizure. —

(a) Authority to Issue Warrant. — A magistrate with jurisdiction in the county where the property sought is located may issue a search warrant authorized by this rule. The district attorney general, assistant district attorney general, criminal investigator, or any other law-enforcement officer may request a search warrant.

(b) Persons or Property Subject to Seizure by Warrant. — A magistrate may issue a warrant under this rule to search for and seize any of the following:

(1) evidence of a crime;

(2) contraband, the fruits of crime, or items otherwise criminally possessed;

(3) property designed or intended for use, or that has been used in a crime;

(4) a person whose arrest is supported by probable cause; or

(5) a person who is unlawfully restrained.

(c) Issuance and Content of Warrant. —

(1) Issuance. — A warrant shall issue only on an affidavit or affidavits that are sworn before the magistrate and establish the grounds for issuing the warrant.

(2) Requesting a Warrant by Electronic Means. — A magistrate may issue a warrant based on information communicated by telephone or other reliable electronic means. The proposed warrant, the signed affidavit, and accompanying documents may be transmitted by electronic facsimile transmission (fax) or by electronic transfer with electronic signatures to the magistrate, who may act upon the transmitted documents as if they were originals. If the warrant is being sought by electronic means rather than face-to-face, the warrant affidavit shall be sworn to or affirmed by administration of the oath by audio-visual means by the magistrate, and the examination of the affiant by the magistrate shall also be by audio-visual means; provided, the warrant affidavit shall be in writing and received by the magistrate prior to the administration of the oath and examination of the affiant. The affidavit with electronic signature received by the magistrate and the warrant approved by the magistrate, signed with electronic signature, shall be deemed originals. The magistrate shall facilitate the filing of the original warrant with the clerk of the court and shall take reasonable steps to prevent tampering with the warrant. The issuing magistrate shall retain a copy of the warrant as part of his or her official records. The issuing magistrate shall issue a copy of the warrant, with electronic signatures, to the affiant. This section does not alter the requirement that the affidavit be submitted to the magistrate in writing regardless of the means of transmission.

(3) Content. — If the magistrate is satisfied that there is probable cause to believe that grounds for the application exist, the magistrate shall issue a warrant as follows:

(A) The warrant shall, as the case may be, identify the property or place to be searched, or name or describe the person to be searched; the warrant also shall name or describe the property or person to be seized.

(B) The search warrant shall command the law enforcement officer to search promptly the person or place named and to seize the specified property or person.

(C) The search warrant shall be directed to and served by:

(i) the sheriff or any deputy sheriff of the county where the warrant is issued; or

(ii) any constable or any other law enforcement officer with authority in the county.

(D) The magistrate shall endorse on the search warrant the hour, date, and name of the officer to whom the warrant was delivered for execution.

(4) Hearsay. — The magistrate may base a finding of probable cause on hearsay evidence in whole or in part.

(d) Copies and Record of Warrant. — The magistrate shall prepare an original and two exact copies of each search warrant. The magistrate shall keep one copy as a part of his or her official records. The other copy shall be left with the person or persons on whom the search warrant is served. The exact copy of the search warrant and the endorsement are admissible evidence.

(e) Procedures to Execute Warrant. —

(1) Who May Execute. — The search warrant may only be executed by the law enforcement officer, or one of them, to whom it is directed. Other persons may aid such officer at the officer's request, but the officer must be present and participate in the execution.

(2) Authority for Forcible Entry. — If, after notice of his or her authority and purpose, a law enforcement officer is not granted admittance, or in the absence of anyone with authority to grant admittance, the peace officer with a search warrant may break open any door or window of a building or vehicle, or any part thereof, described to be searched in the warrant to the extent that it is reasonably necessary to execute the warrant and does not unnecessarily damage the property.

(3) Timely Execution. — The warrant must be executed within five days after its date.

(4) Leaving Copy of Warrant and Receipt. — The officer executing the warrant shall:

(A) give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property; or

(B) shall leave the copy and receipt at a place from which the property was taken.

(f) Procedures After Execution of Warrant. —

(1) Return and Inventory. — The officer executing the warrant shall promptly make a return, accompanied by a written inventory of any property taken. Upon request, the magistrate shall cause to be delivered a copy of the return and the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(2) Documents to Court Clerk. — Unless the property is directed to be restored under these rules, the magistrate shall transmit the executed original warrant with the officer's return and inventory to the clerk of the court having jurisdiction of the alleged offense in respect to which the search warrant was issued.

(g) Motion for Return or Suppression of Property. — A person aggrieved by an unlawful or invalid search or seizure may move the court pursuant to Rule 12(b) to suppress any evidence obtained in the unlawful search or seizure. If property was unlawfully seized, the aggrieved person may move for the return of the property. The motion to suppress and/or the motion to return property unlawfully seized, may be granted, under applicable substantive law and except as to the return of contraband, if the evidence in support of the motion shows that:

(1) the search or seizure was made illegally without a search warrant or illegally with an invalid search warrant, or in any other way in violation of the constitutional protection against unreasonable searches and seizures;

(2) a search warrant was relied on, but the search warrant or supporting affidavit is legally insufficient on its face and hence invalid;

(3) the search warrant relied on was issued on evidence consisting in material part of willful or reckless misrepresentations of the applicant to the issuing magistrate, resulting in a fraudulent procurement;

(4) the search warrant does not describe the property seized, and the seized property is not of such a character as to be subject to lawful seizure without a warrant;

(5) the magistrate did not:

(A) make an original and two copies of the search warrant; or

(B) did not endorse on the warrant the date and time of issuance and the name of the officer to whom the warrant was issued; or

(6) the serving officer–where possible–did not leave a copy of the warrant with the person or persons on whom the search warrant was served.

(h) NONWAIVER OF OBJECTION BY TESTIMONY OF DEFENDANT AS TO ILLEGALLY OBTAINED EVIDENCE. — A defendant does not waive the right to object to the admissibility of evidence if:

(1) inadmissible evidence obtained by an illegal search or seizure is erroneously introduced against the defendant; and

(2) the defendant subsequently testifies as to the same evidence but gives it an innocent or mitigating cast as to the charge and denies the charge. [As amended by order filed January 2, 2015, effective July 1, 2015; and by order filed January 8, 2018, effective July 1, 2018.]

Advisory Commission Comments. Rule 41(b) is intended to conform to Rule 41 of the Federal Rules of Criminal Procedure. Search warrants have traditionally been issued for the seizure of physical items. The Rule now allows for a search warrant for persons. For example, a search warrant is now available to search for a person who is kidnaped under circumstances where exigent circumstances might not justify a warrantless entry. The amendment also allows for a search warrant to effect an arrest where required by the decision in *Steagald v. United States*, 451 U.S. 204 (1981). The commission does not intend to suggest under what circumstances a search warrant is required to effect an arrest, but rather permits judicial authorization for a search warrant where required.

Property ordered suppressed or otherwise excluded from admission into evidence by any general sessions court or court exercising that jurisdiction shall not be returned to any owner or claimant over the objection of the district attorney general or his or her representative. The state must be free to pursue the prosecution to the next level, without being stripped of its evidence. The motion under subdivision (g) is meant to apply only to courts of record of general criminal trial jurisdiction such as Circuit and Criminal Courts.

Under subdivision (g)(1) the commission intended to say explicitly that the violation of any constitutional provision, such as a Fifth Amendment right, which results by operation of law in violation of the Fourth Amendment protection against unreasonable searches and seizures may be raised.

The provision of subdivision (h) is designed to change the rule of *Lester v. State*, 216 Tenn. 615, 393 S.W.2d 288 (1975), which often caused a defendant to waive one right by exercising another. Note that the provision applies only when the testifying defendant denies the charge.

Advisory Commission Comments [2015]. Subdivision (c) was amended by adding a new paragraph (2) (and renumbering what are now paragraphs (3) and (4)). New paragraph (c)(2) allows a search warrant to be obtained without requiring the affiant and the issuing magistrate to be in each other's physical presence during the application/issuance process. The amendment to the rule does not alter the requirement that the affidavit be submitted to the magistrate in writing regardless of the means of transmission.

Advisory Commission Comments [2018]. The 2018 amendment removes the word "shall" and inserts "may" in the section of the rule regarding the exclusion of evidence, and makes Rule 41 more consistent with recent statutory changes, *see* 2011 Tenn. Pub. Acts, ch. 252 *codified at* Tenn. Code Ann. §40-6-108, and recent case law, *see State v. Reynolds*, 504 S.W.3d 283, 313 (Tenn. 2016) (recognizing a good-faith exception to the judicially created exclusionary rule, which permits the introduction of evidence obtained "when the law enforcement officers' action is in objectively reasonable good faith reliance *on binding appellate precedent that specifically authorizes a particular police practice*" [italics added]); *see also State v. Tuttle*, 515 S.W.3d 282, 308 (Tenn. 2017) (negligent mistakes in wording of search warrant insufficient to invalidate search warrant). In *Reynolds*, the Tennessee Supreme Court also clarified that Rule 41, a procedural rule, does not provide greater protection than applicable substantive law on the exclusionary rule and its exceptions. The amendment makes clear that this procedural rule does not take precedence over applicable substantive law related to the exclusionary rule and its exceptions.

Compiler's Notes. The amendment of rule 41, which amended subdivision (c) and added subdivision (c)(2) and added the 2015 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated January 2, 2015, was ratified and approved by 2015 House Resolution 4 and Senate Resolution 12. The order promulgating the amendment of this rule provided that it take effect on July 1, 2015.

The amendment of Rule 41, which amended subdivision (g) and added the [2018] Advisory

Comments, as promulgated and adopted by the Supreme Court in its order dated January 8, 2018, was ratified and approved by 2018 House Resolution 207 and Senate Resolution 166. The order promulgating the amendment of subdivision (d)(3) and the addition of the [2018] Advisory Comments, provided that it take effect July 1, 2018.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 3-12-7, 3-12-8.

Tennessee Jurisprudence. 16 Tenn. Juris., Intoxicating Liquors, §§ 19-25; 22 Tenn. Juris., Searches and Seizures, §§ 3-34; 25 Tenn. Juris., Warrants, § 3.

Law Reviews. Policing the Bases of Modern Expert Testimony (Ronald L. Carlson), 39 Vand. L. Rev. 577 (1986).

Attorney General Opinions. A dispatcher who is an employee of a city police department is not a neutral and detached magistrate for the purpose of issuing search warrants, OAG 00-088 (5/5/00).

A magistrate may issue a search warrant to search for a person in order to arrest him or her, provided there is probable cause to effect an arrest; further, a warrant may authorize a search of a third party's residence for a person if a magistrate makes the determination that probable cause exists to believe that the person to be seized is within that residence, OAG 00-121 (7/17/00).

If the state retains items that an individual believes should be lawfully returned following the entry of a nolle prosequi, the individual may bring a motion under Rule 41(f) of the Rules of Criminal Procedure for the return of the property, OAG 01-155 (10/4/01).

Constitutionality of "Exclusionary Rule Reform Act". OAG 11-32, 2011 Tenn. AG LEXIS 34 (4/11/11).

NOTES TO DECISIONS

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1. Applicability.

Supreme Court of Tennessee had both the authority and the responsibility to decide whether a good-faith exception, or any other exception, to the exclusionary rule was to be adopted. No procedural rule explicitly purported to divest the court of such authority. State v. Reynolds, 504 S.W.3d 283, 2016 Tenn. LEXIS 821 (Tenn. Nov. 3, 2016).

2. Requirements.

Where the issuing magistrate fails to endorse on the warrant the hour, date and name of the officer to whom it is delivered for execution, the search is illegal. State v. Stepherson, 15 S.W.3d 898, 1999 Tenn. Crim. App. LEXIS 937 (Tenn. Crim. App. 1999).

The person providing the affidavit for the search warrant does not have to be the same person who requests the search warrant and does not have to be in the same class of persons as those who may request a search warrant. State v. Powell, 53 S.W.3d 258, 2000 Tenn. Crim. App. LEXIS 855 (Tenn. Crim. App. 2000).

Agent for the Tennessee alcoholic beverage commission (ABC) had the authority to request a search warrant despite that agent only had limited jurisdiction and authority to investigate drug offenses; the agent was still a law enforcement officer and the requirement is only that the requesting party be a law enforcement officer. State v. Powell, 53 S.W.3d 258, 2000 Tenn. Crim. App. LEXIS 855 (Tenn. Crim. App. 2000).

3. —Officer's Name.

Although harsh, Tenn. R. Crim. P. 41(c) makes fatal the failure to properly endorse the name of the officer to whom it is delivered for execution; thus, warrant was fatal where it was not delivered by the issuing magistrate to the person so stated in the warrant. State v. Stepherson, 15 S.W.3d 898, 1999 Tenn. Crim. App. LEXIS 937 (Tenn. Crim. App. 1999).

4. —Sworn Affidavit Required.

Tenn. R. Crim. P. 41 requires a sworn affidavit or affidavits to establish probable cause. State v. Berry, 592 S.W.2d 553, 1980 Tenn. LEXIS 393 (Tenn. 1980), cert. denied, Tennessee v. Berry, 449 U.S. 887, 101 S. Ct. 241, 66 L. Ed. 2d 112, 1980 U.S. LEXIS 3403 (1980).

Even though no statute exists to require the affidavits to be attached to the search warrant, if a previous affidavit is not referred to or incorporated in a search warrant or in its underlying affidavit, the previous affidavit is subject to being disregarded in the review process. State v. Smith, 836 S.W.2d 137, 1992 Tenn. Crim. App. LEXIS 304 (Tenn. Crim. App. 1992).

Although it is preferable that every affidavit contain a completed jurat, an incomplete or defective jurat does not invalidate a warrant issued upon probable cause if it is proven by extrinsic evidence that the supporting affidavit was properly sworn by the affiant. State v. Keith, 978 S.W.2d 861, 1998 Tenn. LEXIS 521 (Tenn. 1998), rehearing denied, State v. Collins, — S.W.2d —, 1998 Tenn. LEXIS 701 (Tenn. Nov. 23, 1998).

Because the affidavit upon which the warrant was issued is not considered part of the search warrant, even if the affidavit and the warrant are on the same preprinted form, there is no statutory law or rule mandating that a signed, exact copy of the supporting affidavit must also be served with the warrant. State v. Price, 46 S.W.3d 785, 2000 Tenn. Crim. App. LEXIS 597 (Tenn. Crim. App. 2000), review or rehearing denied, — S.W.3d —, 2001 Tenn. LEXIS 146 (Tenn. Feb. 26, 2001).

Trial court did not err in denying defendant's motion to suppress the evidence obtained from the search of his house, because the officer intended to obtain a valid search warrant, reasonably believed that the warrant, based on probable cause and issued by a neutral and detached magistrate, was valid, and immediately stopped the search and obtained a second warrant supported by a properly signed affidavit, as required by statute and the criminal rules, once he learned of the problem. State v. Davidson, 509 S.W.3d 156, 2016 Tenn. LEXIS 913 (Tenn. Dec. 19, 2016), cert. denied, Davidson v. Tennessee, 199 L. Ed. 2d 66, 138 S. Ct. 105, 2017 U.S. LEXIS 5551 (U.S. Oct. 2, 2017).

5. —Sufficient Evidence of Probable Cause Required.

Central to all these requirements of Tenn. R. Crim. P. 41(c) and T.C.A. § 40-6-104 is the notion that probable cause must be supported by evidence submitted to the issuing magistrate and that evidence must be sufficient to support an independent and neutral judgment that probable cause exists. State v. Berry, 592 S.W.2d 553, 1980 Tenn. LEXIS 393 (Tenn. 1980), cert. denied, Tennessee v. Berry, 449 U.S. 887, 101 S. Ct. 241, 66 L. Ed. 2d 112, 1980 U.S. LEXIS 3403 (1980).

An affidavit showing probable cause may be based on hearsay information and need not reflect the direct personal observations of the affiant; however, where the affiant relies on hearsay information from a confidential informant, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, was credible or his information reliable. State v. Jacumin, 778 S.W.2d 430, 1989 Tenn. LEXIS 455 (Tenn. 1989).

Probable cause to support the issuance of a search warrant must appear in an affidavit, and judicial review of the existence of probable cause will not include looking to other evidence provided to or known by the issuing magistrate or possessed by the affiant. State v. Moon, 841 S.W.2d 336, 1992 Tenn. Crim. App. LEXIS 630 (Tenn. Crim. App. 1992).

Before a search warrant may be issued based upon an informant's information, an affiant must make sufficient disclosure of the events, activities, or allegations which have been corroborated in order that a magistrate may make a neutral and detached determination that an informant is credible or that his information is reliable. State v. Moon, 841 S.W.2d 336, 1992 Tenn. Crim. App. LEXIS 630 (Tenn. Crim. App. 1992).

6. —Description of Person or Place.

Inaccuracies will not invalidate a search warrant if the description contained in the warrant will enable an officer to locate the premises searched with reasonable certainty and points to a definitely ascertainable place so as to exclude all others. State v. Wright, 618 S.W.2d 310, 1981 Tenn. Crim. App. LEXIS 346 (Tenn. Crim. App. 1981).

The search warrant provided an adequate description of the residence where the warrant stated the address of the premises and described the color of the bricks, the color of the trim, the color of the mailbox and the presence of swimming pool behind a wooden fence in the back yard. State v. Vanderford, 980 S.W.2d 390, 1997 Tenn. Crim. App. LEXIS 1249 (Tenn. Crim. App. 1997).

Trial court did not err by concluding that the warrant contained a sufficiently particular description of the place to be searched because the directions stated in the warrant were essentially accurate apart from the misnaming of a single cross street, both the detective and the investigator were familiar with the location of the mobile home park and the investigator knew specifically where defendant lived, and the warrant also contained the correct street address for defendant as confirmed by the booking record from his arrest shortly before the murder. State v. Parker, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 127 (Tenn. Crim. App. Feb. 25, 2019).

7. —Location of Affiant.

There is no requirement that the affidavit in support of the warrant detail the location of the

affiant when observing criminal activity. State v. Kennedy, 649 S.W.2d 275, 1982 Tenn. Crim. App. LEXIS 488 (Tenn. Crim. App. 1982), overruled, State v. Holt, 691 S.W.2d 520, 1984 Tenn. LEXIS 865 (Tenn. 1984).

8. —Informants.

It is incumbent upon whoever seeks a search warrant to include in the affidavit whether the informational source, named or confidential, qualifies as a citizen or professional informant in order to allow the issuing magistrate to apply the proper constitutional common-law standard, and where the affidavit did not more adequately set out informant's professional status, it was insufficient. State v. Smith, 867 S.W.2d 343, 1993 Tenn. Crim. App. LEXIS 254 (Tenn. Crim. App. 1993).

Reference in the affidavit to a confidential informant as an agent, alone, was insufficient to establish that the informant was a law enforcement officer whose information was considered reliable; the information in the affidavit otherwise failed to establish probable cause for issuance of the search warrant; the corroboration involved only one element of non-suspect behavior and offered little support to the credibility of the informant or the reliability of the informant's information regarding the occurrence of drug transactions at defendant's residence. State v. Smotherman, 201 S.W.3d 657, 2006 Tenn. LEXIS 691 (Tenn. 2006).

9. —Impartial Magistrate.

Although practice by issuing magistrate of altering an affidavit is not commendable, it does not necessarily detract from his neutrality. State v. Nolan, 617 S.W.2d 174, 1981 Tenn. Crim. App. LEXIS 339 (Tenn. Crim. App. 1981).

Search warrant met standard that it be issued by a neutral and detached magistrate. United States v. Finch, 998 F.2d 349, 1993 U.S. App. LEXIS 16174 (6th Cir. Tenn. 1993).

Search of defendant's residence pursuant to a search warrant violated defendant's Fourth Amendment rights because the authorizing judge had no authority to issue a warrant for the county in which defendant's residence was located, pursuant to state law; remand was necessary to determine the applicability of the exclusionary rule. United States v. Master, 614 F.3d 236, 2010 FED App. 276P, 2010 U.S. App. LEXIS 18133 (6th Cir. Aug. 31, 2010).

10. —Copies.

An otherwise lawfully valid search warrant should not be deemed fatal because of a lost or misplaced copy of that search warrant where a defendant fails to show that any prejudice resulted to him by reason of the missing copy of the search warrant. State v. Henry, 680 S.W.2d 476, 1984 Tenn. Crim. App. LEXIS 2527 (Tenn. Crim. App. 1984).

Copy of search warrant was an "exact copy" under Tenn. R. Crim. P. 41(c) where, although portions of the copy retained were barely legible, the copy could be enhanced. State v. Gambrel, 783 S.W.2d 191, 1989 Tenn. Crim. App. LEXIS 695 (Tenn. Crim. App. 1989).

Variance between the original search warrant and defendant's copy caused by failure of the magistrate to endorse the time of issuance created on both copies rendered invalid a search and seizure made pursuant to the warrant. State v. Steele, 894 S.W.2d 318, 1994 Tenn. Crim. App. LEXIS 746 (Tenn. Crim. App. 1994).

An exact copy of the original affidavit was not required to be served on defendant, since, because there was no reference to the affidavit in the warrant, it was not part of the warrant, and there was no reason to hold it to the requirements of Tenn. R. Crim. P. 41(c). State v. Lowe, 949 S.W.2d 300, 1996 Tenn. Crim. App. LEXIS 575 (Tenn. Crim. App. 1996).

The failure of the magistrate to retain a copy of the search warrant deprived the warrant of any efficacy and the fact that the executing officer went into the field in possession and control of the original and all existing copies of the warrant impermissibly influences the purity of the search process. State v. Brewer, 989 S.W.2d 349, 1997 Tenn. Crim. App. LEXIS 989 (Tenn. Crim. App. 1997).

Tenn. R. Crim. P. 41 not only requires probable cause to issue a search warrant, it also imposes specific procedural safeguards; it was important and mandatory to retain an exact copy of the warrant identifying the property or person to be searched, and the requirement has been strictly enforced by the courts. State v. Coffee, 54 S.W.3d 231, 2001 Tenn. LEXIS 623 (Tenn. 2001).

In a double first-degree murder and especially aggravated robbery case where defendant was in jail when the search warrants were executed, the officers properly left the warrant at defendant's residence, the place from which the property was taken. State v. Reid, 91 S.W.3d 247, 2002 Tenn. LEXIS 550 (Tenn. 2002), cert. denied, Reid v. Tennessee, 540 U.S. 828, 124 S. Ct. 56, 157 L. Ed. 2d 52, 2003 U.S. LEXIS 6131 (2003).

District court properly rejected defendant's request for suppression on the basis of an invalid search warrant because, although the search warrant did not meet the requirements of Tenn. R. Crim. P. 41(d), in that an original and two exact copies were not made, the issuing judge's signature on one copy of the warrant was sufficient to satisfy the Fourth Amendment. United States v. Beals, 698 F.3d 248, 2012 FED App. 360P, 2012 U.S. App. LEXIS 21389 (6th Cir. Oct. 16, 2012).

11. —Return.

Failure to return an executed search warrant to the issuing magistrate did not render the warrant invalid since the return of an officer

upon a search warrant is a ministerial function and does not affect the validity of the warrant and its execution by the officer. State v. Hilliard, 906 S.W.2d 466, 1995 Tenn. Crim. App. LEXIS 246 (Tenn. Crim. App. 1995).

Even if an officer violated this rule by returning the warrant to the state court rather than the state court clerk, the violation would not require exclusion of items seized under the warrant. United States v. Jones, 943 F. Supp. 909, 1996 U.S. Dist. LEXIS 15104 (M.D. Tenn. 1996), aff'd in part, rev'd in part, 159 F.3d 969, 1998 FED App. 331P, 1998 U.S. App. LEXIS 28141 (6th Cir. Tenn. 1998).

12. Time.

Court of criminal appeals erred in holding that it could not consider defendants' contention in a certified question that a search warrant was not valid where the copy of the search warrant was in the record and was reviewed and considered by the trial court; however, the Supreme Court of Tennessee held that because the hour was not endorsed by the magistrate on the search warrant, the warrant failed to explicitly show that it was issued first, then executed, and thus, the warrant violated Tenn. R. Crim. P. 41(c), so as to render all of the evidence seized pursuant thereto, illegal and inadmissible. State v. Bobadilla, 181 S.W.3d 641, 2005 Tenn. LEXIS 1043 (Tenn. 2005).

Defendant's drug convictions were improper because the warrant did not comply with the requirements of Tenn. R. Crim. P. 41. The judge's error in inadvertently writing "p.m." instead of "a.m." on the original and defendant's copy of the search warrant rendered the warrant invalid because it failed to comply with the mandatory requirements the rule; therefore, the resulting search was illegal, and the evidence seized pursuant to the search warrant was required to be suppressed. State v. Hayes, 337 S.W.3d 235, 2010 Tenn. Crim. App. LEXIS 684 (Tenn. Crim. App. Aug. 18, 2010), appeal denied, — S.W.3d —, 2011 Tenn. LEXIS 152 (Tenn. Feb. 17, 2011).

13. Suppression of Evidence.

Suppression of evidence seized under color of search warrant was proper. State v. Lee, 836 S.W.2d 126, 1991 Tenn. Crim. App. LEXIS 903 (Tenn. Crim. App. 1991).

When a general sessions court opts to suppress evidence during a preliminary hearing, the ruling is limited in scope to the preliminary hearing. The ruling does not prohibit the state from presenting the contraband to the grand jury when seeking an indictment against the accused; and the ruling is not binding upon the criminal court if the grand jury returns an indictment against the accused. State v. Dixon, 880 S.W.2d 696, 1992 Tenn. Crim. App. LEXIS 244 (Tenn. Crim. App. 1992).

The failure of the magistrate to retain a copy of the search warrant makes any search conducted an illegal search and any seizure thereunder an illegal seizure. State v. Brewer, 989 S.W.2d 349, 1997 Tenn. Crim. App. LEXIS 989 (Tenn. Crim. App. 1997).

Where woman and her lover were charged with murdering the woman's husband, the woman's motion to suppress contents of her computer hard drive, such as email and chat room transactions with the lover, was properly denied where the woman signed a consent form that included officers' removal of letters, papers, materials, or other property; because the computer was seized for the information it contained, it was reasonably foreseeable that an examination of its contents would follow and a separate search warrant was not necessary under Tenn. R. Crim. P. 41 or the fourth amendment. State v. Watson, 227 S.W.3d 622, 2006 Tenn. Crim. App. LEXIS 259 (Tenn. Crim. App. 2006), appeal denied, State v. Brooks, — S.W.3d —, 2006 Tenn. LEXIS 620 (Tenn. July 3, 2006).

Where a search warrant was issued three days after a controlled buy and the warrant was executed five days after being issued, suppression was not warranted, because officers executed the warrant within the time period of the Tennessee Rules, the five-day delay was reasonable due to a holiday and scheduling conflicts, and there were no changed circumstances between the issuance of the warrant and its execution that affected the presence of probable cause. United States v. Archibald, 685 F.3d 553, 2012 FED App. 212P, 2012 U.S. App. LEXIS 14104 (6th Cir. July 11, 2012).

There was ample basis for the trial court to reject defendant's request for an evidentiary hearing where he failed to provide the trial court with any basis to conclude that any alleged misstatement or omission in the search warrant affidavit was either deliberate of reckless, and even if any allegedly misstated facts were deemed reckless and deleted from the affidavit, the remainder was clearly sufficient to support the finding of probable cause. State v. Willis, 496 S.W.3d 653, 2016 Tenn. LEXIS 405 (Tenn. July 6, 2016), cert. denied, Willis v. Tennessee, 197 L. Ed. 2d 466, 137 S. Ct. 1224, — U.S. —, 2017 U.S. LEXIS 1710 (U.S. Mar. 6, 2017).

Tennessee Exclusionary Rule Reform Act, T.C.A. § 40-6-108, was not an ex post facto statute as applied in defendant's case. As a result, defendant's motion to suppress the evidence against defendant was not well-taken because the error in the date written on the search warrant was a good faith or technical mistake and the trial court properly ruled that, pursuant to the Act, the evidence was not to be suppressed. State v. Pruitt, 510 S.W.3d 398, 2016 Tenn. LEXIS 980 (Tenn. Dec. 30, 2016).

14. Motion to Suppress.

A defendant may not attack a search warrant beyond the face of the document by mere con-

clusory allegations; the motion to suppress must point out specifically the basis for the claim and the defendant must be prepared to offer supporting evidence. State v. Brown, 618 S.W.2d 325, 1981 Tenn. Crim. App. LEXIS 348 (Tenn. Crim. App. 1981).

Sixth Amendment did not entitle a defendant to participate, through counsel, in the determination of the existence of probable cause for the issuance of a warrant to seize a sample of defendant's blood. The ex parte search warrant proceeding did not diminish the defendant's right to a fair trial; defendant was permitted to, and did in fact, file a motion to suppress the evidence pursuant to Tenn. R. Crim. P. 41(f) and Tenn. R. Crim. P. 12(b). State v. Blye, 130 S.W.3d 776, 2004 Tenn. LEXIS 131 (Tenn. 2004), cert. denied, Blye v. Tennessee, 125 S. Ct. 289, 160 L. Ed. 2d 74, 543 U.S. 845, 2004 U.S. LEXIS 6027 (U.S. 2004).

In applying this rule during hearings on motions to suppress the evidence, trial judges will hereafter have discretion to consider variations of the good-faith exception to the exclusionary rule. In doing so, the Tennessee Supreme Court urges the trial courts to consider the following non-exhaustive factors: (1) whether the police error was the result of simple negligence rather than systemic error; (2) whether the error was the result of reckless disregard of constitutional requirements; (3) whether the error was isolated rather than recurrent; and (4) whether the error existed, undetected or uncorrected, for such an amount of time as to indicate reckless or gross negligence. State v. McElrath, 569 S.W.3d 565, 2019 Tenn. LEXIS 100 (Tenn. Mar. 12, 2019).

15. Subsequent Search.

When exigencies of situation authorized police to enter defendants' home and they did nothing on this visit to taint a subsequent search, subsequent search conducted pursuant to a warrant is valid. State v. Wright, 618 S.W.2d 310, 1981 Tenn. Crim. App. LEXIS 346 (Tenn. Crim. App. 1981).

16. Probable Cause Defined.

Generally, probable cause is a reasonable ground for suspicion, supported by circumstances indicative of an illegal act. State v. Johnson, 854 S.W.2d 897, 1993 Tenn. Crim. App. LEXIS 16 (Tenn. Crim. App. 1993), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 119 (Tenn. Mar. 22, 1993).

17. Probable Cause Found.

Affidavit found sufficient on its face to establish probable cause. State v. Nolan, 617 S.W.2d 174, 1981 Tenn. Crim. App. LEXIS 339 (Tenn. Crim. App. 1981); State v. Henry, 680 S.W.2d 476, 1984 Tenn. Crim. App. LEXIS 2527 (Tenn. Crim. App. 1984).

Suppression motion was properly denied under Tenn. Const. art. I, § 7 where: (1) the search warrant affidavit under T.C.A. § 40-6-103 and Tenn. R. Crim. P. 41(c) met the *Aguilar-Spinelli/Jacumin* test by stating that a confidential informant (CI) had given information on narcotics trafficking resulting in several seizures of cocaine and marijuana and several felony narcotics arrests for cocaine and marijuana; (2) a specific number of seizures and arrests was not required; and (3) a specific number requirement for establishing the CI's credibility would have constituted a hypertechnical application of the *Aguilar-Spinelli* test. State v. Sales, 393 S.W.3d 236, 2012 Tenn. Crim. App. LEXIS 845 (Tenn. Crim. App. Oct. 17, 2012).

Trial court did not err by denying defendant's motion to suppress the evidence obtained via the search warrant because the affidavit contained sufficient information to conclude that there was a fair probability that contraband or evidence of a crime would be found in defendant's residence, as the affidavit stated that officers were looking for a .30-06 rifle with a scope and the ammunition for such a rifle, that the defendant's grandfather reported having given the defendant such a gun approximately one week before the victim's murder. State v. Parker, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 127 (Tenn. Crim. App. Feb. 25, 2019).

Denial of defendant's motion to suppress evidence obtained from investigatory stop was appropriate because a police officer had reasonable suspicion to believe that defendant had driven under the influence in that a reliable citizen informant provided information of a potentially intoxicated person acting in a concerning manner and driving away in a car, the officer soon found defendant by a road in a parked car that matched the description that was given, and the reasonable inference was that defendant had driven while potentially intoxicated. State v. Jackson, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 80 (Tenn. Crim. App. Mar. 7, 2021).

18. Probable Cause Not Found.

Affidavit failed to reflect that informant was credible or that his information was reliable; therefore, search warrant was not issued upon probable cause and any evidence obtained as a result of the search pursuant to the warrant should have been suppressed. State v. Moon, 841 S.W.2d 336, 1992 Tenn. Crim. App. LEXIS 630 (Tenn. Crim. App. 1992).

19. Authority of Officers.

Participation by detective of Nashville police department in execution of search warrant in Robertson County did not invalidate the warrant. State v. Smith, 868 S.W.2d 561, 1993 Tenn. LEXIS 410 (Tenn. 1993), rehearing denied, — S.W.2d —, 1994 Tenn. LEXIS 2 (1994), cert. denied, Smith v. Tennessee, 513 U.S. 960, 115 S. Ct. 417, 130 L. Ed. 2d 333, 1994 U.S. LEXIS 7536 (1994).

20. Knock and Announce.

Knock and announce rule in executing search warrants does not apply to interior doors. State v. Starks, 658 S.W.2d 544, 1983 Tenn. Crim. App. LEXIS 410 (Tenn. Crim. App. 1983).

Tenn. R. Crim. P. 41 is a codification of the "knock and announce" rule, is applicable only to gain entry into a building that is to be searched and does not require officers to risk the disposal of drugs by occupants while officers are pausing at interior doors; once the officers are inside a house or other building that is to be searched, the privacy of the occupants has already been breached. State v. Starks, 658 S.W.2d 544, 1983 Tenn. Crim. App. LEXIS 410 (Tenn. Crim. App. 1983).

Conviction was reversed where officer neither spoke nor in any way announced his authority before kicking in the defendant's door, and where the officer could advance no reason for his failure to announce himself. State v. Fletcher, 789 S.W.2d 565, 1990 Tenn. Crim. App. LEXIS 85 (Tenn. Crim. App. 1990).

A police officer cannot justify his simultaneous announcement and forced entry into a residence based upon exigent circumstances that he created. Such conduct violates the letter and spirit of Tenn. R. Crim. P. 41. State v. Lee, 836 S.W.2d 126, 1991 Tenn. Crim. App. LEXIS 903 (Tenn. Crim. App. 1991).

Identification of police and giving occupants a reasonable time to respond are far more constitutionally significant than stating their purpose in demanding entry, and in the absence of special circumstances, such as an inquiry from within, the failure to state the purpose does not require suppression of evidence which is seized. United States v. Finch, 998 F.2d 349, 1993 U.S. App. LEXIS 16174 (6th Cir. Tenn. 1993).

Search of defendant's office at a church was not invalid due to the officer's failure to comply with the "knock and announce rule," as when the officers asked to speak with defendant he was carrying the brief case that was believed to contain the pornographic material to be seized, and defendant ran away and hid in some church robes; thus, exigent circumstances created an exception to the "knock and announce" rule. State v. McCary, 119 S.W.3d 226, 2003 Tenn. Crim. App. LEXIS 17 (Tenn. Crim. App. 2003), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 674 (Tenn. July 7, 2003).

Exigent circumstances existed which justified the issuance of a "no knock" warrant because defendant had drugs inside his house, the residence was equipped with a surveillance system, and any evidence could be destroyed quickly due to defendant's ability to monitor the activity outside the residence. State v. Perry, 178 S.W.3d 739, 2005 Tenn. Crim. App. LEXIS 270 (Tenn. Crim. App. 2005), appeal denied, — S.W.3d —, 2005 Tenn. LEXIS 717 (Tenn. Aug. 22, 2005).

21. Five-day Period of § 40-6-107.

There is a rebuttable presumption that a warrant served within the five-day period as provided in T.C.A. § 40-6-107 retains the probable cause validity attributed to it by the issuing magistrate, subject to a proper evidentiary showing to the contrary. The burden of proof is on the challenger to show, not just that probable cause no longer exists, but that something objective occurred in the interval to reasonably put the police on notice of that fact. State v. Evans, 815 S.W.2d 503, 1991 Tenn. LEXIS 289 (Tenn. 1991).

Execution of a warrant beyond the five-day period fixed by T.C.A. § 40-6-107 renders the warrant impermissibly void and in violation of the U.S. Const., amend. 4 prohibition against unreasonable searches and seizures. State v. Evans, 815 S.W.2d 503, 1991 Tenn. LEXIS 289 (Tenn. 1991).

22. —Conflict with Federal Rules.

Whether state or federal law should be applied to determine the validity of a warrant issued by a federal magistrate that was executed one day too late under T.C.A. § 40-6-107 and Tenn. R. Civ. P. 41(d) (now Tenn. R. Crim. P. 41(e)(3)), but within the 10-day limit set by federal law, did not turn, as a matter of law, on the forum in which the evidence was proffered, but instead, turned, as a factual matter, on the relationship between the federal and state officers involved in the case and whether those officers were acting under color of state law. State v. Hudson, 849 S.W.2d 309, 1993 Tenn. LEXIS 51 (Tenn. 1993).

23. Contraband.

Where no burglary was proven, car seized during execution of warrant was not contraband or burglary tool, even though it had been modified so that trunk would not open without using special procedures. State v. Casey, 868 S.W.2d 737, 1993 Tenn. Crim. App. LEXIS 558 (Tenn. Crim. App. 1993).

24. Nonwaiver of Right to Object to Inadmissible Evidence.

In a prosecution for unlawful possession of drugs with intent to manufacture, deliver, or sell and unlawful possession of drug paraphernalia, the defendant did not waive his right to raise the issue of the admission of illegally seized evidence by admitting that he manufactured marijuana for his own use, since this constituted an implicit denial of the crime with which he was charged and fulfilled the requirements of Tenn. R. Crim. P. 41(g). State v. Valentine, 911 S.W.2d 328, 1995 Tenn. LEXIS 652 (Tenn. 1995).

25. Review.

Where search warrant apparently never became a part of the record at all, appellate review of warrant was denied. State v. Johnson,

854 S.W.2d 897, 1993 Tenn. Crim. App. LEXIS 16 (Tenn. Crim. App. 1993), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 119 (Tenn. Mar. 22, 1993).

On appeal from his drug convictions, defendant's argument that the warrant failed to comply with Tenn. R. Crim. P. 41(c) because the judge failed to hand deliver the search warrant to the executing officer was raised for the first time on appeal and was therefore waived, Tenn. R. Crim. P. 12(b); T.R.A.P. 36(a). State v. Hayes, 337 S.W.3d 235, 2010 Tenn. Crim. App. LEXIS 684 (Tenn. Crim. App. Aug. 18, 2010), appeal denied, — S.W.3d —, 2011 Tenn. LEXIS 152 (Tenn. Feb. 17, 2011).

26. Jurisdiction.

Trial court properly granted defendants' motion to suppress drugs and drug paraphernalia seized from their homes pursuant to search warrants because the warrants were invalid under the Fourth Amendment, as the district circuit court judge who issued the search warrants lacked jurisdiction to issue search warrants for defendants' residences that were located in a different judicial district. Nothing in the record established that the issuing judge obtained jurisdiction to issue the search warrants by interchange, designation, appointment, or other lawful means. State v. Frazier, 558 S.W.3d 145, 2018 Tenn. LEXIS 537 (Tenn. Sept. 26, 2018).

Rule 42. Criminal Contempt. —

(a) Summary Disposition. — A judge may summarily punish a person who commits criminal contempt in the judge's presence if the judge certifies that he or she saw or heard the conduct constituting the contempt. The contempt order shall recite the facts, be signed by the judge, and entered in the record.

(b) Disposition on Notice and Hearing. — A criminal contempt shall be initiated on notice, except as provided in subdivision (a) of this rule.

(1) Content of Notice. — The criminal contempt notice shall:

(A) state the time and place of the hearing;

(B) allow the alleged contemner a reasonable time to prepare a defense; and

(C) state the essential facts constituting the criminal contempt charged and describe it as such.

(2) Form of Notice. — The judge shall give the notice orally in open court in the presence of the alleged contemner or by written order, including an arrest order if warranted. The notice and order may also issue on application of the district attorney general, an attorney appointed by the court for that purpose, or an attorney representing a party in the case.

(3) Release on Bail. — The alleged contemner is entitled to admission to bail as provided in these rules.

(4) Disqualification of Judge. — When the contempt charged involves disrespect to or criticism of a judge, that judge is disqualified from presiding at the hearing, except with the alleged contemner's consent.

(5) Punishment Order. — If the court finds the alleged contemner to be in contempt, the court shall enter an order setting the punishment. [As amended by order entered December 16, 2013, effective July 1, 2014.]

Advisory Commission Comments. Rule 42 tracks some of the language of the federal rule. No right to a jury trial exists upon a state charge of criminal contempt under present law establishing the penalties for the offense.

Advisory Commission Comment [2014]. The reference in Rule 42(b)(2) to "a show cause order" was deleted. The burden of proof in a criminal contempt proceeding governed by subdivision (b) of the rule is on the district attorney or other attorney prosecuting the allegation of criminal contempt, and requiring an alleged contemner to "show cause" why he or she should not be held in contempt impermissibly placed the burden of proof on the alleged contemner.

Subdivision (b)(2) also was amended to add "an attorney representing a party in the case"

in order to conform the rule to current practice. This rule also guides criminal contempt proceedings arising in civil cases that involve attorneys for the parties. *See, e.g.,Wilson v. Wilson*, 984 S.W.2d 898 (Tenn. 1998).

Subdivision (b) also was amended to use the term "alleged contemner" throughout the subdivision, instead of only the word "defendant," to prevent confusion by distinguishing the person charged with criminal contempt from a named defendant in a particular case. A party charged with criminal contempt may or may not be a named defendant in the particular case. The new term conforms the language of the rule to the terminology in *Baker v. State*, ___ S.W.3d ___, ___, 2013 WL 4768309, at *6-7 (Tenn. 2013).

Compiler's Notes. The amendment of rule 42, which amended subdivision (b) and added the 2014 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 16, 2013, was ratified and approved by 2014 House Resolution 154 and Senate Resolution 74. The order promulgating the 2014 amendment of subdivision (b) and the addition of the 2014 Advisory Commission Comments provided that it take effect on July 1, 2014.

In its order filed September 16, 2014, the Supreme Court provided: "The Advisory Commission on the Rules of Practice & Procedure annually presents recommendations to the Court to amend the Tennessee Rules of Appellate, Civil, Criminal, and Juvenile Procedure and the Tennessee Rules of Evidence. In August 2014, the Advisory Commission completed its 2013-2014 term and transmitted its recommendations to the Court. After considering the amendments recommended by the Commission, the Court hereby publishes for public comment the proposed amendments set out in the Appendix to this order.

"The Court hereby solicits written comments on the proposed amendments from the bench, the bar, and the public. The deadline for submitting written comments is Wednesday, November 26, 2014. Written comments should be addressed to: James Hivner, Clerk, Re: 2015 Rules Package, 100 Supreme Court Building, 401 7th Avenue North, Nashville, TN 37219-1407, and should reference the docket number [ADM2014-01791]."

The proposed amendment to Tennessee Rules of Criminal Procedure, Rule 42 promulgated by the Supreme Court in its order dated September 16, 2014, would amend subdivision (b)(5) by adding the last three sentences, which read: "The court may allow the award of attorney's fees and expenses to private counsel, either retained or appointed, for the prosecution of contempts arising under this Rule where the alleged act of contempt involves the failure to pay support to a spouse, former spouse, or dependent. The court may not award attorney fees or expenses in any other proceeding brought under this Rule. No fees or expenses shall be awarded to the district attorney general, the attorney general, or members of their respective staffs for the prosecution of any matter involving the failure to pay support to a spouse, former spouse, or dependent." and adding subdivisions (c) and (d), which read: "(c) PLEADING AND HEARING. — A petition charging criminal contempt shall not be joined in a pleading charging civil contempt. A charge of criminal contempt shall be heard and concluded with a finding of guilty or not guilty prior to hearing further evidence relating to a charge of civil contempt.

"If a finding of guilty is made by the court, punishment, if any, by fine, incarceration, or both, whether suspended or not, shall be announced prior to hearing further evidence relating to a charge of civil contempt.

"(d) DISCOVERY. — Discovery in a criminal contempt proceeding is governed by the Rules of Criminal Procedure."

A 2015 Advisory Commission note would also be added. It would read: "*Advisory Commission Comment [2015]* — Subdivision (b)(5) was amended by adding the second, third, and fourth sentences, which pertain to limiting the award of attorney fees and expenses in criminal contempt proceedings.

"Subdivision (c) was added to the rule to set out the procedure for trial courts to follow in cases in which a respondent is faced with allegations of both criminal and civil contempt. Subdivision (c) provides that a petition alleging criminal contempt cannot be joined in a pleading that alleges civil contempt. The subdivision also provides that an allegation of criminal contempt must be adjudicated to its conclusion by the trial court prior to adjudicating an allegation of civil contempt. Additionally, subdivision (c) provides that, in the event the court finds the respondent to be in criminal contempt, the court must impose any punishment before hearing further evidence relating to an allegation of civil contempt.

"Subdivision (d) was added to the rule to provide that discovery in criminal contempt proceedings is governed by the Rules of Criminal Procedure."

Cross-References. Breach of confidentiality concerning investigative grand jury documents, penalty, T.C.A. § 40-12-211.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 375, 376.

Law Reviews. Criminal Contempt, Jury Trial, Private Prosecutors & Child Support, (Clarke Lee Shaw), 34 Tenn. B.J. 22 (1998).

Attorney General Opinions. Role of district attorney general in prosecution contempts for violating orders of protection, OAG 92-25 (3/25/92).

NOTES TO DECISIONS

ANALYSIS

1. In General.
2. Evidence Sufficient.
3. Contempt Conviction Invalid.
4. Disqualification of Judge.
5. Attorney's Fees.
6. Prosecution by Private Attorney.
7. Sanctions.
8. Notice.

1. In General.

Where the members of a compensation self-insured group trust in liquidation were not found to be in criminal contempt, the trial court's findings that the members did not make payments pursuant to a court order did not have to be proven beyond a reasonable doubt. State ex rel. Flowers v. Tenn. Trucking Ass'n Self Ins. Group Trust, 209 S.W.3d 602, 2006 Tenn. App. LEXIS 251 (Tenn. Ct. App. 2006), appeal denied, State ex rel. Flowers v. Tenn. Trucking Ass'n Self Ins. Group Trust & Trucking Servs., — S.W.3d —, 2006 Tenn. LEXIS 1010 (Tenn. 2006).

Dismissal of the former wife's contempt petition was improper because the wife's petition alleged willful violations of the parties' divorce decree and it also satisfied all of the requirements of Tenn. R. Crim P. 42(b). Long v. McAllister-Long, 221 S.W.3d 1, 2006 Tenn. App. LEXIS 561 (Tenn. Ct. App. 2006), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 69 (Tenn. 2007).

There was no reason to dismiss a magistrate's contempt finding based on an alleged failure to comply with the procedures of subsection (a) because an attorney was not harmed by the juvenile court's one-day delay in entering its written order, which clearly contained the requisite factual basis for the contempt order. In re Brown, 470 S.W.3d 433, 2015 Tenn. App. LEXIS 137 (Tenn. Ct. App. Mar. 23, 2015), appeal denied, — S.W.3d —, 2015 Tenn. LEXIS 654 (Tenn. Aug. 14, 2015).

2. Evidence Sufficient.

Evidence supported the trial court's judgment that attorney who represented wife in a divorce proceeding misrepresented a material fact regarding an automobile, which was the subject of the action, to the court in order to invoke the extraordinary powers of the court to his client's advantage. Wilson v. Wilson (In re Cowan), 877 S.W.2d 271, 1993 Tenn. App. LEXIS 814 (Tenn. Ct. App. 1993).

Based on evidence of an attorney's direct confrontation with the trial judge and boisterous conduct which required his removal from the courtroom, the court did not abuse its discretion in invoking summary disposition of three direct criminal contempts. State v. Turner, 914 S.W.2d 951, 1995 Tenn. Crim. App. LEXIS 705 (Tenn. Crim. App. 1995).

Evidence was sufficient to sustain defendant's conviction for criminal contempt, where he obstructed plaintiff's attempt to legitimately obtain public records and he gave false responses to questions about the records. Moody v. Hutchison, 159 S.W.3d 15, 2004 Tenn. App. LEXIS 331 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 1102 (Tenn. Dec. 6, 2004).

Magistrate did not abuse his discretion in concluding that exceptional circumstances existed to warrant summarily punishing an attorney for direct criminal contempt because the conduct constituted willful misbehavior in the presence of the court, or so near thereto as to obstruct the administration of justice; the imposition of summary punishment was justified given the attorney's boisterous conduct in the courtroom and his failure to obey the magistrate's directives. In re Brown, 470 S.W.3d 433, 2015 Tenn. App. LEXIS 137 (Tenn. Ct. App. Mar. 23, 2015), appeal denied, — S.W.3d —, 2015 Tenn. LEXIS 654 (Tenn. Aug. 14, 2015).

3. Contempt Conviction Invalid.

Trial attorney's convictions for contempt in violation of T.C.A. § 29-9-102(1) were invalid where obtained under circumstances in which trial judge should have appointed another judge to hear the contempt charges under Tenn. R. Crim. P. 42(b) and where the actions of the trial attorney were not willful, but were motivated by the sincere pursuit of vigorous advocacy he deemed necessary to represent a client on trial for his life. State v. Green, 783 S.W.2d 548, 1990 Tenn. LEXIS 41 (Tenn. 1990).

Where none of the contempt petitions designated the contempt as criminal, providing no opportunity for the contemnor to purge himself, and because the contemnor was not afforded proper notice as required by the Tenn. R. Crim. P. 42(b) and Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 31 S. Ct. 492, 55 L. Ed. 797, 1911 U.S. LEXIS 1746 (1911), the court reversed that part of the trial court's order sentencing the contemnor to two 10-day periods in the county workhouse. Storey v. Storey, 835 S.W.2d 593, 1992 Tenn. App. LEXIS 47 (Tenn. Ct. App. 1992).

The record was insufficient to support the trial court's finding of direct contempt where it did not specify the conduct on which the finding of contempt was based and that the judge saw or heard the conduct or that it was committed in his presence. Varley v. Varley, 934 S.W.2d 659, 1996 Tenn. App. LEXIS 459 (Tenn. Ct. App. 1996).

Imposition of summary contempt on an attorney pursuant to T.C.A. § 29-9-102 was inappropriate because the hearing at which the trial

court exercised its summary authority was held more than three weeks after the alleged contempt and was not the type of summary proceeding authorized and the need for summary punishment had greatly diminished. Daniels v. Grimac, 342 S.W.3d 511, 2010 Tenn. App. LEXIS 695 (Tenn. Ct. App. Nov. 9, 2010), review or rehearing denied, Daniel v. Grimac, — S.W.3d —, 2011 Tenn. LEXIS 398 (Tenn. Apr. 13, 2011).

4. Disqualification of Judge.

Where the attorney's angry comments and conduct were directed entirely toward the jury and opposing counsel, not the trial judge, the judge did not err by denying the attorney's recusal motion. Black v. Blount, 938 S.W.2d 394, 1996 Tenn. LEXIS 807 (Tenn. 1996).

Failure of husband to comply with support orders did not constitute personal "disrespect to or criticism of" the judge who had presided over divorce proceedings and was not type of conduct that disqualified the judge from presiding at contempt proceedings. Herrera v. Herrera, 944 S.W.2d 379, 1996 Tenn. App. LEXIS 656 (Tenn. Ct. App. 1996).

The mere fact that a judge issued adverse rulings against the husband in divorce proceedings did not, in and of itself, evidence bias or prejudice toward the husband so as to require the judge to recuse himself from consideration of contempt charges against the husband. Herrera v. Herrera, 944 S.W.2d 379, 1996 Tenn. App. LEXIS 656 (Tenn. Ct. App. 1996).

Trial court was correct in determining that the contempt did not involve disrespect to or criticism of the judge personally and therefore did not disqualify the judge from hearing the charge; furthermore, defendant's act of publishing unflattering material regarding the judge and naming him with other defendants in a federal lawsuit did not by itself require recusal. State v. Thigpen, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 92 (Tenn. Crim. App. Feb. 14, 2020).

5. Attorney's Fees.

The trial court had authority to order an attorney cited for criminal contempt to pay a private prosecutor's attorney's fees. Black v. Blount, 938 S.W.2d 394, 1996 Tenn. LEXIS 807 (Tenn. 1996).

6. Prosecution by Private Attorney.

No constitutional principle nor ethical standard automatically disqualifies a private attorney representing the beneficiary of a court order from simultaneously prosecuting a contempt action which alleges a violation of the order. Wilson v. Wilson, 984 S.W.2d 898, 1998 Tenn. LEXIS 744 (Tenn. 1998), rehearing denied, — S.W.3d —, 1999 Tenn. LEXIS 32 (Tenn. Jan. 19, 1999), cert. denied, Oakley v. Wilson, 528 U.S. 822, 120 S. Ct. 68, 145 L. Ed. 2d 59, 1999 U.S. LEXIS 5077 (1999).

7. Sanctions.

Attorneys risk sanctions under Tenn. R. Civ. P. 11 for filing unjustified or improper contempt applications. Wilson v. Wilson, 984 S.W.2d 898, 1998 Tenn. LEXIS 744 (Tenn. 1998), rehearing denied, — S.W.3d —, 1999 Tenn. LEXIS 32 (Tenn. Jan. 19, 1999), cert. denied, Oakley v. Wilson, 528 U.S. 822, 120 S. Ct. 68, 145 L. Ed. 2d 59, 1999 U.S. LEXIS 5077 (1999).

8. Notice.

Fact that contempt proceeding was started by a petition and not a warrant was a distinction without a difference and the warrants against defendant charging multiple violations of a protection order served the purpose of giving the notice of a charge of indirect criminal contempt required by Tenn. R. Crim. P. 42(b). State v. Wood, 91 S.W.3d 769, 2002 Tenn. App. LEXIS 330 (Tenn. Ct. App. 2002), appeal denied, — S.W.3d —, 2002 Tenn. LEXIS 526 (Tenn. Nov. 12, 2002).

Defendant received proper notice of the criminal contempt charges against him, where defendant knew that he was the individual who signed the second amended response, and it was clear that at least part of the basis for the alleged criminal contempt was the allegedly false statements made in the second amended response signed by defendant. Therefore, defendant clearly had notice that the basis for the claimed criminal contempt was his allegedly false statements, and if defendant had made the exact same false statements with the same obstructive effect in litigation that did not involve his sheriff's department, his statements would be no less contemptuous; it was entirely immaterial that the document containing the false statements happened to be a response to a Tennessee Public Records Act request. Moody v. Hutchison, 159 S.W.3d 15, 2004 Tenn. App. LEXIS 331 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 1102 (Tenn. Dec. 6, 2004).

Defendant's due process rights were violated when she did not receive notice of criminal contempt proceeding arising out of failure to appear at contempt hearing on alleged violation of injunction; moreover, defendant did not receive a hearing on the matter. Bailey v. Crum, 183 S.W.3d 383, 2005 Tenn. App. LEXIS 362 (Tenn. Ct. App. 2005), review or rehearing denied, — S.W.3d —, 2005 Tenn. LEXIS 1076 (Tenn. 2005).

Defendant's due process rights were violated where she did not receive notice of criminal contempt proceeding arising out failure to appear at the contempt hearing on alleged violation of injunction; under Tenn. R. Crim. P. 42(b) notice given to defendant was insufficient because it did not state whether the contempt proceeding was a civil or criminal proceeding, and it did not give the date and location of the alleged violation. Bailey v. Crum, 183 S.W.3d

383, 2005 Tenn. App. LEXIS 362 (Tenn. Ct. App. 2005), review or rehearing denied, — S.W.3d —, 2005 Tenn. LEXIS 1076 (Tenn. 2005).

Respondent received sufficient notice of the contempt charges because petitioner's motions, the fiats, and the oral statements of the trial court provided respondent with both oral and written notice of the criminal contempt charges. Respondent received written and oral warnings that he could face up to ten days of incarceration for each offense. Faucon v. Mgridichian, — S.W.3d —, 2020 Tenn. App. LEXIS 274 (Tenn. Ct. App. June 11, 2020).

X. GENERAL PROVISIONS.

Rule 43. Presence of the Defendant. —

(a) Presence Required. — Unless excused by the court on defendant's motion or as otherwise provided by this rule, the defendant shall be present at:

(1) the arraignment;

(2) every stage of the trial, including the impaneling of the jury and the return of the verdict; and

(3) the imposition of sentence.

(b) Continued Presence Not Required. — The further progress of the trial, to and including the return of the verdict and imposition of sentence, shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present:

(1) Voluntary Absence. — Voluntarily is absent after the trial has commenced, whether or not he or she has been informed by the court of the obligation to remain during the trial; or

(2) Disruptive Conduct. — After being warned by the court that disruptive conduct will result in removal from the courtroom, persists in conduct justifying exclusion from the courtroom.

(c) Procedure After Voluntary Absence or Removal. —

(1) Representation by Counsel. — If a trial proceeds in the voluntary absence of the defendant or after the defendant's removal from the courtroom, he or she must be represented in court by counsel.

(2) Disruptive Conduct. — If the defendant is removed from the courtroom for disruptive behavior under Rule 43(b)(2):

(A) Access to Counsel After Removal. — The defendant shall be given reasonable opportunity to communicate with counsel during the trial; and

(B) Periodic Review of Removal. — The court shall determine at reasonable intervals whether the defendant indicates a willingness to avoid creating a disturbance if allowed to return to the courtroom. The court shall permit the defendant to return when the defendant so signifies and the court reasonably believes the defendant.

(d) Presence Not Required. — A defendant need not be present in the following circumstances:

(1) Organizational Defendant. — The defendant is a corporation, limited liability company, or limited liability partnership which is represented by counsel.

(2) Minor Offense. — The maximum possible sentence is a fine not in excess of fifty dollars ($50.00), no incarceration is possible, and the defendant is represented by counsel.

(3) Question of Law. — At a conference or argument on a question of law.

(4) Arraignment. — At arraignment when:

(A) the defendant's attorney of record is present in open court and presents a waiver of presence signed by the defendant; or

(B) the arraignment is conducted by electronic audio-visual conference as set forth in Rule 43(f).

(e) INITIAL APPEARANCE–AUDIO-VISUAL DEVICES. — The initial appearance of the defendant before the court pursuant to Rule 5 of the Tennessee Rules of Criminal Procedure may be through the use of an electronic audio-visual device if:

(1) the judge or magistrate exercises sound discretion and determines that the use of such devices will achieve the purposes of the Rules of Criminal Procedure;

(2) the judge or magistrate and the defendant are able to view and communicate with each other simultaneously and to be heard in the courtroom by members of the public or, if the judge or magistrate is not in a location accessible to the public at the time of the initial appearance, the audio-visual communication is contemporaneously accessible to the public; and,

(3) the court accepts no plea except a plea of not guilty.

(f) ARRAIGNMENT–AUDIO-VISUAL DEVICES. — Unless the defendant objects, he or she may be arraigned–pursuant to Rule 10 of the Tennessee Rules of Criminal Procedure–through the use of an electronic audio-visual device if:

(1) the judge exercises sound discretion and determines that the use of such devices will achieve the purposes of the Rules of Criminal Procedure;

(2) the judge and defendant are able to view and communicate with each other simultaneously and to be heard in the courtroom by members of the public; and

(3) the court accepts no plea except a plea of not guilty. [Amended by order filed December 29, 2015, effective July 1, 2016; amended by order dated January 8, 2019, effective October 1, 2019.]

Advisory Commission Comments. This rule is based upon but is broader than the federal rule.

Rule 43(d)(4) allows the defendant to waive his or her physical presence at the arraignment but only when the defendant's counsel of record presents the written waiver to the trial judge. If an attorney enters such an appearance, the attorney is expected to continue representation of the defendant. This rule should not be read to allow an attorney to simply make an appearance for the limited purpose of arraignment.

Rule 43(e) permits general sessions courts to use audio-visual technology to conduct initial appearances where a plea of not guilty is entered by the defendant. Nothing in paragraph (e) [formerly (d)] prohibits the prosecutor or defense counsel from being present and heard. In addition, paragraph (e) [formerly (d)] does not apply to preliminary hearings pursuant to Rule 5.1 nor misdemeanor trials. These amendments are substantially similar to Rule 5-303 of the New Mexico Rules of Criminal Procedure and Rule 10 of Hawaii Rules of Penal Procedure and reflect the growing need for the use of technology to expedite the processing of initial criminal proceedings and reduce the cost of such processing. The purposes for the Rules, which these amendments are intended to achieve, are set forth in Rule 2: "... to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay."

The purpose of Rule 43(f) is to extend the discretion of the court to use electronic audio-visual technology to criminal arraignments. The Rule is intended to parallel Rule 43(e) and Rule 5 of the Tennessee Rules of Criminal Procedure permitting the use of electronic audio-visual technology in initial appearances. The Rule permits the court, in its discretion, to use electronic audio-visual technology at an arraignment if the use promotes the purposes for the Tennessee Rules of Criminal Procedure, allows the judge and defendant to communicate with and view each other simultaneously, permits discussions to be heard by the public, and does not involve the defendant's entry of a guilty plea.

Advisory Commission Comments [2016]. Consistent with simultaneous amendments to Tenn. R. Crim. P. 5 and 5.1, the second paragraph of the original Advisory Commission Comments to Rule 43 is amended to substitute the term "preliminary hearing" for the obsolete term "preliminary examination." No substantive amendments are made to the Rule.

Advisory Commission Comments [2019]. Rule 43(e) contemplates that contemporaneous public access to initial appearances may be achieved through a monitor placed in a room open to the public, such as the lobby of a detention facility, or by other electronic means, such as live streaming accessible to public internet users.

Compiler's Notes. The amendment of the existing Advisory Commission Comments to Rule 43 and the addition of [2016] Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 147 and Senate Resolution 80. The order promulgating the amendment of the existing Advisory Commission Comments to Rule 43 and the addition of [2016] Advisory Commission Comments provided that it take effect July 1, 2016.

The amendment of Rule 43, which amended subdivision (e)(2) and added the [2019] Advisory Commission Comment, as promulgated and adopted by the Supreme Court in its order dated January 8, 2019, was ratified and approved by 2019 Special Session House Resolution 2 and 2019 Regular Session Senate Resolution 14. The order promulgating amendment of Rule 43 by amending subdivision (e)(2) and the addition the [2019] Advisory Commission Comment, provided that it take effect October 1, 2019.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 3-43-1, 3-43-2.

Tennessee Jurisprudence. 24 Tenn. Juris., Verdict, § 25.

Law Reviews. 1985 Tennessee Survey: Selected Developments in Tennessee Law, 53 Tenn. L. Rev. 351 (1986).

Paine on Procedure: Trial in Absentia: The Tim Kirk and Mary Evans Tragicomedy (Donald F. Paine), 44 Tenn. B.J. 23 (2008).

Policing the Bases of Modern Expert Testimony (Ronald L. Carlson), 39 Vand. L. Rev. 577 (1986).

Attorney General Opinions. Presence of defendant at preliminary hearing, OAG 89-70 (5/2/89).

NOTES TO DECISIONS

Analysis

1. Waiver of Right to be Present.
2. Inquiries Off the Record.
3. Jury Selection Without Defendant.
4. Examinations Without Defendant.
5. Miscellaneous.

1. Waiver of Right to be Present.

An individual may sacrifice his right to be present at trial if he insists on conducting himself in a manner so disorderly, disruptive, or disrespectful that the trial cannot proceed with him present in the courtroom. State v. Cole, 629 S.W.2d 915, 1981 Tenn. Crim. App. LEXIS 418 (Tenn. Crim. App. 1981).

Tenn. R. Crim. P. 43 does not absolutely bar a trial when a defendant absents himself before his trial date; the fact that he allegedly did not know that the trial would proceed in his absence and did not learn that it had until he read about the verdict in the newspaper was irrelevant on defendant's right to be present. State v. Kirk, 699 S.W.2d 814, 1985 Tenn. Crim. App. LEXIS 3142 (Tenn. Crim. App. 1985), cert. denied, Kirk v. Tennessee, 475 U.S. 1023, 106 S. Ct. 1215, 89 L. Ed. 2d 327, 1986 U.S. LEXIS 394 (1986), overruled, State v. Far, 51 S.W.3d 222, 2001 Tenn. Crim. App. LEXIS 247 (Tenn. Crim. App. 2001)

Defendant waived his right to be present at sentencing hearing on his convictions for especially aggravated robbery and especially aggravated kidnapping where he was voluntarily absent from the sentencing hearing and the trial judge had made every effort to persuade defendant to attend the hearing. State v. Carruthers, 35 S.W.3d 516, 2000 Tenn. LEXIS 683 (Tenn. 2000), cert. denied, Carruthers v. Tennessee, 533 U.S. 953, 121 S. Ct. 2600, 150 L. Ed. 2d 757, 2001 U.S. LEXIS 5032 (2001).

The clear implication from the language "initially present" and "to be removed from the courtroom" is that Tenn. R. Crim. P. 43(b)(2) only allows the trial court to prevent a defendant from continued attendance at the trial when the defendant was initially permitted to attend the trial, but engaged in disruptive behavior during the trial. State v. Ballard, 21 S.W.3d 258, 2000 Tenn. Crim. App. LEXIS 177 (Tenn. Crim. App. 2000).

Tenn. R. Crim. P. 43 only allows a trial in absentia when the defendant is first present at trial and then leaves, voluntarily or otherwise. State v. Far, 51 S.W.3d 222, 2001 Tenn. Crim. App. LEXIS 247 (Tenn. Crim. App. 2001).

Trial court did not err by permanently removing defendant from his trial because he repeatedly offered non-responsive answers to the questions of his own counsel and provided testimony that was not relevant to the proceedings, Tenn R. Crim. P. 43(a); additionally, he persisted in his misbehavior and taunted the trial judge. State v. Mosley, 200 S.W.3d 624,

2005 Tenn. Crim. App. LEXIS 1196 (Tenn. Crim. App. 2005), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 266 (Tenn. 2006).

Standard for determining whether a defendant has waived the right to be present at trial should be the same standard for determining whether the defendant has waived the right to testify. State v. Mosley, 200 S.W.3d 624, 2005 Tenn. Crim. App. LEXIS 1196 (Tenn. Crim. App. 2005), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 266 (Tenn. 2006).

Trial counsel was not ineffective for waiving petitioner's presence at the hearing because it was a strategic decision so that the witness could not identify petitioner, just two weeks before his trial for running over the victim, as the man who picked up the witness and made incriminating statements about running over the victim. Hudson v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 195 (Tenn. Crim. App. Mar. 23, 2020).

2. Inquiries Off the Record.

A judge is not permitted to make a private inquiry off the record and act upon the information so obtained. State v. Suttles, 767 S.W.2d 403, 1989 Tenn. LEXIS 34 (Tenn. 1989).

3. Jury Selection Without Defendant.

Under Tenn. R. Crim. P. 43, a defendant has the right to be present during jury selection and, in the absence of evidence that the defendant waived that right, the defendant's total absence from jury selection is not subject to harmless error analysis and requires automatic reversal. State v. Muse, 967 S.W.2d 764, 1998 Tenn. LEXIS 196 (Tenn. 1998).

4. Examinations Without Defendant.

Even in determining the competency of a child to be a witness, the judge should not examine the child outside the presence of the defendant in a criminal case unless the defendant agrees and waives the right to be present. State v. Suttles, 767 S.W.2d 403, 1989 Tenn. LEXIS 34 (Tenn. 1989).

5. Miscellaneous.

Discrimination claims of two men, who were both hearing-impaired and mute, stemming from the lack of an interpreter at their initial appearances were summarily dismissed; both men entered pleas of not guilty and received a trial date, as contemplated by Tenn. R. Crim. P. 5, and both were present for the proceeding, as contemplated by Tenn. R. Crim. P. 43, and neither man presented an argument that the outcome would have been different if an interpreter would have been present. Tucker v. Hardin County, 448 F. Supp. 2d 901, 2006 U.S. Dist. LEXIS 60754 (W.D. Tenn. 2006), aff'd, Tucker v. Tennessee, 539 F.3d 526, 2008 FED App. 329P, 2008 U.S. App. LEXIS 18618 (6th Cir. Aug. 29, 2008).

Rule 44. Right to and Assignment of Counsel. —

(a) Right to Assigned Counsel. — Every indigent defendant is entitled to have assigned counsel in all matters necessary to the defense and at every stage of the proceedings, unless the defendant waives counsel.

(b) Waiver. —

(1) Actions by Court. — Before accepting a waiver of counsel, the court shall:

(A) advise the accused in open court of the right to the aid of counsel at every stage of the proceedings; and

(B) determine whether there has been a competent and intelligent waiver of such right by inquiring into the background, experience, and conduct of the accused, and other appropriate matters.

(2) Written Waiver. — A waiver of counsel shall be in writing.

(3) Record of Waiver. — An accepted waiver of counsel shall be in the record.

(c) Procedures for Appointment of Counsel. — The procedures for assigning counsel are those provided by law.

(d) Inquiry Into Joint Representation. —

(1) Definition of Joint Representation. — Joint representation occurs when:

(A) two or more defendants have been jointly charged under Rule 8(c) or have been joined for trial under Rule 13; and

(B) are represented by the same retained or assigned counsel or by retained or assigned counsel who are associated in the practice of law.

(2) Court's Responsibilities in Cases of Joint Representation. — The court shall promptly inquire about the propriety of joint representation and shall

personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless there is good cause to believe no conflict of interest is likely to arise, the court shall take appropriate measures to protect each defendant's right to counsel.

Advisory Commission Comments. This rule is similar to the federal rule.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), No. 3-44-1.

Tennessee Jurisprudence. 8 Tenn. Juris., Criminal Procedure, §§ 20, 22.

Attorney General Opinions. Procedure where failure to appear in municipal court with general sessions jurisdiction charged, OAG 99-096 (4/27/99).

NOTES TO DECISIONS

ANALYSIS

1. In General.
2. Applicability.
3. Waiver of Counsel.
4. Compensation.
5. Indigency.
6. Forfeiture of Right to Counsel.

1. In General.

Unless the right is waived, every indigent defendant is entitled to have counsel assigned to represent him in all matters necessary for his defense and at every stage of the proceedings. State v. Gardner, 626 S.W.2d 721, 1981 Tenn. Crim. App. LEXIS 402 (Tenn. Crim. App. 1981).

2. Applicability.

It was not clear whether the requirements of Tenn. R. Crim. P. 44(a) applied to other than indigent defendants; however, the best procedure would require a written waiver of counsel in all cases where an accused insists on self-representation. State v. Armes, 673 S.W.2d 174, 1984 Tenn. Crim. App. LEXIS 2811 (Tenn. Crim. App. 1984).

3. Waiver of Counsel.

Failure to diligently examine the defendant's background and experience, failure to notify defendant as to the possible extent of any penitentiary sentence, and failure to elaborate fully to defendant why he thought it unwise to waive counsel left the trial judge unaware of the facts essential to an informed decision that the accused had executed a valid waiver of his right to counsel. State v. Northington, 667 S.W.2d 57, 1984 Tenn. LEXIS 923 (Tenn. 1984).

Motions for self-representation signed and filed by defendant satisfied the requirement for a written waiver. State v. Goodwin, 909 S.W.2d 35, 1995 Tenn. Crim. App. LEXIS 340 (Tenn. Crim. App. 1995).

Even though defendant misled the court regarding his education and previous employment as a paralegal, where he demonstrated that he knew what he needed to mount a defense and the problems he would encounter, he knowingly and intelligently waived his right to counsel. State v. Goodwin, 909 S.W.2d 35, 1995 Tenn. Crim. App. LEXIS 340 (Tenn. Crim. App. 1995).

An accused who has intelligently and voluntarily waived the right to counsel and chosen to proceed pro se is not constitutionally entitled to the assistance of advisory counsel, and the appointment of such advisory counsel is a matter entirely within the discretion of the trial court. The court's decision on this issue should not be overturned in the absence of a clear abuse of discretion. State v. Small, 988 S.W.2d 671, 1999 Tenn. LEXIS 225 (Tenn. 1999), cert. denied, Small v. Tennessee (1999) 528 U.S. 891, 120 S. Ct. 216, 145 L. Ed. 2d 181, 1999 U.S. LEXIS 6092.

Trial court did not err in allowing defendant to represent himself as: (1) The trial court conducted a lengthy hearing to ascertain whether the defendant was competent to represent himself at trial; (2) The trial court informed the defendant of his right to counsel and warned against the perils of proceeding pro se; (3) Defendant was offered the services of his previous counsel, as "elbow" counsel; and (4) Defendant advised the court he had taken paralegal courses and was aware of the rules of evidence and procedure. State v. McCary, 119 S.W.3d 226, 2003 Tenn. Crim. App. LEXIS 17 (Tenn. Crim. App. 2003), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 674 (Tenn. July 7, 2003).

Where defendant moved the trial court seven times for a change of appointed counsel in his murder case, the court did not err by finding that he forfeited his right to counsel under Tenn. R. Crim. P. 44(a). Defendant repeatedly refused to cooperate with counsel, did not establish any basis for complaint against any of his attorneys, and his conduct was egregiously manipulative and abusive of the judicial process. State v. Willis, 301 S.W.3d 644, 2009 Tenn. Crim. App. LEXIS 547 (Tenn. Crim. App. July 6, 2009).

Trial court did not err by holding that defendant knowingly and intelligently waived his right to counsel because it conducted an appro-

priate inquiry and properly advised defendant as it repeatedly advised defendant of his right to counsel, strenuously discouraged defendant from proceeding pro se, and gave him multiple opportunities to bring in counsel. State v. Jones, 568 S.W.3d 101, 2019 Tenn. LEXIS 19 (Tenn. Jan. 30, 2019), cert. denied, Jones v. Tennessee, 205 L. Ed. 2d 144, 140 S. Ct. 262, — U.S. —, 2019 U.S. LEXIS 5344 (U.S. Oct. 7, 2019).

Trial court did not err in denying defendant's request to represent himself because the evidence in the record did not preponderate against the trial court's finding that he did not have a genuine desire to represent himself and was only making the request to manipulate the judicial process. State v. Reed, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 620 (Tenn. Crim. App. Sept. 18, 2020).

4. Compensation.

The general assembly intended compensation for counsel for indigents at all stages of felony proceedings, including those before local committing magistrates such as general sessions or municipal courts; further, the right to compensation of counsel for indigents has been extended to misdemeanor cases as well as to felonies. The supreme court also has been directed to provide rules for compensation in all cases where appointment of counsel is required by law. Allen v. McWilliams, 715 S.W.2d 28, 1986 Tenn. LEXIS 840 (Tenn. 1986). (See R. Sup. Ct. 13.)

5. Indigency.

For the purpose of determining whether counsel will be appointed, an indigent person is one who does not possess compensation for the services of a competent attorney. It is not necessary that appellant be a pauper or destitute. It is irrelevant that appellant's family may be financially capable of retaining counsel on his behalf. It is also irrelevant that the appellant does not stand accused of a felony. State v. Henry, 733 S.W.2d 127, 1987 Tenn. Crim. App. LEXIS 2527 (Tenn. Crim. App. 1987).

Trial court did not err in determining that defendant, who was not indigent, made an explicit waiver of her right to counsel, which was knowing and voluntary, despite her failure to execute a written waiver because Tenn. R. Crim. P. 44(b) only required a written waiver from indigent defendants. State v. Walker, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 29 (Tenn. Crim. App. Jan. 20, 2021).

6. Forfeiture of Right to Counsel.

Defendant was entitled to a new trial because defendant was erroneously denied his fundamental constitutional right to counsel under U.S. Const. amend. VI, Tenn. Const. art. I, § 9, and Tenn. R. Crim. P. 44(a), While defendant's physical attack on his lawyer was serious misconduct, it did not rise to the level of extremely serious misconduct sufficient to warrant an immediate forfeiture. State v. Holmes, 302 S.W.3d 831, 2010 Tenn. LEXIS 3 (Tenn. Jan. 12, 2010).

Rule 45. Computing and Extending Time. —

(a) Computing Time. — The following rules apply in computing any period of time specified in these rules or in any court order:

(1) Day of Act or Event Excluded. — Exclude the day of the act or event from which the designated period of time begins to run.

(2) Last Day of Period Included. — Include the last day of the period unless it is:

(A) a Saturday, Sunday, or legal holiday; or

(B) when the act to be done is the filing of a paper in court, a day on which the office of the court clerk is closed or on which weather or other conditions have made the clerk's office inaccessible.

When the last day is so excluded, the period runs until the end of the next day that is not one of the aforementioned days.

(3) Exclusion from Periods of Less Than Seven Days. — Exclude intermediate Saturdays, Sundays, and legal holidays when the period of time is less than 7 days.

(4) Definition of Legal Holiday. — "Legal holiday" means any holiday listed in Tenn. Code Ann. § 15-1-101.

(b) Extending Time. — When an act shall or may be done at or within a specified time, the court for cause shown may at any time extend the period, as follows:

(1) Before End of Specified Time. — With or without motion or notice, the court may extend the period if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order; or

(2) After End of Specified Time. — On motion made after the expiration of the specified period, the court may extend the period if the failure to act was the result of excusable neglect;

(3) Exception. — The court may not extend the time for taking any action under Rules of Criminal Procedure 29, 33 and 34, except to the extent and under the conditions stated in those rules.

(c) Service of Motions and Affidavits. —

(1) Written Motions. — A written motion–other than one which may be heard "ex parte"– and notice of the hearing on the motion shall be served not later than 5 days before the time specified for the hearing, unless a different period is set by rule or court order. For cause shown, such an order may be made on "ex parte" application.

(2) Affidavits. — An affidavit supporting a motion shall be served with the motion. Opposing affidavits may be served not less than 1 day before the hearing unless the court permits them to be served at a later time.

(d) Additional Time After Service by Mail. — Whenever a party has the right to, or is required to, do an act within a prescribed period after the service of a notice or other paper, and the party is served by mail with the notice or other paper, the prescribed period is extended by 3 days. [As amended by order filed December 21, 2010, effective July 1, 2011.]

Advisory Commission Comments. If a clerk's office is closed all day on a date other than a Saturday, Sunday, or legal holiday, a lawyer would be unable to gain entrance to file a document on the "deadline." Consequently Rule 45(a)(2) extends the deadline to the next business day that the courthouse is open or accessible.

Advisory Commission Comments [2011]. Rule 45(a)(4) is amended to define "legal holiday" by reference to statute, Tenn. Code Ann. § 15-1-101. The status of a day as a legal holiday is statutory; thus, for the purpose of filing papers in court, it does not depend on whether the clerk's office is open for business. For example, state offices might be open on Columbus Day, pursuant to the governor's authority under Tenn. Code Ann. § 4-4-105(a)(3) to substitute the day after Thanksgiving for the Columbus Day holiday; in such circumstances, however, Columbus Day is still a "legal holiday" for purposes of computing time periods under the rule.

Rule 45(a)(2)(B) also is amended to add a reference to days on which the office of the court clerk is closed.

Compiler's Notes. This rule may supersede T.C.A. § 1-3-102 in part.

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated December 21, 2010, was ratified and approved by 2011 House Resolution 36 and Senate Resolution 14. The order promulgating the 2011 amendment of this rule provided that it take effect July 1, 2011.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), No. 3-45-1.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, § 87; 8 Tenn. Juris., Criminal Procedure, § 26; 11 Tenn. Juris., Evidence, § 80.

Law Reviews. The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure, VIII. Practice on Appeal (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 102.

NOTES TO DECISIONS

1. Motion for New Trial.

It is not sufficient that the defendant file some document within 30 days of the date of the sentence order but he must file a motion for a new trial containing specific grounds for relief. State v. Blunkall, 731 S.W.2d 72, 1987 Tenn. Crim. App. LEXIS 2103 (Tenn. Crim. App. 1987).

Defendant's good faith efforts within the 30-day period under Tenn. R. Crim. P. 33 cannot alter a mandatory rule of procedure, and the state cannot waive it. State v. Davis, 748

S.W.2d 206, 1987 Tenn. Crim. App. LEXIS 2427 (Tenn. Crim. App. 1987).

A trial judge does not have jurisdiction to hear and determine the merits of a motion for a new trial that has not been timely filed, and failure to file a timely motion not only results in defendant losing the right to a hearing on the motion, but also deprives defendant of the opportunity to argue on appeal any issues that were or should have been presented in the motion. State v. Martin, 940 S.W.2d 567, 1997 Tenn. LEXIS 131 (Tenn. 1997).

Although the provisions of Tenn. R. Crim. P. 45 are mandatory and may not be waived, the court may still exercise its discretion and take notice of an error which affects a substantial right of the defendant where it may be necessary to do substantial justice, notwithstanding the defendant's failure to file a timely motion for a new trial. State v. Patterson, 966 S.W.2d 435, 1997 Tenn. Crim. App. LEXIS 1347 (Tenn. Crim. App. 1997).

Where the 30-day period in which to file a motion for a new trial ended on a Sunday, the last day of the period would have been extended to Monday but, since Monday was a legal holiday, the last day was extended to Tuesday and a motion filed on that day was timely. State v. Cutshaw, 967 S.W.2d 332, 1997 Tenn. Crim. App. LEXIS 1237 (Tenn. Crim. App. 1997).

Rule 46. [Reserved.]

Rule 47. Motions. —

(a) In General. — A party applying to the court for an order shall do so by motion.

(b) Form of Motion. — A motion — except one made during a trial or hearing — shall be in writing unless the court permits it to be made orally.

(c) Content of Motion. — A motion shall state:

(1) with particularity the grounds on which it is made; and

(2) the relief or order sought.

(d) Affidavit. — A motion may be supported by affidavit.

Advisory Commission Comments. The lack of particularity in criminal motions, especially those filed pretrial, has been a source of complaint by appellate courts which have imposed a practical requirement of some specificity. *See State v. Davidson*, 606 S.W.2d 293 (Tenn. Crim. App. 1980). Rule 47(c)(1) therefore adds the word "particularity" to the required content of any motion. This is essentially the requirement of motions in civil practice. *See* Rule 7.02(1), Tenn. R. Civ. P.

Advisory Commission Comments [2012]. Effective July 1, 2012, the Supreme Court adopted Tenn. Sup. Ct. R. 10B, governing motions seeking disqualification or recusal of a judge. Section 1 of Rule 10B provides a procedural framework for determining when the judge of a court of record should not preside over the case. In summary, Section 1 provides for the filing of a motion for disqualification or recusal and also provides for the judge's prompt ruling on the motion. Section 2 of Rule 10B governs appeals from the denial of such motions, and it provides that such appeals may be effected either by filing an interlocutory appeal as of right authorized by the rule or by raising the disqualification or recusal issue in an appeal as of right at the conclusion of the case. Under Section 2.01, those two methods of appeal are "the *exclusive* methods for seeking appellate review of any issue concerning the trial court's ruling on a motion filed pursuant to this Rule." (Emphasis added.) As a result, "neither Tenn. R. App. P. 9 nor Tenn. R. App. P. 10 may be used to seek an interlocutory or extraordinary appeal by permission concerning the judge's ruling on such a motion." Tenn. Sup. Ct. R. 10B, Explanatory Comment to Section 2.

Attorneys or self-represented litigants should consult Tenn. Sup. Ct. R. 10B concerning the procedure for filing motions seeking the disqualification or recusal of a judge and for appealing from a denial of such a motion.

Compiler's Notes. The addition of the 2012 Advisory Commission Comments for this rule, as promulgated and adopted by the Supreme Court in its order dated January 13, 2012, was ratified and approved by 2012 House Resolution 192 and Senate Resolution 79. The order promulgating the 2012 amendment of this rule provided that it take effect July 1, 2012.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), No. 3-12-12.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, § 87; 8 Tenn. Juris., Criminal Procedure, § 25; 17 Tenn. Juris., Jury, § 20.

Law Reviews. The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure, VIII. Practice on Appeal (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 102.

NOTES TO DECISIONS

ANALYSIS

1. Notice.
2. Motion to Suppress.
3. Newly Discovered Evidence.
4. Motion to Correct Illegal Sentence.

1. Notice.

The opposing party is entitled to be informed as to the grounds of a motion before it is presented for determination to enable him to make appropriate preparation for response. State v. Briley, 619 S.W.2d 149, 1981 Tenn. Crim. App. LEXIS 356 (Tenn. Crim. App. 1981).

2. Motion to Suppress.

A motion to suppress, like any other motion, is required to state the grounds upon which it is predicated with particularity. State v. Burton, 751 S.W.2d 440, 1988 Tenn. Crim. App. LEXIS 124 (Tenn. Crim. App. 1988).

Defendant was not prejudiced by the trial court's failure to have a hearing on the motion to suppress evidence because the motion did not state which specific evidence other than "all," it did not indicate to which arrest the motion was referring, and the motion cited no legal authority. Because defendant did not satisfy the requirements of this rule, he could not show that he would have been entitled to a hearing and thus he could not show how he was harmed. State v. Winbush, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 198 (Tenn. Crim. App. Mar. 24, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 453 (Tenn. Aug. 6, 2020).

Motion to suppress evidence obtained from defendant's cell phone did not satisfy the requirements of this rule because by simply stating "his" phone in the motions, it was impossible to know to which phone defendant was referring. The record showed multiple phone numbers were used by defendant and during his first arrest, five phones were found in the vehicle with defendant. State v. Winbush, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 198 (Tenn. Crim. App. Mar. 24, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 453 (Tenn. Aug. 6, 2020).

3. Newly Discovered Evidence.

A petition for the writ of error coram nobis in a criminal case, which seeks relief on the ground of subsequently or newly discovered evidence, should recite: (a) The grounds and the nature of the newly discovered evidence; (b) Why the admissibility of the newly discovered evidence may have resulted in a different judgment if the evidence had been admitted at the previous trial; (c) The petitioner "was without fault in failing to present" the newly discovered evidence at the appropriate time; and (d) The relief sought by the petitioner. Affidavits should be filed in support of the petition either as exhibits or attachments to the petition or at some point in time prior to the hearing. Teague v. State, 772 S.W.2d 915, 1988 Tenn. Crim. App. LEXIS 765 (Tenn. Crim. App. 1988), rehearing denied, — S.W.2d —, 1989 Tenn. Crim. App. LEXIS 45 (1989), appeal denied, — S.W.2d —, 1989 Tenn. LEXIS 292 (Tenn. June 5, 1989), overruled, Owens v. State, 908 S.W.2d 923, 1995 Tenn. LEXIS 614 (Tenn. 1995), overruled, State v. Mixon, 983 S.W.2d 661, 1999 Tenn. LEXIS 33 (Tenn. 1999).

4. Motion to Correct Illegal Sentence.

At a minimum, any motion to correct an illegal sentence must state with particularity the factual allegations on which the claim for relief from an illegal sentence is based, and the moving party may support the motion with affidavits; when determining whether a motion to correct an illegal sentence sufficiently states a colorable claim, a trial court may consult the record of the proceeding from which the allegedly illegal sentence emanated. State v. Wooden, 478 S.W.3d 585, 2015 Tenn. LEXIS 932 (Tenn. Dec. 2, 2015).

Rule 48. Dismissal. —

(a) BY THE STATE. — With the court's permission, the state may terminate a prosecution by filing a dismissal of an indictment, presentment, information, or complaint. A dismissal may not be filed during the trial without the defendant's consent.

(b) BY THE COURT FOR UNNECESSARY DELAY. — The court may dismiss an indictment, presentment, information, or complaint if unnecessary delay occurs in:

(1) presenting to a grand jury a charge against a defendant who has been held to answer to the trial court; or

(2) bringing a defendant to trial.

Cross-References. Affidavit of complaint, Tenn. R. Crim. P. 3.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), No. 3-48-1.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, § 233; 3 Tenn. Juris., Attorney General, § 5; 9 Tenn. Juris., Dismissal, Discontinuance and Nonsuit, § 24.

Attorney General Opinions. General sessions judge's legal authority, OAG 00-001 (1/4/00).

NOTES TO DECISIONS

Analysis

1. Pretrial Diversion.
2. Discretion of Court.
3. Speedy Trial.

1. Pretrial Diversion.

Pretrial diversion is not permitted for offenses carrying a potential of more than ten years in prison; for a trial court to allow a district attorney to do indirectly (dismiss or retire a charge which has the potential of carrying more than ten years' imprisonment so as to allow diversion on a second charge) what the statute will not allow him to do directly, would be erroneous. State v. Landers, 723 S.W.2d 950, 1987 Tenn. LEXIS 819 (Tenn. 1987), superseded by statute as stated in, State v. Layman, 214 S.W.3d 442, 2007 Tenn. LEXIS 35 (Tenn. 2007), overruled in part, State v. Layman, 214 S.W.3d 442, 2007 Tenn. LEXIS 35 (Tenn. 2007).

2. Discretion of Court.

The decision whether to dismiss an indictment lies within the discretion of the trial court; appellate courts may not interfere with a ruling made within the discretionary powers of the trial court absent clear abuse. State v. Harris, 33 S.W.3d 767, 2000 Tenn. LEXIS 690 (Tenn. 2000).

Absent some indication of unnecessary delay, a defect in the indictment or some articulable reason for dismissal, a sua sponte decision to dismiss the indictment clearly was beyond the authority of the trial court and constituted an abuse of discretion. State v. Harris, 33 S.W.3d 767, 2000 Tenn. LEXIS 690 (Tenn. 2000).

T.C.A. § 40-15-105(a) focuses not upon the charges set forth in the indictment, but upon the offense for which pretrial diversion is sought, and a defendant's eligibility for pretrial diversion is determined not by the indictment, but rather by the charges existing against the defendant at the time the court rules on the memorandum of understanding seeking pretrial diversion. State v. Layman, 214 S.W.3d 442, 2007 Tenn. LEXIS 35 (Tenn. 2007).

Trial court erred in dismissing with prejudice a two-count indictment against defendants because, while dismissal of the indictment was within the discretion of the trial court, dismissal with prejudice was not justified where the trial court failed to make express findings of fact on each of the relevant factors. State v. Ferguson, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 606 (Tenn. Crim. App. Sept. 26, 2019).

3. Speedy Trial.

Trial court did not abuse its discretion by finding that the state's delayed prosecution of defendant violated his right to a speedy trial on the DUI charge where defendant's testimony regarding his memory of the incident weighed heavily in support of finding that he was prejudiced by the delay; the delay that could be tolerated for an ordinary street crime was considerably less than for a serious, complex charge, and the factors relevant to a speedy trial inquiry were interrelated and depended upon the particular circumstances of each case. State v. Hudgins, 188 S.W.3d 663, 2005 Tenn. Crim. App. LEXIS 959 (Tenn. Crim. App. 2005).

In a case where defendant was charged with aggravated vehicular homicide and vehicular homicide arising from an accident that occurred on October 16, 2004, and defendant was arrested three days later and was indicted on December 7, 2004, trial was originally set to begin on April 18, 2005, but the court granted the state a continuance until August 11, 2005 with the hopes of identifying a potential witness; in this case, defendant was not prejudiced by the delay and therefore his right to a speedy trial was not violated under Tenn. R. Crim. P. 48(b). State v. Bowman, 327 S.W.3d 69, 2009 Tenn. Crim. App. LEXIS 35 (Tenn. Crim. App. Jan. 14, 2009), appeal denied, — S.W.3d —, 2009 Tenn. LEXIS 395 (Tenn. June 15, 2009), cert. denied, Bowman v. Tennessee, 175 L. Ed. 2d 388, 130 S. Ct. 559, 2009 U.S. LEXIS 8080 (U.S. 2009).

Although the delay of over two years between defendant's initial indictment and his trial was enough to require inquiry into all of the speedy trial factors, defendant's motion to dismiss for lack of a speedy trial was properly denied because the length of the delay was not egregious, given the fact that defendant was charged with three felonies ranging from Class C to Class A; the delays were caused or acquiesced to by defendant; he waited until almost two years had elapsed before he asserted his right to a speedy trial; and he failed to establish that he was prejudiced by the delay as no evidence was presented regarding when his mother had died or that her testimony that the jewelry belonged to her was unable to preserved. State v. Morris, 469 S.W.3d 577, 2014 Tenn. Crim. App. LEXIS 425 (Tenn. Crim. App.

May 6, 2014), appeal denied, — S.W.3d —, 2014 Tenn. LEXIS 838 (Tenn. Oct. 15, 2014).

Rule 49. Serving and Filing Papers. —

(a) When Required. — A party shall serve on every other party:

(1) written motions, other than those heard ex parte;

(2) written notices;

(3) each order required to be served by the terms of the order;

(4) designations of record on appeal; and

(5) similar papers.

(b) Service; How Made. —

(1) Upon Attorney. — When the law, these rules, or a court order requires or permits service to be made on a party represented by an attorney, the service shall be made on the attorney unless service on the party in person is required by law or is ordered by the court.

(2) Method of Service. — Service of a copy of a document on an attorney or party shall be made by one of the following methods:

(A) Delivery in Person. — Delivery in Person.

(B) Mail to Last Known Address. — Mail to the recipient's last known address. Service by mail is complete upon mailing.

(C) Leaving Copy with Court Clerk. — If no address is known, service is accomplished by leaving the copy with the clerk of the court.

(3) Definition of Delivery. — Delivery of a copy within this rule means:

(A) placing it in the hands of the attorney or the party;

(B) leaving it at that person's office with a clerk or other person in charge thereof or, if there is no one in charge, leaving it in a conspicuous place therein; or

(C) if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion residing there.

(c) Filing Served Papers with Court. — Papers required to be served shall be filed with the court as follows:

(1) With Court Clerk. — The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge. When papers are filed with the judge, he or she shall note on the papers the filing date and promptly transmit them to the clerk's office.

(2) Duties of Clerk. — The clerk shall endorse on every pleading and on all other papers filed with the clerk in a proceeding the date and hour of the filing.

(3) Recycled Paper. — The use of recycled paper with the highest feasible percentage of postconsumer waste content is recommended for all papers filed with the court.

(d) Service by Pro Se Inmate. —

(1) When Deemed Filed. — If a paper required or permitted to be filed pursuant to the rules of criminal procedure is prepared by or on behalf of a pro se litigant incarcerated in a correctional facility and is not received by the court clerk until after the deadline for filing, the filing is timely if the paper was delivered to the appropriate individual at the correctional facility

within the time set for filing. This provision also applies to service of papers by such litigants pursuant to the rules of criminal procedure.

(2) Definition of Correctional Facility. — "Correctional facility" includes a prison, jail, county workhouse, or similar institution in which a pro se litigant is incarcerated.

(3) Burden of Proving Timely Filing. — When timeliness of filing or service is an issue, the burden is on the pro se litigant to establish compliance with this provision.

Advisory Commission Comments. This rule represents the commission's judgment on how best to accomplish service and filing, given the practicalities of practice and the necessity for meaningful compliance.

It is the public policy of the State of Tennessee to encourage recycling and the use of recycled products and materials. This policy is reflected in the Tennessee Solid Waste Planning and Recovery Act ((title 68, ch. 211, part 6) et seq.) and in the Solid Waste Management Act of 1991 ((title 68, ch. 211, part 8) et seq.). Rule 49(c)(3) supports the Court's policy of recommending and encouraging that all papers filed in the Tennessee courts be submitted on recycled paper.

Pro se litigants who are incarcerated in correctional facilities cannot ensure the timely mailing of their mail and, as a consequence, cannot control the timely filing of their legal papers. The pro se prisoner-filing provision in Rule 49(d) covers all papers required or permitted to be filed pursuant to the rules of criminal procedure. Should timeliness of filing become an issue, Rule 49(d)(3) places the burden on the incarcerated person to establish compliance with the deadline. The provision relative to filing with the appropriate correctional personnel is consistent with the United States Supreme Court's ruling in *Houston v. Lack*, 487 U.S. 266 (1988).

Textbooks. Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, § 87.

NOTES TO DECISIONS

Analysis

1. Insufficient Service.
2. Time-Barred Claims.
3. Appropriate Individual.

1. Insufficient Service.

Where defense counsel of record did not receive notice of scheduled status hearing, the order dismissing the defendant's appeal was set aside and the cause remanded. State v. Williams, 24 S.W.3d 821, 2000 Tenn. Crim. App. LEXIS 362 (Tenn. Crim. App. 2000).

2. Time-Barred Claims.

Trial court did not err in dismissing petition for post-conviction relief as time barred where the petition was not filed with the clerk's office until well outside the limitations period; despite petitioner's unsupported assertions, there was no evidence that the petitioner timely delivered the petition to the appropriate prison authorities for mailing within the applicable time for filing and there was no certificate of service produced at the hearing or on appeal. Neely v. State, 34 S.W.3d 879, 2000 Tenn. Crim. App. LEXIS 439 (Tenn. Crim. App. 2000).

Lower court did not err by dismissing a petition for postconviction relief filed by petitioner because it was not timely filed, as it was filed nearly three months after the statute of limitation had expired and petitioner failed to show that the mailbox rule applied. Petitioner had not provided any proof other than his own testimony that the prison was on lockdown when he delivered the petition to the officer, and he was ambivalent about when he actually signed the petition and was unable to explain why it was not filed with the clerk's office until more than two months after he claimed he put it in the mail. Godspower v. State, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 775 (Tenn. Crim. App. Oct. 17, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 141 (Tenn. Feb. 21, 2019).

Postconviction petition was not timely filed under T.C.A. § 40-30-102(a) because he had until January 17, 2018 to file the petition, the petition was not delivered to the prison authorities until January 18, 2018, and petitioner provided no proof that he complied with this rule, other than an assertion that he was on lockdown and unable to access the mail or notary within the jail until January 18, 2018. Jones v. State, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 723 (Tenn. Crim. App. Nov. 8, 2019).

3. Appropriate Individual.

Determining who was an "appropriate individual" for purposes of filing post-conviction petitions under Tenn. Sup. Ct. R. 28, § 2(G) or Tenn. R. Crim. P. 49(c) was a question of fact best resolved by the various trial courts of the

state of Tennessee, and the Tennessee supreme court declined to adopt a bright-line rule. Butler v. State, 92 S.W.3d 387, 2002 Tenn. LEXIS 704 (Tenn. 2002).

Habeas corpus court properly summarily denied defendant's pro se petition because he did not establish delivery to the appropriate individual at the correctional facility within the time set for filing, he did not provide a reason for filing his habeas corpus petition in the convicting court rather than the court closest in point of distance, and the interests of justice did not require a waiver of the untimely filing of the notice of appeal. McClenton v. Perry, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 118 (Tenn. Crim. App. Mar. 29, 2021).

Rule 49.1. Facsimile Filing of Papers. —

(a) Definitions. —

(1) Facsimile filing. — "Facsimile filing" means the facsimile transmission of an original document which is received in the original document's entirety by the trial court clerk and filed by the clerk.

(2) Facsimile machine. — "Facsimile machine" means a device capable of sending a facsimile transmission using the international standard for scanning, coding, and transmission established for Group 3 machines by the Consultative Committee of International Telegraphy and Telephone of the International Telecommunications Union in regular resolution. Any facsimile machine used to send documents to a court must send at an initial transmission speed of no less than 4800 baud and be able to generate a transmission record.

(3) Facsimile transmission. — "Facsimile transmission" is the transmission of a document by a system that encodes a document into electrical signals, transmits these electrical signals over a telephone line, and reconstructs the signals to print a duplicate of the original document at the receiving end.

(4) Sender. — "Sender" is the person or entity sending the facsimile transmission to the court.

(5) Transmission record. — "Transmission record" means the document printed by the sending facsimile machine stating the telephone number of the receiving machine, the number of pages sent, the transmission time and date, and an indication of any errors in transmission.

(b) Facsimile Filing; Exceptions. —

(1) Facsimile Filing Permitted. — The trial court clerk shall accept papers for filing by facsimile transmission as provided in this rule. The trial court clerk shall maintain a dedicated telephone line for the clerk's facsimile machine.

(2) Exception: Facsimile Filing Not Permitted. — The following documents shall not be filed in the trial court by facsimile transmission:

(A) An appeal from a lower court to a circuit/criminal court;

(B) A notice of appeal to an appellate court;

(C) The affidavit of complaint for an arrest warrant or summons (see Tenn. R. Crim. Proc. 4);

(D) [Reserved];

(E) A confidential document that the court previously has ordered to be filed under seal; and

(F) Indictments, presentments, and informations.

(c) Requirements for Facsimile Filed Document. —

(1) Cover Sheet. — Any document filed by facsimile transmission shall be accompanied by: the uniform cover sheet set forth in the comment to this rule stating:

(A) the caption of the case;

(B) the trial court docket number;

(C) the title of the transmitted document;

(D) the number of pages of the facsimile transmission (including the cover sheet);

(E) the sender's name, address, voice telephone number, and facsimile telephone number;

(F) the date of the facsimile transmission; and

(G) clear and concise instructions as to the filing of the transmitted document.

(2) Size of Originals. — The original document sent by facsimile transmission shall be on letter-sized paper (8 1/2 by 11 inches). Originals on larger-sized paper may be reduced prior to facsimile transmission if the reduction to 8 1/2 by 11 inch paper renders a legible and complete copy of the original.

(3) Length. — No facsimile filing shall exceed fifty (50) pages in length, including the cover sheet, unless authorized by the court; absent such authorization, a facsimile transmission exceeding fifty (50) pages, including the cover sheet, shall not be filed by the clerk. A facsimile filing may not be split into multiple facsimile transmissions to avoid this page limitation.

(4) Compliance With Other Rules. — All documents filed by facsimile transmission shall comply with all applicable rules of court, including, without limitation, rules governing the content and form of pleadings and other papers; the signing of pleadings, motions and other papers; and the service of all papers.

(d) Clerk's Duties Upon Receipt of Facsimile. —

(1) Notification of Receipt of Facsimile Not Required. — The clerk is not required to notify the sender by return facsimile transmission or voice telephone call that the facsimile document has been received by the clerk or that the facsimile document has not been received in its entirety. This provision shall not relieve the clerk of any notice requirements imposed by law or by the court.

(2) Placing Date on Received Facsimile Documents. — Upon receiving a facsimile transmission in its entirety, the clerk shall note the filing date on the facsimile filing in the same manner as with original pleadings or other documents filed by mail or in person. For purposes of this provision, the clerk receives the facsimile transmission when indicated by the date and time printed on the facsimile transmission by the clerk's facsimile machine.

(e) Effect of Facsimile Filing. —

(1) When Deemed Filed. — A facsimile transmission received by the clerk after 4:30 p.m. but before midnight, clerk's local time, on a day the clerk's office is open for filing shall be deemed filed as of that business day. A facsimile transmission received after midnight but before 8:00 a.m., clerk's local time, on a business day, or a facsimile transmission received by the clerk on a Saturday, Sunday, legal holiday, or other day on which the clerk's office for filing is closed, shall be deemed filed on the preceding business day.

(2) Facsimile Signature. — A signature reproduced by facsimile transmission shall be treated as an original signature.

(3) Risk on Sender. —

(A) Sender Bears Risk of Faulty Transmission. — The sender bears the risk of using facsimile transmission to convey a document to a court for filing, including, without limitation, malfunction of facsimile equipment, whether the sender's or the clerk's equipment; electrical power outages; incorrectly dialed telephone numbers; or receipt of a busy signal from the clerk's facsimile telephone number. In the event that a facsimile transmission to the clerk is unsuccessful, the sender may file the document by mail or in person; in such cases, the filing date shall be determined as provided in Rules 45 and 49, Tenn. R. Crim. Proc.

(B) Nunc Pro Tunc Remedy. — If a facsimile transmission is not received in its entirety by the clerk because of a transmission error, the sender may move acceptance nunc pro tunc by filing a written motion with the court. The motion shall be accompanied by the sender's transmission record, the original document that was the subject of the attempted transmission, and an affidavit of the sender detailing the facts concerning the attempted transmission. The court, in its discretion, may order filing of the original document nunc pro tunc.

(f) Original Document. — The filing of the original document shall not be required after facsimile filing. The sender shall retain the original document in the sender's possession or control during the pendency of the action and shall produce such document upon request by the court or any party to the action. Upon failure to produce such document, the court may strike the document filed by facsimile transmission.

(g) Facsimile Service Charge. — The sender of the facsimile transmission shall pay to the trial court clerk a service charge for each facsimile filing in the amount of five dollars ($5.00) plus one dollar ($1.00) per page of the facsimile filing (including the cover sheet). Payment of the service charge, accompanied by a copy of the facsimile filing cover sheet, shall be received by the trial court clerk not later than ten (10) calendar days after the facsimile filing. The facsimile service charge shall be paid by the sender as provided in this rule and shall not be taxed as court costs, subject to the following exception. If the sender is either a party who has been allowed to proceed on a pauper's oath or an attorney for such a party, timely payment of the facsimile service charge under this rule is suspended, and the charges shall be taxed as court costs. [As amended by order filed January 2, 2015, effective July 1, 2015; and by order filed December 21, 2016, effective July 1, 2017.]

Advisory Commission Comments. Rule 49.1 provides for the filing of papers in the trial court by facsimile transmission. The rule lists certain documents which cannot be filed by this method. Moreover, the rule covers only filing, not service, of papers. Service is governed by Rule 49.

Advisory Commission Comments [2015]. The 2015 amendment deleted the text of subdivision (b)(2)(D), which listed "Search warrants, affidavits, returns, and inventories (see Tenn. R. Crim. P. 41)" among the documents that could not be filed by facsimile transmission. The deletion of "Search warrants, affidavits, returns, and inventories" from Tenn. R. Crim. P. 49. 1(b)(2) does not mean that those documents may now be filed by fax under Tenn. R. Crim. P. 49.1. Rather, the Commission concluded for several reasons that Tenn. R. Crim. P. 49.1 did not actually apply to the search-warrant process. The most important of those reasons is that the procedures for obtaining a search warrant are governed by Tenn. R. Crim. P. 41, and that rule was simultaneously amended to authorize the use of electronic means (including facsimile transmission) in the search-warrant process. The Commission therefore concluded that deleting the text of

subdivision (b)(2)(D) (and replacing it with "[Reserved]") would avoid any inconsistency between the two rules. The Commission further concluded that Tenn. R. Crim. P. 41 properly governs the search-warrant process and that, as amended, Tenn. R. Crim. P. 49.1 no longer applies to that process, one way or the other.

Advisory Commission Comments [2017]. Rule 49.1(c)(3) is amended to increase the page limit for facsimile filings from ten (10) to fifty (50).

Compiler's Notes. The amendment of rule 49.5, which amended subdivision (b)(2)(D) and added the 2015 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated January 2, 2015, was ratified and approved by 2015 House Resolution 4 and Senate Resolution 12. The order promulgating the amendment of this rule provided that it take effect on July 1, 2015.

The amendment of Rule 49.1, which amended subdivision (c)(3) and added the [2017] Advisory Comments, as promulgated and adopted by the Supreme Court in its order dated December 21, 2016, was ratified and approved by 2017 House Resolution 17 and Senate Resolution 17. The order promulgating the amendment of the second sentence of the rule and the addition of the [2017] Advisory Comments, provided that it take effect July 1, 2017.

TENNESSEE COURTS
UNIFORM FACSIMILE FILING COVER SHEET

TO (COURT CLERK): _____

WITH (COURT): _____

CLERK'S FAX NUMBER: _____

CASE NAME: _____

DOCKET NUMBER: _____

TITLE OF DOCUMENT: _____

FROM (SENDER): _____

SENDER'S ADDRESS: _____

_____

SENDER'S VOICE TELEPHONE NUMBER: _____

SENDER'S FAX TELEPHONE NUMBER: _____

DATE: _____ TOTAL PAGES, INCLUDING COVER PAGE: _____

FILING INSTRUCTIONS/COMMENTS (attach additional sheet if necessary):

Unless authorized by the Court, a facsimile transmission exceeding ~~ten (10)~~fifty (50) pages, including the cover page, shall not be filed by the clerk.

Rule 49.2. Electronic filing, signing, or verification. —

Any court governed by these rules may, by local rule, allow papers to be filed, signed, or verified by electronic means compliant with technological standards promulgated by the Supreme Court. Pleadings and other papers filed electronically under such local rules shall be considered the same as written papers. [Adopted by order filed January 8, 2018, effective July 1, 2018.]

Advisory Commission Comments [2018]. Courts in certain counties have expressed a desire to implement an electronic filing system. This rule permits trial courts, by local rule, to adopt such systems. This rule provides the same authority for trial courts exercising criminal jurisdiction as currently exists under Rule 5B, Tennessee Rules of Civil Procedure, and Rule 106(h), Tennessee Rules of Juvenile Procedure.

Electronic filing systems have also been implemented in all of the federal district courts (with the sole exception of the United States District Court for the Northern Mariana Islands) and in a number of states. Electronic filing offers numerous advantages over traditional "paper filing," including vastly increased public access to court documents and reduction of the time and expense incurred by litigants and court personnel in filing, storing, and retrieving documents.

The Commission envisions that, in the not too distant future, all of Tennessee's courts will adopt electronic case filing systems. In order to achieve statewide uniformity, the systems utilized throughout the state must comply with technological standards promulgated by the Supreme Court. Without such uniformity, the desired ease of access to data and cost efficiencies could not be achieved.

Compiler's Notes. In its order filed January 8, 2018, the Supreme Court adopted this rule, effective July 1, 2018, subject to approval by resolution of the General Assembly.

The addition of Rule 49.2, which added the rule and the [2018] Advisory Comments, as promulgated and adopted by the Supreme Court in its order dated January 8, 2018, was ratified and approved by 2018 House Resolution 207 and Senate Resolution 166. The order promulgating this rule and the addition of the [2018] Advisory Comments, provided that it take effect July 1, 2018.

Rule 50. Scheduling Cases. —

(a) Trial Schedule. — Trial courts shall provide by rule for the scheduling of trials.

(b) Preferences. —

(1) Criminal Cases. — Those courts that try both civil and criminal cases shall give preference to criminal proceedings as far as practicable.

(2) Defendants in Custody or Posing Risk. — Courts shall give preference over other criminal cases to the trial of defendants in custody and defendants whose pretrial liberty is reasonably believed to present unusual risks.

Advisory Commission Comments. Uniformity in the setting of cases in the trial courts of this state is impossible to accomplish by rule because of the diversity of factors involved. The commission leaves rule-making on setting of dockets to the trial judges, given the priority guidelines that have historically been advanced in this state.

Textbooks. Tennessee Jurisprudence. 24 Tenn. Juris., Verdict, § 24.

Rule 51. Formal Exceptions Unnecessary. —

(a) Exceptions Unnecessary. — Exceptions to rulings or orders of the court are unnecessary.

(b) Preserving Error for Appeal. — For all purposes for which an exception has heretofore been necessary, it is sufficient that a party–at the time the ruling or order of the court is made or sought–informs the court of:

(1) the action that the party desires the court to take; or

(2) the party's objection to the action of the court and the grounds for the objection. If a party has no opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party.

Advisory Commission Comments. This rule is based on the similar federal rule.

Textbooks. Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 117, 169; 17 Tenn. Juris., Jury, § 32.

Rule 52–54. [Reserved.]

Advisory Commission Comments [2009]. The text of Rule 52 ("Harmless Error and Plain Error") is deleted because harmless error and plain error are covered in amended Tennessee Rule of Appellate Procedure 36(b).

Rule 55. Records in Criminal Proceedings. —

The clerks of general sessions courts and criminal courts of Tennessee shall keep such records in criminal proceedings as the law and these rules provide.

Rule 56–58. [Reserved.]

Advisory Commission Comments [2006]. The text of Rule 57 was deleted because it was rendered obsolete by the adoption of Tenn. Sup. Ct. R. 18, which now governs the local rules of practice for Tennessee trial courts.

Rule 59. Effective Date. —

These rules take effect ninety (90) days subsequent to their approval by the General Assembly and the Governor. They govern all criminal proceedings thereafter commenced, and so far as just and practicable, all proceedings then pending.

Advisory Commission Comments. On April 14, 1978, the Governor approved the joint resolution adopting these rules. They therefore became effective on July 13, 1978.

Rule 60. Title. —

These rules shall be known as the Tennessee Rules of Criminal Procedure and cited as Tenn. R. Crim. P.

Rules of Criminal Procedure

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A

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TENNESSEE RULES OF APPELLATE PROCEDURE

[EFFECTIVE JULY 1, 1979]

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42. Issuance, Stay, and Recall of Mandates From the Appellate Court.
43. Filing of Mandate in the Trial Court and Proceedings Thereafter.
44. Process in the Appellate Court.

J. RULES BY THE INTERMEDIATE APPELLATE COURTS

Rule.
45. Rules by the Court of Appeals and Court of Criminal Appeals.
46. [Reserved.]

K. TITLE; FORMS; EFFECTIVE DATE

Rule.
47. Title.
48. Forms.
49. Effective Date.

APPENDIX A: FORMS

A. APPLICABILITY OF RULES

Rule 1. Scope and Construction of Rules. — These rules shall govern procedure in proceedings before the Supreme Court, Court of Appeals, and Court of Criminal Appeals. These rules shall be construed to secure the just, speedy, and inexpensive determination of every proceeding on its merits.

Advisory Commission Comments. These rules are drawn under the authority of Tenn. Code Ann. §§ 16-3-402 – 16-3-407, and 16-3-601. Those provisions of the Tennessee Code empower the Supreme Court to make rules of practice and procedure in all courts of this state and in all civil and criminal suits, actions and proceedings. Accordingly, these rules govern procedure before all the appellate courts in Tennessee and in all proceedings, whether denominated as appeals or otherwise, in both civil and criminal cases. By the terms of the statute, after the rules have taken effect, all laws in conflict therewith are of no further force and effect.

A principal purpose of these rules is to bring together in one place a simplified, coherent, and modern body of law. Under Rule 45 of these rules and Tenn. Code Ann. § 16-3-407, the intermediate appellate courts are expressly authorized to make and amend rules governing their practice not inconsistent with these rules.

These rules are not identical to the Federal Rules of Appellate Procedure either in their substance or organization. Instead, they reflect a study of existing Tennessee law as well as the rules and statutes of virtually every other state.

As is the case with the Tennessee Rules of Civil Procedure, it is the policy of these rules to disregard technicality in form in order that a just, speedy, and inexpensive determination of every appellate proceeding on its merits may be obtained.

Unlike the rules of many other jurisdictions, these rules do not contain a provision specifying that they shall not be construed to extend or limit the jurisdiction of the appellate courts. Nothing in these rules is intended to affect substantive rights, and all the rules must be construed consistently with the constitutions of the United States and the state of Tennessee.

Textbooks. Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 4, 20, 22-31, 53, 63, 86; 22 Tenn. Juris., Rules of Court, § 2.

Law Reviews. Failure to Timely File Notice of Appeal for First Tier Appellate Review: A Client's Rights, 14 Mem. St. U.L. Rev. 483 (1984).

How are Tennessee Trial Courts Apportioning Liability Under the Comparative Fault System? An Unresolved and Expensive Concern, 27 U. Mem. L. Rev. 113 (1996).

The Tennessee Court of Appeals: How Often It Corrects the Trial Courts — and Why, 68 Tenn. L. Rev. 557 (2001).

NOTES TO DECISIONS

Analysis

1. In General.
2. Law of State.
3. Conflicting Statutes Invalid.
4. General Sessions Courts.
5. Circuit and Chancery Courts.

1. In General.

Once a timely notice of appeal is filed, the rules should not erect unjustified technical barriers which prevent consideration of the merits of the appeal. Johnson v. Hardin, 926 S.W.2d 236, 1996 Tenn. LEXIS 466 (Tenn. 1996).

This rule and T.R.A.P. 36(a) contemplate that allegations of error should be evaluated in light of the entire record. State v. Henning, 975 S.W.2d 290, 1998 Tenn. LEXIS 370 (Tenn. 1998).

2. Law of State.

Rules of Civil Procedure along with the Rules of Criminal Procedure and the Rules of Appellate Procedure, are "law" of this state, in full force and effect, until such time as they are superseded by legislative enactment or inconsistent rules promulgated by this court and adopted by the General Assembly. Tennessee Dep't of Human Services v. Vaughn, 595 S.W.2d 62, 1980 Tenn. LEXIS 417 (Tenn. 1980).

3. Conflicting Statutes Invalid.

These rules govern procedure before all appellate courts, and statutes in conflict with the rules have no force and effect. Bush v. Bradshaw, 615 S.W.2d 157, 1981 Tenn. LEXIS 431 (Tenn. 1981).

4. General Sessions Courts.

Proceedings of general sessions courts are not governed by the Rules of Appellate Procedure. State v. Osborne, 712 S.W.2d 488, 1986 Tenn. Crim. App. LEXIS 2604 (Tenn. Crim. App. 1986).

5. Circuit and Chancery Courts.

The Rules of Appellate Procedure, not the Rules of Civil Procedure, are applicable to cir-

cuit and chancery courts in reviewing beer board cases. Cooper v. Alcohol Com. of Memphis, 745 S.W.2d 278, 1988 Tenn. LEXIS 7 (Tenn. 1988).

Rule 2. Suspension of Rules. — For good cause, including the interest of expediting decision upon any matter, the Supreme Court, Court of Appeals, or Court of Criminal Appeals may suspend the requirements or provisions of any of these rules in a particular case on motion of a party or on its motion and may order proceedings in accordance with its discretion, except that this rule shall not permit the extension of time for filing a notice of appeal prescribed in Rule 4, an application for permission to appeal to the Supreme Court from the denial of an application for interlocutory appeal by an intermediate appellate court prescribed in Rule 9(c), an application for permission to appeal to the Supreme Court from an intermediate appellate court's denial of an extraordinary appeal prescribed in Rule 10(b), an application for permission to appeal prescribed in Rule 11, or a petition for review prescribed in Rule 12. [As amended by order filed January 31, 2003, and effective July 1, 2003.]

Advisory Commission Comments. The primary purpose of this rule is to make clear the power of the appellate courts to suspend the requirements or provisions of any of these rules in a particular case. The courts are thus empowered to relieve litigants of the consequences of noncompliance with the rules in those circumstances in which it is appropriate to do so. The need for this power is the result of two principal considerations. These rules, as do most rules of law, necessarily speak in somewhat general terms. Otherwise, the rules would be overburdened with qualifications, exceptions, specifications, and provisos. In addition, no person or group of persons can possibly foresee all the situations life may churn up. This rule, therefore, permits the necessary individualization of the law in particular cases, and provides the source of authority for the courts to formulate law in situations not currently foreseeable.

The exceptions to this rule prohibit the appellate courts from extending the time for taking an appeal as of right, applying for permission to appeal from an intermediate appellate court to the supreme court, and for petitioning for review in those rare cases in which the Court of Appeals directly reviews orders of an administrative agency. Those times are specified in Rules 4, 11, and 12. Since filing a notice of appeal is an essential step necessary to a valid appeal of right, this step should not generally be waivable inasmuch as the rights of parties remain uncertain during the time available for filing a notice of appeal. Similar considerations prompted the other two exceptions. *But see* Advisory Commission Comment [2014] to this rule, discussing limited waiver provisions set out in Rules 4(a) and 11(b).

The rule envisions that the appellate court may act on its own motion or on motion of a party. A motion by a party should be made in the manner provided in Rule 22. If the appellate court does suspend the requirements or provisions of these rules, proceedings thereafter will be had in accordance with the discretion and direction of the court.

The final clause prohibiting extensions in no way affects computation of time under T.R.A.P. 21. For example, if the thirtieth day to file a notice of appeal falls on a holiday, the notice could be filed on the next business day.

Advisory Commission Comments [2003]. The rule was amended to clarify that the filing deadlines to the Supreme Court under T.R.A.P. 9(c) and 10 are jurisdictional, like those in T.R.A.P. 4, 11 and 12.

Advisory Commission Comments [2014]. Rule 2 bars an appellate court from extending the time for filing a notice of appeal pursuant to Rule 4(a) and from extending the time for filing one of the listed applications for permission to appeal. Rules 4(a) and 11(b), however, grant the Court of Criminal Appeals and the Supreme Court, respectively, the discretionary authority to waive the pertinent time period if a notice of appeal or an application for permission to appeal pursuant to Tenn. R. App. P. 11 is not timely filed in a criminal case. (See Rule 11(b) for two types of criminal appeals in which the waiver provision in that rule does not apply.) The distinction between a prohibited extension under Rule 2 and a permissible waiver under Rules 4(a) and 11(b) is that an extension is prospective (i.e., granting a motion for an extension of time to file), while a waiver is retrospective (i.e., waiving an untimely filing in a criminal appeal, in the court's discretion and "in the interest of justice," depending on the reason(s) for the untimely filing).

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 31, 2003, was ratified and approved by 2003 House

Resolution 19 and Senate Resolution 9. The order promulgating the 2003 amendment of this rule provided that it take effect on July 1, 2003.

T.R.A.P. 2 may supersede Tenn. Code Ann. § 27-6-107.

The amendment of Rule 2, which amended the second paragraph of the original Advisory Commission Comments and added the 2014 Advisory Commission Comments as promulgated and adopted by the Supreme Court in its order dated December 16, 2013, as amended, March 14, 2014, was ratified and approved by 2014 House Resolution 156 and Senate Resolution 75. The order promulgating the 2014 amendment of the original Advisory Commission Comments and addition of the 2014 Advisory Commission Comments provided that it take effect on July 1, 2014.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), No. 2-2-1.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 27, 33, 53, 63, 67, 75, 78, 114, 137, 217; 5 Tenn. Juris., Certiorari, § 2; 9 Tenn. Juris., Dismissal, Discontinuance and Nonsuit, § 15; 20 Tenn. Juris., Pleading, § 10.

Law Reviews. Seeking Justice on Appeal, 27 No. 4, Tenn. B.J. 28 (1991).

The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 1.

The Theoretical Foundations of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 45 Tenn. L. Rev. 161.

NOTES TO DECISIONS

Analysis

1. Supremacy over Rule 3.
2. Brief Not Timely Filed.
3. Extension of Time for Appeal.
4. Final Judgment.
5. Motion Not Timely Filed.
6. Appellate Jurisdiction.
7. Good Cause.
8. Discretion Exercised to Consider Issue Insufficiently Explained.

1. Supremacy over Rule 3.

The express language of this rule granting the appellate courts authority to suspend the rules and at the same time prohibiting waiver of the rules in three instances, must prevail over the conflicting language of T.R.A.P. 3(e). G. F. Plunk Constr. Co. v. Barrett Properties, Inc., 640 S.W.2d 215, 1982 Tenn. LEXIS 435 (Tenn. 1982).

2. Brief Not Timely Filed.

Court declined to dismiss defendant's appeal for failure to file his brief within the time provided by T.R.A.P. 29(c), preferring to suspend the rules in accordance with T.R.A.P. 2 in order that the appeal might be disposed of in the most expeditious manner possible and brought to its proper conclusion. State v. Reeves, 610 S.W.2d 730, 1980 Tenn. Crim. App. LEXIS 337 (Tenn. Crim. App. 1980).

3. Extension of Time for Appeal.

Under this rule, appellate courts are expressly prohibited from extending the time allowed for taking appeal as of right. John Barb, Inc. v. Underwriters at Lloyds of London, 653 S.W.2d 422, 1983 Tenn. App. LEXIS 578 (Tenn. Ct. App. 1983); Edmundson v. Pratt, 945 S.W.2d 754, 1996 Tenn. App. LEXIS 836 (Tenn. Ct. App. 1996), appeal denied, — S.W.2d —, 1997 Tenn. LEXIS 235 (Tenn. 1997).

4. Final Judgment.

Although the judgment appealed from was not a final judgment, the issues that had already been adjudicated by the chancery court regarding the partition by cotenants were unlikely to be pretermitted by future events and rather than delaying the inevitable need to address those issues, judicial economy was best served by addressing the issues on their merits in the instant appeal. Parker v. Lambert, 206 S.W.3d 1, 2006 Tenn. App. LEXIS 224 (Tenn. Ct. App. 2006), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 958 (Tenn. 2006).

Appeal from a non-final order granting an allegedly untimely motion for relief from a default judgment was dismissed because it was not appropriate to suspend the final judgment rule, as (1) more than tertiary issues were unadjudicated, (2) the case did not involve multiple appeals, (3) the order did not adjudicate all of one party's claims or impose one party's possible incarceration, (4) the ruling did not decide all other issues, (5) judicial economy did not justify suspending finality, and (6) an immediate appeal was unnecessary to prevent needless litigation or irreparable injury. Levitt, Hamilton, & Rothstein, LLC v. Asfour, 587 S.W.3d 1, 2019 Tenn. App. LEXIS 162 (Tenn. Ct. App. Mar. 29, 2019).

5. Motion Not Timely Filed.

Plaintiffs' notice of appeal was filed more than 30 days after the entry of summary judgment for defendants in a slander of title action, therefore the court lacked jurisdiction to hear the appeal and was required to dismiss the appeal. Also under T.R.A.P. 2, an appellate court is not authorized to extend the time for filing a notice of appeal. Briley v. Chapman, 182 S.W.3d 884, 2005 Tenn. App. LEXIS 466 (Tenn. Ct. App. 2005), appeal denied, — S.W.3d —, 2005 Tenn. LEXIS 1105 (Tenn. Dec. 5, 2005).

Trial court properly denied a maternal grandmother's motion to set aside a grand-

child's adoption, and imposed sanctions because her appeal was untimely, and the appellate court was not at liberty to waive the untimely filing of a notice of appeal. In re Zane M.O., — S.W.3d —, 2020 Tenn. App. LEXIS 518 (Tenn. Ct. App. Nov. 19, 2020).

6. Appellate Jurisdiction.

Tennessee Court of Appeals erred in remanding case for discovery concerning allegations of misconduct by chancellor and in ordering that discovery materials be transmitted to it as a supplemental record, where the clear effect of the order was that the court of appeals, not the trial court, would determine the merits of allegations, requiring the court of appeals to make factual findings based upon the "supplemental record," which determination was an unauthorized exercise of original jurisdiction; proper remedy was for plaintiff to file motion asking court of appeals to remand the case to the trial court for the filing and adjudication of a motion pursuant to Tenn. R. Civ. P. 60. Peck v. Tanner, 181 S.W.3d 262, 2005 Tenn. LEXIS 579 (Tenn. 2005).

Although the order appealed from was not a final order as the trial court failed to rule on several issues concerning the allocation of the decedent's estate and did not certify the order appealed from as final, the appellate court suspended the finality requirements because the interests of justice and judicial economy were best served by the court exercising jurisdiction over the appeal given the protracted litigation, a prior appeal, and the necessity of providing a determination to facilitate the remainder of the distribution of the estate. In re Estate of Schubert, — S.W.3d —, 2020 Tenn. App. LEXIS 419 (Tenn. Ct. App. Sept. 18, 2020).

7. Good Cause.

Although an appeal was intended to be an interlocutory appeal pursuant to T.R.A.P. 9 from a disputed parentage order, despite the fact that a Rule 9 petition was not filed, pursuant to T.R.A.P. 2 the rules for filing such a petition were suspended and permission for the interlocutory appeal was granted due to the subject matter involved. In re K.M., 382 S.W.3d 354, 2012 Tenn. App. LEXIS 242 (Tenn. Ct. App. Apr. 17, 2012).

Although there were profound deficiencies in a pro se mortgagor's appellate brief, T.R.A.P. 27(a) and Tenn. Ct. App. R. 6(a) and (b), the appellate court exercised its authority under T.R.A.P. 2 to consider the appeal because there was only one dispositive issue: whether the trial court erred in dismissing the mortgagor's complaint without prejudice based on his failure to plead fraud with particularity. Diggs v. Lasalle Nat'l Bank Ass'n, 387 S.W.3d 559, 2012 Tenn. App. LEXIS 347 (Tenn. Ct. App. May 30, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 763 (Tenn. Oct. 17, 2012).

Good cause existed to allow victims to proceed with their appeal of the trial court's denial of their petition to intervene because judicial economy would not be served by dismissing the appeal and remanding to the trial court until the resolution of all of the issues in the underlying action; if the victims were entitled to intervene, a delay in allowing them to participate could prejudice their rights. White v. Johnson, 522 S.W.3d 417, 2016 Tenn. App. LEXIS 474 (Tenn. Ct. App. July 7, 2016).

Because dismissal of a surviving spouse's appeal would only have served to delay resolution of a discrete issue between the parties in a probate proceeding, the appellate court concluded that in the interest of judicial economy, good cause existed that allowed the court to suspend the finality requirements in the matter and to proceed to address the substantive issues presented regarding the surviving spouse's claims for exempt property and a year's support. In re Estate of Baker, — S.W.3d —, 2019 Tenn. App. LEXIS 565 (Tenn. Ct. App. Nov. 22, 2019).

8. Discretion Exercised to Consider Issue Insufficiently Explained.

Court exercised its discretion to consider the merits of the appeal despite deficiencies in appellant's brief because review was limited to a technical record of less than 100 pages, plus there was another problem the court could not excuse, namely that appellant provided neither a transcript nor a statement of the evidence; his issues turned on the facts presented at trial, and in light of the presumption that the findings were supported by the evidence, the judgment was affirmed. Ray v. Willoughby, — S.W.3d —, 2020 Tenn. App. LEXIS 97 (Tenn. Ct. App. Mar. 5, 2020).

Despite the deficiencies in the grandmother's brief, the court exercised its discretion under the rule and considered the substance of her appeal because public policy preferred courts to resolve cases on their merits rather than dismiss them due to procedural deficiencies, especially in cases involving the interests of children like this one. In re Cassi J., — S.W.3d —, 2020 Tenn. App. LEXIS 258 (Tenn. Ct. App. June 2, 2020).

Pro se appellant's brief did not comply with the Tennessee Rules of Appellate Procedure, as the brief, for example, contained no statement of facts. However, although the appellant's brief left much to be desired in places and was not a model of clarity, the appellate court exercised its discretion to review the substance of each issue the appellant raised notwithstanding the brief's deficiencies. Weakley v. Franklin Woods Cmty. Hosp., — S.W.3d —, 2020 Tenn. App. LEXIS 588 (Tenn. Ct. App. Dec. 22, 2020).

Although there were deficiencies in appellants' brief, the appellate court concluded that the court's review of the matter was not hin-

dered by the deficiencies. Accordingly, the court proceeded to address appellants' issues on appeal in spite of the deficiencies in appellants' brief. Kirby Parkway Prof'l Condo. Ass'n v. Cindy-Jarvis Ltd. L.P., — S.W.3d —, 2020 Tenn. App. LEXIS 598 (Tenn. Ct. App. Dec. 30, 2020).

B. APPEAL AS OF RIGHT

Rule 3. [Current rule. See Proposed rule and compiler's notes.] Appeal as of Right: Availability; Method of Initiation. — (a) Availability of Appeal as of Right in Civil Actions. — In civil actions every final judgment entered by a trial court from which an appeal lies to the Supreme Court or Court of Appeals is appealable as of right. Except as otherwise permitted in Rule 9 and in Rule 54.02 Tennessee Rules of Civil Procedure, if multiple parties or multiple claims for relief are involved in an action, any order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before entry of a final judgment adjudicating all the claims, rights, and liabilities of all parties.

(b) Availability of Appeal as of Right by Defendant in Criminal Actions. — In criminal actions an appeal as of right by a defendant lies from any judgment of conviction entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals: (1) on a plea of not guilty; and (2) on a plea of guilty or nolo contendere, if the defendant entered into a plea agreement but explicitly reserved the right to appeal a certified question of law dispositive of the case pursuant to and in compliance with the requirements of Rule 37(b)(2)(A) or (D) of the Tennessee Rules of Criminal Procedure, or if the defendant seeks review of the sentence and there was no plea agreement concerning the sentence, or if the issues presented for review were not waived as a matter of law by the plea of guilty or nolo contendere and if such issues are apparent from the record of the proceedings already had. The defendant may also appeal as of right from an order denying or revoking probation, an order or judgment entered pursuant to Rule 36 or Rule 36.1, Tennessee Rules of Criminal Procedure, from a final judgment in a criminal contempt, habeas corpus, extradition, or post-conviction proceeding, from a final order on a request for expunction, and from the denial of a motion to withdraw a guilty plea under Tennessee Rules of Criminal Procedure 32(f).

(c) Availability of Appeal as of Right by the State in Criminal Actions. — In criminal actions an appeal as of right by the state lies only from an order or judgment entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals: (1) the substantive effect of which results in dismissing an indictment, information, or complaint; (2) setting aside a verdict of guilty and entering a judgment of acquittal; (3) arresting judgment; (4) granting or refusing to revoke probation; or (5) remanding a child to the juvenile court. The state may also appeal as of right from a final judgment in a habeas corpus, extradition, post-conviction proceeding, from an order or judgment entered pursuant to Rule 36 or Rule 36.1, Tennessee Rules of Criminal Procedure, and from a final order on a request for expunction.

(d) Definition; One Method of Appeal as of Right. — An appeal as of right is an appeal that does not require permission of the trial or appellate court as a

prerequisite to taking an appeal. There shall be one method of appeal as of right to be known as an "appeal as of right." Writs of error, appeals in the nature of a writ of error, and simple appeals are abolished.

(e) Initiation of Appeal as of Right. — An appeal as of right to the Supreme Court, Court of Appeals, or Court of Criminal Appeals shall be taken by timely filing a notice of appeal with the clerk of the appellate court as provided in Rule 4 and by service of the notice of appeal as provided in Rule 5. An appeal as of right may be taken without moving in arrest of judgment, praying for an appeal, entry of an order permitting an appeal or compliance with any other similar procedure. Provided, however, that in all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal but is ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal.

(f) Content of the Notice of Appeal. — The notice of appeal shall specify the party or parties taking the appeal by naming each one in the caption or body of the notice (but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X"), shall designate the judgment from which relief is sought, and shall name the court to which the appeal is taken. The notice of appeal should include a list of the parties upon whom service of notice of docketing of the appeal is required by Rule 5 of these rules. An appeal shall not be dismissed for informality of form or title of notice of appeal.

(g) Definition of Judgment. — The term "judgment" as used in these rules includes a decree.

(h) Cross Appeals and Separate Appeals Not Required in Civil Cases. — Consistent with Rule 13(a), cross appeals and separate appeals are not required. Consequently, upon the filing of a single notice of appeal in a civil case, issues may be brought up for review and relief pursuant to these rules by any party.

(i) For purposes of this rule, the terms "party" and "parties" shall include any person filing a motion to intervene pursuant to Tenn. R. Civ. P. 24. [As amended effective July 1, 1980; as amended effective May 7, 1981; by order effective July 1, 1996; by order effective July 1, 1998; by order filed January 31, 2002, effective July 1, 2002; by order entered December 10, 2003, effective July 1, 2004; by order entered January 6, 2005, effective July 1, 2005; by order filed January 13, 2012, effective July 1, 2012; by order filed December 18, 2012, effective July 1, 2013; by order filed January 2, 2015, effective July 1, 2015; and by order filed December 21, 2016, effective July 1, 2017; and by order filed January 8, 2018, effective July 1, 2018.]

Advisory Commission Comments. *Subdivision (a).* This subdivision states the general rule that in civil actions an appeal as of right may be taken only after entry of a final judgment. In addition, the rule offers a definition of finality in those circumstances in which mul-

tiple claims or multiple parties are involved. The rule does not otherwise define a final judgment because it is typically clear whether an order is final or interlocutory. Interlocutory appeals are governed by Rules 9 and 10.

Subdivision (b). This subdivision specifies those situations in which the defendant in a criminal action may appeal as of right. Interlocutory appeals by the defendant may be sought as provided in Rules 9 and 10.

Subdivision (c). The only limitation placed upon the right of appeal by the state is that it may not appeal upon a judgment of acquittal. In addition, notions of double jeopardy place constitutional restrictions on the availability of appeals by the state. *See, e. g., United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977). This subdivision specifies situations, within constitutional limits, in which it seems desirable to recognize the state's right of appeal. In addition, the rule provides that appeals as of right lie only in those circumstances specified in the subdivision. Interlocutory appeals by the state may be sought as provided in Rules 9 and 10.

Subdivision (d). These rules recognize two types of appeals: appeals as of right and appeals by permission. This subdivision defines an appeal as of right as one that does not require the permission of either the trial or appellate court as a prerequisite to taking an appeal. Appeals by permission, on the other hand, require that either the trial court or the appellate court expressly authorize the taking of an appeal.

Subdivision (e). The intent of this subdivision is to provide a uniform and simplified method of taking an appeal as of right. This subdivision combined with Rules 4 and 5 require that a notice of appeal be filed with the clerk of the trial court within the time prescribed for taking an appeal and that a copy of the notice of appeal be served on all parties. The form and content of the notice of appeal are set out in official form 1, and Rule 48 specifically provides that the use of this form is sufficient under these rules.

Rule 36 provides that relief need not be granted to a party who fails to take whatever action is reasonably available to prevent or nullify the harmful effect of error. Failure to present an issue to the trial court, therefore, will typically not merit appellate relief. In addition, under Rule 13(c) the appellate court is generally limited in its review to those facts set forth in the record. Thus matters that can only be made a part of the record by a new trial motion must be so included in order to gain appellate review. Jury misconduct provides one example.

Under Rule 16, two or more persons may proceed on appeal jointly. Thus it is entirely proper for parties to file a joint notice of appeal; however, a joint notice of appeal must comply with subdivision (f) of this rule.

Subdivision (f). This subdivision specifies the content of the notice of appeal. The purpose of the notice of appeal is simply to declare in a formal way an intention to appeal. As long as this purpose is met, it is irrelevant that the paper filed is deficient in some other respect. Similarly, the notice of appeal plays no part in defining the scope of appellate review. Scope of review is treated in Rule 13. This subdivision read in conjunction with Rule 13(a) permits any question of law to be brought up for review [except as otherwise provided in Rule 3(e)] as long as any party formally declares an intention to appeal in a timely fashion.

Subdivision (g). This subdivision makes clear that the term "judgment" as used in these rules is not limited to its strict common-law definition but includes equitable decrees. This subdivision is derived from Rule 54.01 of the Tennessee Rules of Civil Procedure.

Advisory Commission Comments [1980]. This amendment adds the following instances in which the state may appeal as of right from a final judgment in criminal actions: (1) habeas corpus proceedings, (2) extradition proceedings, and (3) post conviction relief proceedings. This amendment does not represent any change in existing law.

Advisory Commission Comments [1996]. The final sentence of Rule 3(e) ensures that trial judges will know what decisions have been appealed.

Advisory Commission Comments [1998]. Because the trial clerk rather than the appellant's lawyer is now responsible for serving the appellate clerk with a copy of the notice of appeal, the words "and service" were deleted from subdivision (e).

Advisory Commission Comments [1999]. It is the policy of the appellate court clerk's office in cases involving cross appeals to consider the appellant to be the party who first files a notice of appeal; in the event that the notices are filed on the same day, the plaintiff in the proceeding below is considered to be the appellant unless the parties otherwise agree or the court otherwise directs.

Advisory Commission Comments [2000]. The third sentence of Rule 3(e) does not bar an appellee who failed to move for a new trial from raising issues on appeal under Rule 13(a). That has been the practice since adoption of the Appellate Rules, and it is the conclusion reached by Prof. John Sobieski—Reporter at the time—in 46 Tenn. L. Rev. at 732-4 (1979).

Advisory Commission Comments [2002]. Specific reference to Criminal Rule 37(b)(2)(i) and (iv) was added to subdivision (b)(2) to ensure awareness of the strict requirements for

appealing a certified question of law. See *State v. Preston*, 759 S.W.2d 647, (Tenn. 1988).

Advisory Commission Comments [2004]. The language of paragraph (f) in parentheses, taken from Federal Rule of Appellate Procedure 3(c), provides a lawyer representing appellants with options other than listing each appellant by name. The lawyer should consult with clients to make sure each wants to appeal, thereby avoiding problems with court costs.

Termination of Parental Rights Proceedings. Rule 8A imposes special requirements governing the appeal of any termination of parental rights proceeding. In particular, Rule 8A(a)(2) imposes a special provision regarding the content of a notice of appeal in such a proceeding.

Advisory Commission Comments [2005]. Former subdivision (h) (pertaining to "assignments of error") is deleted because it is obsolete.

Advisory Commission Comments [2012]. *Generally.* Effective July 1, 2012, the Supreme Court adopted Tenn. Sup. Ct. R. 10B, governing motions seeking disqualification or recusal of a judge. Section 2 of Rule 10B provides the procedural framework for appealing the denial of a disqualification or recusal motion by a judge of a court of record. Section 2.01 of the rule provides that such appeals may be effected either by filing an interlocutory appeal as of right authorized by the rule or by raising the disqualification or recusal issue in an appeal as of right at the conclusion of the case. Under Section 2.01, those two methods of appeal are "the exclusive methods for seeking appellate review of any issue concerning the trial court's ruling on a motion filed pursuant to this Rule." (Emphasis added.) As a result, "neither Tenn. R. App. P. 9 nor Tenn. R. App. P. 10 may be used to seek an interlocutory or extraordinary appeal by permission concerning the judge's ruling on such a motion." Tenn. Sup. Ct. R. 10B, Explanatory Comment to Section 2. Attorneys or self-represented litigants therefore should consult Tenn. Sup. Ct. R. 10B concerning the procedure for appealing from the denial of a disqualification or recusal motion.

Subdivisions (b) and (c). Tenn. R. App. P. 3(b) is amended to update an obsolete cross-reference to Tenn. R. Crim. P. 37(b)(2), changing the subparagraph designations from "(i) or (iv)" to "(A) or (D)."

Rule 3(b) and (c) are amended to provide for an appeal as of right from the trial court's filing of a corrected judgment or order pursuant to Tenn. R. Crim. P. 36.

Advisory Commission Comments [2013]. Tenn. R. Crim. P. 36.1 was adopted in 2013 to provide a mechanism for the defendant or the state to seek to correct an illegal sentence. With the adoption of that rule, this rule (Tenn. R. App. P. 3) was amended to provide for an appeal as of right, by either the defendant (see paragraph 3(b)) or the state (see paragraph 3(c)), from the trial court's ruling on a motion filed under Tenn. R. Crim. P. 36.1 to correct an illegal sentence.

Paragraphs (b) and (c) also were amended to permit appeals as a matter of right for the defendant and the state in expunction requests. The amendments were designed to address the decision in *State v. Adler*, 92 S.W.3d 397 (Tenn. 2002), which held that rulings on expunction requests could only be appealed by use of the writ of certiorari, pursuant to Tenn. Code Ann. § 27-8-101 (2000). Since these matters can be appealed, they now are included under Tenn. R. App. P. 3 as a matter that can be appealed as of right.

Advisory Commission Comments [2014]. The third paragraph of "Subdivision (e)" in the original Advisory Commission was amended by substituting the word "subdivision" for the word "subparagraph." The text of the rule and the text of the other Advisory Commission Comments were not changed.

Advisory Commission Comments [2015]. The amendment added subdivision (h), which refers to Tenn. R. App. P. 13(a)'s statement that "[c]ross appeals...[and] separate appeals" are not required. Subdivision (h) goes on to state that, upon the filing of a single notice of appeal in a civil case, issues may be raised pursuant to these rules by any party. Thus, after the filing of a single notice of appeal by one or more parties, other parties are not required to file a separate notice of appeal in order to raise their own issues in the appellate court.

Advisory Commission Comments [2017]. In 2017, the Appellate Court Clerk's office will implement electronic filing and begin charging fees at the initiation of an appeal. To accommodate these initiatives, subdivision (e) of this rule is amended to change the location for filing the notice of appeal from the office of the trial court clerk to the office of the appellate court clerk. Subdivision (f) is also amended to be consistent with amended Form 1 ("Notice of Appeal") in the Appendix to the rules.

This paragraph of the Comment is added to cross-reference the 2017 amendment to Tenn. R. Crim. P. 36, which provides that an appeal as of right is available following the trial court's *denial* of a motion filed pursuant to Tenn. R. Crim. P. 36, in addition to cases in which the court files a corrected judgment or order. That amendment makes Tenn. R. Crim. P. 36 consistent with the text of the 2012 amendment to Tenn. R. App. P. 3(b) and (c), which authorized an appeal as of right from "an order or judgment entered pursuant to Rule 36..., Tennessee Rules of Criminal Procedure[.]" As a result of the 2017 amendment to Tenn. R. Crim. P. 36, the second paragraph of the 2012 Advisory Commission Comment to Tenn. R. App. P. 3(b) and (c) is superseded.

Advisory Commission Comments [2018]. The 2018 amendment adds to the list in subsection (b) a motion for withdrawal of a plea of

guilty. *See State v. Peele*, 59 S.W.3d 701 (Tenn. 2001). The 2018 amendment also adds a new subsection (i) to clarify that the terms "party" and "parties" include persons who have filed motions to intervene and desire to take an appeal of right, as is permitted by the 2018 amendments to Rules 24 and 54, Tennessee Rules of Civil Procedure. Effective July 1, 2018, any order granting or denying a motion to intervene shall be a final judgment, and a timely appeal of that final judgement shall be the only method to appeal the grant or denial of a motion to intervene.

Compiler's Notes. T.R.A.P. 3(d) may supersede Tenn. Code Ann. §§ 27-3-107, 27-6-102, 27-6-108, 27-6-112.

T.R.A.P. 3(d) may affect Tenn. Code Ann. §§ 8-47-123, 25-5-106, 27-1-114, 27-3-107, 27-6-101, 36-830 [now § 36-4-123], 37-258(f) [now § 37-1-159], 40-11-113, 40-26-104, 40-30-102, 40-30-120, 40-30-122, 40-30-124 (repealed), 49-1417 [now § 49-5-513], 50-1018 [now § 50-6-225].

T.R.A.P. 3(e) may supersede Tenn. Code Ann. §§ 27-6-107, 27-6-108.

T.R.A.P. 3(e) may affect Tenn. Code Ann. §§ 27-9-112, 30-518 [now § 30-2-315], 40-26-102, 49-1759 [now § 49-6-3205], 49-3258 [now § 49-8-304], 50-560 [now § 50-3-806], 58-1-230(d), 70-1006 [now § 69-6-406].

The amendment of Rule 3, as promulgated and adopted by the Supreme Court in its order dated December 10, 2003, was ratified and approved by 2004 House Resolution 234 and Senate Resolution 117. The order promulgating the amendment of Rule 3 provided that it take effect July 1, 2004.

The deletion of Rule 3(h), as promulgated and adopted by the Supreme Court in its order dated January 6, 2005, was ratified and approved by 2005 House Resolution 14 and Senate Resolution 10. The order promulgating the deletion of Rule 3(h) provided that it take effect July 1, 2005.

The amendment of Rule 3, as promulgated and adopted by the Supreme Court in its order dated January 13, 2012, was ratified and approved by 2012 House Resolution 194 and Senate Resolution 80. The order promulgating the amendment of Rule 3 provided that it take effect July 1, 2012.

The amendment of Rule 3, which amended subsections (b) and (c) and added the 2013 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 18, 2012, was ratified and approved by House Resolution 35 and Senate Resolution 13. The order promulgating the amendment of subsections (b) and (c) and the addition of the 2013 Advisory Commission Comments provided that it take effect July 1, 2013.

The amendment of Rule 3, which amended the third paragraph of "Subdivision (e)" in the original Advisory Commission Comments and added the 2014 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 16, 2013, as amended, March 14, 2014, was ratified and approved by House Resolution 156 and Senate Resolution 75. The order promulgating the amendment of the third paragraph of "Subdivision (e)" in the original Advisory Commission Comments and the addition of the 2014 Advisory Commission Comments provided that it take effect July 1, 2014.

The amendment of rule 3, which added subdivision (h) and added the 2015 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated January 2, 2015, was ratified and approved by 2015 House Resolution 3 and Senate Resolution 13. The order promulgating the amendment of this rule provided that it take effect on July 1, 2015.

The amendment of Rule 3, which amended subdivisions (e) and (f) and added the [2017] Advisory Comments, as promulgated and adopted by the Supreme Court in its order dated December 21, 2016, was ratified and approved by 2017 House Resolution 19 and Senate Resolution 16. The order promulgating the amendment of subdivisions (e) and (f) and the addition of the [2017] Advisory Comments, provided that it take effect July 1, 2017.

In its order filed January 8, 2018, the Supreme Court adopted amendments to this rule, effective July 1, 2018, subject to approval by resolution of the General Assembly.

The amendment of Rule 3, which amended subdivisions (b) and (i) and added the [2018] Advisory Comments, as promulgated and adopted by the Supreme Court in its order dated January 8, 2018, was ratified and approved by 2018 House Resolution 200 and Senate Resolution 165. The order promulgating the amendment of subdivisions (b) and (i8 and the addition of the [2017] Advisory Comments, provided that it take effect July 1, 2018.

Cross-References. Appeal of order requiring person gathering information for publication or broadcast to disclose, T.C.A. § 24-1-208.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 214, 236, 659, 667.

Tennessee Forms (Robinson, Ramsey and Harwell), No. 2-3-2.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 4-6, 16, 18-33, 36, 41-59, 61, 63, 67-70, 75, 78, 81-86, 99-120, 127, 130-138; 3 Tenn. Juris., Attachment and Garnishment, § 170; 4 Tenn. Juris., Bail and Recognizance, § 16; 5 Tenn. Juris., Carriers, § 58; 5 Tenn. Juris., Certiorari, §§ 10, 11; 7 Tenn. Juris. Corporations, § 117; 8 Tenn. Juris., Costs, §§ 42, 65; 8 Tenn. Juris., Criminal Procedure, § 39; 9 Tenn. Juris., Dismissal, Discontinuance and Nonsuit, § 15; 11 Tenn. Juris., Evidence, § 80; 12 Tenn. Juris., Exceptions, Bill of, § 4;

13 Tenn. Juris., Forcible Entry and Detainer, §§ 17, 19; 14 Tenn. Juris., Habeas Corpus, § 11; 16 Tenn. Juris., Intoxicating Liquors, § 7; 16 Tenn. Juris., Judges, § 15; 16 Tenn. Juris., Judgments and Decrees, § 45; 16 Tenn. Juris., Judicial Sales, § 48; 17 Tenn. Juris., Larceny, § 13; 18 Tenn. Juris., Lis Pendens, § 5; 19 Tenn. Juris., Motions and Summary Proceedings, § 2; 20 Tenn. Juris., New Trials, §§ 27, 29; 20 Tenn. Juris., Pleading, § 10; 21 Tenn. Juris., Reference and Commissioners, § 13; 23 Tenn. Juris., Streets and Highways, § 35.

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Attorney General Opinions. Appeals from grant or denial of order of protection, OAG 98-043 (2/17/98).

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1. Construction.

The inference in T.R.A.P. 3(e) that the timely filing and service of a notice of appeal affects the validity of the appeal is a general reference rather than a specific reference to the subject of suspension of rules. G. F. Plunk Constr. Co. v. Barrett Properties, Inc., 640 S.W.2d 215, 1982 Tenn. LEXIS 435 (Tenn. 1982).

The express language of T.R.A.P. 2, the rule that grants the appellate courts authority to suspend the rules and at the same time prohibits its waiver of the rules in three instances, must prevail over the conflicting language of Rule 3(e). G. F. Plunk Constr. Co. v. Barrett Properties, Inc., 640 S.W.2d 215, 1982 Tenn. LEXIS 435 (Tenn. 1982).

T.R.A.P. 3(e) is consistent with Tenn. R. Civ. P. 50, and is limited to issues which were tried to the jury, to jury misconduct and to other events occurring during a jury trial or in some other way involving the jury, its verdict or instructions to that body. McCormic v. Smith, 659 S.W.2d 804, 1983 Tenn. LEXIS 735 (Tenn. 1983).

Where a plea agreement stated that the defendant retained his right to "appeal legal issues," this did not mean all legal issues but rather those reserved in the plea agreement. To hold otherwise would have exceeded the legal bounds of Tenn. R. Crim. P. 37(b)(2)(i) or T.R.A.P. 3(b). State v. Shults, 684 S.W.2d 108, 1984 Tenn. Crim. App. LEXIS 2983 (Tenn. Crim. App. 1984).

The right to counsel on a first tier appeal derives from notions of equal protection and due process under the fourteenth amendment. State v. Gillespie, 898 S.W.2d 738, 1994 Tenn. Crim. App. LEXIS 602 (Tenn. Crim. App. 1994).

There is no constitutional right of appeal, but where appellate review is provided by statute, the proceedings must comport with constitutional standards. State v. Gillespie, 898 S.W.2d 738, 1994 Tenn. Crim. App. LEXIS 602 (Tenn. Crim. App. 1994).

There is nothing in the Rules of Appellate Procedure that requires a defendant to raise the sufficiency of evidence either in a motion for judgment of acquittal or in a motion for new trial in order to preserve the issue for appellate review. When the issue, if found to be meritorious, would result in dismissal of the prosecu-

tion against the accused the T.R.A.P. 3 waiver provisions do not apply. State v. Electroplating, Inc., 990 S.W.2d 211, 1998 Tenn. Crim. App. LEXIS 618 (Tenn. Crim. App. 1998), rehearing denied, — S.W.2d —, 1998 Tenn. Crim. App. LEXIS 799 (Tenn. Crim. App. Aug. 7, 1998), overruled in part, State v. King, — S.W.3d —, 2013 Tenn. Crim. App. LEXIS 192 (Tenn. Crim. App. Mar. 4, 2013), overruled in part, State v. King, 432 S.W.3d 316, 2014 Tenn. LEXIS 351 (Tenn. Apr. 23, 2014).

As a general matter, appellate courts will decline to consider issues raised for the first time on appeal that were not raised and considered in the trial court; however, T.R.A.P. 3(b) and T.R.A.P. 36(a) give appellate courts considerable discretion to consider issues that have not been properly presented in order to achieve fairness and justice. Heatherly v. Merrimack Mut. Fire Ins. Co., 43 S.W.3d 911, 2000 Tenn. App. LEXIS 751 (Tenn. Ct. App. 2000).

An improperly filed T.R.A.P. 3 appeal may be treated as a T.R.A.P. 10 extraordinary appeal. State v. Norris, 47 S.W.3d 457, 2000 Tenn. Crim. App. LEXIS 437 (Tenn. Crim. App. 2000).

Before an issue can be properly preserved in a motion for a new trial under T.R.A.P. 3(e), a well pleaded motion should: (1) Allege a sufficient factual basis for the error by setting forth the specific circumstances giving rise to the alleged error; and (2) Allege a sufficient legal basis for the error by identifying the trial court's claimed legal basis for its action and some articulation of why the court erred in taking such actions. Fahey v. Eldridge, 46 S.W.3d 138, 2001 Tenn. LEXIS 233 (Tenn. 2001).

Precise citation to a rule, statute, or case as the legal ground for the alleged error is normally not required to preserve the issue for appeal under T.R.A.P. 3(e), although to the extent that citation to authority aids in fairly bringing the legal nature of the error to the attention of the trial judge, such a practice ought to be encouraged. Fahey v. Eldridge, 46 S.W.3d 138, 2001 Tenn. LEXIS 233 (Tenn. 2001).

Although defendants' motions were not models to be followed when seeking to bring alleged errors to the attention of the trial court or to preserve those alleged errors for appeal, it was possible to identify, with diligent and patient effort, at least 12 alleged errors that were stated with sufficient specificity as to be preserved for appellate review; therefore, the court erred in dismissing the appeal pursuant to T.R.A.P. 3(e). Fahey v. Eldridge, 46 S.W.3d 138, 2001 Tenn. LEXIS 233 (Tenn. 2001).

As petitioner's document entitled "notice of appeal" included a reference to the trial judge's order, the issue sought to be raised, i.e., the legality of his sentence, and the argument that the sentence violated the Sixth Amendment, it was sufficient to comply with the rule. Graham v. State, 90 S.W.3d 687, 2002 Tenn. LEXIS 548 (Tenn. 2002), rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 66 (Tenn. 2003).

Denial of the attorney's request that the trial court expunge the public records relating to the charge of criminal contempt was improper, where T.C.A. § 40-32-101(a)(1) applied insofar as the contempt charges were criminal in nature; further, the attorney's petition was properly treated as a petition for a writ of certiorari, because there was no right to appeal an unfavorable ruling on expungement, pursuant to T.R.A.P. 3(c), and thus, there was no other plain, speedy, or adequate remedy without granting the writ. Robinson v. Fulliton, 140 S.W.3d 304, 2003 Tenn. App. LEXIS 789 (Tenn. Ct. App. 2003).

2. Construction with Other Rules.

Good cause existed to allow victims to proceed with their appeal of the trial court's denial of their petition to intervene because judicial economy would not be served by dismissing the appeal and remanding to the trial court until the resolution of all of the issues in the underlying action; if the victims were entitled to intervene, a delay in allowing them to participate could prejudice their rights. White v. Johnson, 522 S.W.3d 417, 2016 Tenn. App. LEXIS 474 (Tenn. Ct. App. July 7, 2016).

3. Purpose of Subsection (e).

The reason for T.R.A.P. 3(e) is to allow the trial court to rectify any errors that might have been made at trial and to avoid appeal by ambush. Mason v. Tennessee Farmers Mut. Ins. Co., 640 S.W.2d 561, 1982 Tenn. App. LEXIS 412 (Tenn. Ct. App. 1982).

Pursuant to T.R.A.P. 3(e), appellate courts should review a motion for a new trial in the light most likely to preserve the issue alleged, although courts cannot create an error where none has been legitimately preserved. Fahey v. Eldridge, 46 S.W.3d 138, 2001 Tenn. LEXIS 233 (Tenn. 2001).

4. Appeal Dismissed.

Appeal from a non-final order granting an allegedly untimely motion for relief from a default judgment was dismissed because no per se exception to the finality rule was proper, as (1) such an exception conflicted with the policy against piecemeal appeals, (2) a trial court still had subject matter jurisdiction to consider the motion, and (3) Tennessee law provided multiple avenues of review. Levitt, Hamilton, & Rothstein, LLC v. Asfour, 587 S.W.3d 1, 2019 Tenn. App. LEXIS 162 (Tenn. Ct. App. Mar. 29, 2019).

Appeal from a non-final order granting an allegedly untimely motion for relief from a default judgment was dismissed because it was not appropriate to suspend the final judgment rule, as (1) more than tertiary issues were unadjudicated, (2) the case did not involve

multiple appeals, (3) the order did not adjudicate all of one party's claims or impose one party's possible incarceration, (4) the ruling did not decide all other issues, (5) judicial economy did not justify suspending finality, and (6) an immediate appeal was unnecessary to prevent needless litigation or irreparable injury. Levitt, Hamilton, & Rothstein, LLC v. Asfour, 587 S.W.3d 1, 2019 Tenn. App. LEXIS 162 (Tenn. Ct. App. Mar. 29, 2019).

When defendant, after pleading guilty to aggravated statutory rape, completed judicial diversion and charges were dismissed with prejudice, defendant's appeal of an order finding no jurisdiction to order defendant's removal from the sexual offender registry was dismissed because, upon dismissal, there was no criminal case for an appellate court to review, as the trial court then had no subject matter or personal jurisdiction, and defendant had no appeal as of right. State v. Seymour, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 253 (Tenn. Crim. App. Apr. 22, 2019).

If co-defendant successfully completes his probationary period, no judgments of conviction would be entered, and if his probation was revoked and his convictions subsequently reinstated, he would be entitled to a Tenn. R. App. P. 3 appeal at that time; court declined to convert the appeal into a Tenn. R. App. P. 10 appeal by permission and ordered that his appeal be dismissed. State v. Sullivan, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 101 (Tenn. Crim. App. Mar. 22, 2021).

5. Discretion of Trial Judge.

Defendant's failure to take any action to call issue of trial court's instruction to the trial court's attention and his active procurement of an instruction he now claims was erroneous would preclude review on appeal; however, if defendant was tried under law inapplicable to his case, his substantial rights may have been affected, and under these circumstances the supreme court will exercise its discretion to review issue in order to insure substantial justice is done. State v. Brimmer, 876 S.W.2d 75, 1994 Tenn. LEXIS 15 (Tenn. 1994), rehearing denied, 876 S.W.2d 75, 1994 Tenn. LEXIS 136 (1994), cert. denied, Brimmer v. Tennessee, 513 U.S. 1020, 115 S. Ct. 585, 130 L. Ed. 2d 499, 1994 U.S. LEXIS 8413 (1994).

6. Vested Right of Appeal.

A defendant has a vested right of appellate review of the action of the trial judge in granting plaintiff a new trial. Panzer v. King, 743 S.W.2d 612, 1988 Tenn. LEXIS 5 (Tenn. 1988).

T.R.A.P. 3(b) did not specifically enumerate that a defendant may appeal as of right a denial of a motion to modify a condition of probation; thus, defendant did not have appeal as of right to challenge trial court's decision. State v. Lane, 254 S.W.3d 349, 2008 Tenn. LEXIS 365 (Tenn. May 20, 2008).

7. Contents of New Trial Motion.

To comply with T.R.A.P. 3(e) of this rule, the motion for new trial must specify the portion of the oral argument complained of with reasonable certainty, or the matter cannot be considered by the trial court on the motion for new trial or by an appellate court on appeal. State v. McKinney, 603 S.W.2d 755, 1980 Tenn. Crim. App. LEXIS 289 (Tenn. Crim. App. 1980).

The grounds relied upon in a motion for new trial must be specified with reasonable certainty so as to advise the trial court and opposing counsel of the alleged error or irregularity relied upon and to enable the appellate courts to see that the alleged error was presented to the trial court for correction as required by T.R.A.P. 36(a); otherwise, the matter cannot be considered by the trial court on the motion for a new trial or by an appellate court on appeal. State v. King, 622 S.W.2d 77, 1981 Tenn. Crim. App. LEXIS 373 (Tenn. Crim. App. 1981); State v. Gauldin, 737 S.W.2d 795, 1987 Tenn. Crim. App. LEXIS 2594 (Tenn. Crim. App. 1987).

It is not sufficient that the defendant file some document within 30 days of the date of the sentence order; he must file a motion for a new trial containing specific grounds for relief. State v. Blunkall, 731 S.W.2d 72, 1987 Tenn. Crim. App. LEXIS 2103 (Tenn. Crim. App. 1987).

8. Failure to Raise Issue in New Trial Motion.

Untimely filing of a motion for new trial waives appellant's right to present those issues on appeal. The court, however, has the authority to review the record for apparent errors, assuming a timely notice of appeal has been filed. State v. Givhan, 616 S.W.2d 612, 1981 Tenn. Crim. App. LEXIS 335 (Tenn. Crim. App. 1981).

A finding that the evidence was insufficient to support the verdict would mandate a dismissal, and thus such ground would be subject to review even though it was not listed in a motion for a new trial. State v. Durham, 614 S.W.2d 815, 1981 Tenn. Crim. App. LEXIS 331 (Tenn. Crim. App. 1981).

Where appellant's motion for new trial alleged that the jury's verdict was based on passion, sympathy, prejudice and caprice, it did not properly allege juror misconduct. The court was foreclosed from considering that issue by the appellant's failure to state the grounds in its motion, raising the issue for the first time on appeal. Terry v. Plateau Electric Coop., 825 S.W.2d 418, 1991 Tenn. App. LEXIS 98 (Tenn. Ct. App. 1991), rehearing denied, Terry v. Plateau Electric Co., — S.W.2d —, 1991 Tenn. App. LEXIS 520 (Tenn. Ct. App. July 9, 1991).

Alleged errors were waived because of failure to raise them in the motion for new trial. State v. Caughron, 855 S.W.2d 526, 1993 Tenn. LEXIS 189 (Tenn. 1993), cert. denied,

Caughron v. Tennessee, 510 U.S. 979, 114 S. Ct. 475, 126 L. Ed. 2d 426, 1993 U.S. LEXIS 7207 (1993).

The waiver provision of T.R.A.P. 3(e) does not apply when the issue, if found to be meritorious, would result in the dismissal of the prosecution against the accused. State v. Keel, 882 S.W.2d 410, 1994 Tenn. Crim. App. LEXIS 270 (Tenn. Crim. App. 1994).

The waiver provision of T.R.A.P. 3(e) did not apply to the issue of a variance between a conspiracy charge and proof at the trial, even though the issue was not raised in defendant's motion for a new trial. State v. Keel, 882 S.W.2d 410, 1994 Tenn. Crim. App. LEXIS 270 (Tenn. Crim. App. 1994).

Issues concerning instructions given or refused by the trial court are waived if the issues were not included in the motion for a new trial. State v. Keel, 882 S.W.2d 410, 1994 Tenn. Crim. App. LEXIS 270 (Tenn. Crim. App. 1994).

Defendant waived the issue of ineffective assistance of counsel when he failed to raise it in his motion for new trial. State v. Meade, 942 S.W.2d 561, 1996 Tenn. Crim. App. LEXIS 673 (Tenn. Crim. App. 1996).

Where the jury charge is not included in the transcript, the appellate court must presume that the trial court charged the jury fully and correctly. Norman v. Prather, 971 S.W.2d 398, 1997 Tenn. App. LEXIS 923 (Tenn. Ct. App. 1997).

Since motion for continuance was not made until after the jury was impaneled, and the alleged error was not cited in a motion for a new trial, the issue was precluded pursuant to T.R.A.P. 3(e). Mires v. Clay, 3 S.W.3d 463, 1999 Tenn. App. LEXIS 564 (Tenn. Ct. App. 1999).

Because defendants did not raise the defense of equitable estoppel in their respective motions for a new trial, the issue was waived and the court of appeals should not have considered the defense. Alexander v. Armentrout, 24 S.W.3d 267, 2000 Tenn. LEXIS 305 (Tenn. 2000).

As petitioner's document entitled "notice of appeal" included a reference to the trial judge's order, the issue sought to be raised, i.e., the legality of his sentence, and the argument that the sentence violated the Sixth Amendment, it was sufficient to comply with the rule. Graham v. State, 90 S.W.3d 687, 2002 Tenn. LEXIS 548 (Tenn. 2002), rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 66 (Tenn. 2003).

In an action seeking to establish that a public road extended to a company's northern property line, because the adjoining property owners and the city failed to raise the issue of admitting evidence of motive of the city officials in their motion for a new trial, the issue was waived. Brandy Hills Estates, LLC v. Reeves, 237 S.W.3d 307, 2006 Tenn. App. LEXIS 794 (Tenn. Ct. App. Dec. 15, 2006), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 607 (Tenn. June 25, 2007).

During defendant's criminal trial, he did not object to either the inclusion of the "obtaining" element in the theft jury instruction or the omission of an accomplice jury instruction; because defendant failed to raise the issue in his motion for new trial, it was deemed waived under Tenn. R. Crim. P. 30(b). State v. Bowman, 327 S.W.3d 69, 2009 Tenn. Crim. App. LEXIS 35 (Tenn. Crim. App. Jan. 14, 2009), appeal denied, — S.W.3d —, 2009 Tenn. LEXIS 395 (Tenn. June 15, 2009), cert. denied, Bowman v. Tennessee, 175 L. Ed. 2d 388, 130 S. Ct. 559, 2009 U.S. LEXIS 8080 (U.S. 2009).

Issue of whether the trial court erred in admitting the statements of an eyewitness to a shooting through the testimony of a police officer was precluded from plenary appellate review because it should have been raised in a timely filed motion for new trial. The appellate court could then review for plain error only. State v. Branch, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 79 (Tenn. Crim. App. Feb. 11, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 362 (Tenn. June 3, 2020).

Defendant waived consideration of additional claims regarding the admission of evidence which defendant raised on appeal because defendant did not raise those claims in defendant's motion for new trial Moreover, defendant did not argue that defendant was entitled to plain error relief on those claims. State v. Jackson, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 353 (Tenn. Crim. App. May 14, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 454 (Tenn. Aug. 5, 2020).

Defendant waived the issue of whether the trial court erred by allowing the State of Tennessee to play an audio recording of a controlled drug buy because defendant failed to raise the issue in defendant's motion for a new trial or at the hearing on the motion. State v. Strong, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 66 (Tenn. Crim. App. Feb., 28, , 2021).

9. Preservation for Review.

On appeal from his convictions for first-degree premeditated murder and abuse of a corpse, defendant's claim that the trial court erred by permitting the state to argue that defendant raped the victim and then killed her to cover up the rape was waived for failing to lodge a contemporaneous objection, T.R.A.P. 36(a), 3(e). Although the prosecutor's statement arguably included facts not in evidence, defense counsel did not object to the argument, and the prosecutor admitted that she could not prove her assertions beyond a reasonable doubt; under those circumstances, the record did not establish either that defendant did not waive the issue for tactical reasons or that consideration of the error was necessary to do substantial justice and thus, the prosecutor's argu-

ment, even if improper, did not rise to the level of plain error. State v. Hill, 333 S.W.3d 106, 2010 Tenn. Crim. App. LEXIS 371 (Tenn. Crim. App. May 12, 2010), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 953 (Tenn. Oct. 12, 2010).

Defendant did not properly preserve for plenary appellate review an election of the facts the state was relying upon to establish the charge of rape of a child because defendant did not object to the inaccuracy in the election and the jury instruction or raise it in his motion for new trial; defendant challenged only the sufficiency of the evidence. State v. Knowles, 470 S.W.3d 416, 2015 Tenn. LEXIS 591 (Tenn. July 31, 2015).

Defendant's argument that the trial court erred in refusing to allow defendant to sit at counsel table was properly preserved for appeal because during the course of his argument at trial, defendant argued the counsel table issue, and the trial court ruled on the issue on the merits. State v. Smith, 492 S.W.3d 224, 2016 Tenn. LEXIS 383 (Tenn. June 24, 2016).

Defendant did not waive the issue of double jeopardy because defendant's amended motion for new trial was sufficient to direct the trial court's and the state of Tennessee's attention to defendant's challenge to multiple convictions for employing a firearm during the commission of a dangerous felony when defendant fired a single weapon. Moreover, the intermediate appellate court construed defendant's argument as a challenge to defendant's firearm convictions based on double jeopardy grounds. State v. Harbison, 539 S.W.3d 149, 2018 Tenn. LEXIS 7 (Tenn. Jan. 9, 2018).

When defendant appealed the denial of defendant's motion for modification of sentence, the appellate court did not extend its review to defendant's issue concerning the trial court's revocation of defendant's probation without notice because defendant did not raise that issue in the notice of appeal. State v. Smith, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 258 (Tenn. Crim. App. Apr. 15, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 551 (Tenn. Sept. 16, 2020).

Although defendant waived the issue of a mistrial based on the State of Tennessee's failure to produce evidence related to a photographic line-up prior to trial by failing to include the issue in defendant's motion for a new trial, defendant properly preserved the challenge to the trial court's denial of defendant's motion for a continuance based on the alleged violation. State v. Ward, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 516 (Tenn. Crim. App. July 28, 2020).

10. Certified Questions of Law.

Where defendant's counsel announced that defendant was not giving up his right to contest the constitutionality of the statute under which he was convicted at the time he entered a nolo contendere plea, but there was no mention of the reservation in the plea agreement or judgment of the court, the issue was not reserved for consideration on appeal. State v. Caldwell, 924 S.W.2d 117, 1995 Tenn. Crim. App. LEXIS 983 (Tenn. Crim. App. 1995).

Where judgment makes no reference to reservation of dispositive question of law for appellate review, and where it does not refer to nor incorporate independent document which identifies scope of issue, requirements of rule are not met. State v. Irwin, 962 S.W.2d 477, 1998 Tenn. LEXIS 90 (Tenn. 1998).

Trial court's order did not reserve a certified question of law in compliance with the guidelines of *Preston* where, although it appeared that the trial court, while still retaining jurisdiction, entered the order containing the second version of the certified question in response to the defendant's motion for new trial, it did not enter an amended judgment form indicating a certified question of law different from the original certification. State v. Bowery, 189 S.W.3d 240, 2004 Tenn. Crim. App. LEXIS 690 (Tenn. Crim. App. 2004).

11. Jurisdiction of Appellate Court.

The jurisdiction of the Court of Criminal Appeals of Tennessee attaches with the filing of the notice of appeal. State v. Givhan, 616 S.W.2d 612, 1981 Tenn. Crim. App. LEXIS 335 (Tenn. Crim. App. 1981).

Jurisdiction of an appeal under T.R.A.P. 3 in a tort action lies in the court of appeals, not the supreme court. Smith v. Lincoln Brass Works, Inc., 712 S.W.2d 470, 1986 Tenn. LEXIS 759 (Tenn. 1986).

Failure to comply with time limits for filing new trial motions does not divest appellate courts of jurisdiction to hear appeals. State v. Givhan, 616 S.W.2d 612, 1981 Tenn. Crim. App. LEXIS 335 (Tenn. Crim. App. 1981); State v. Davis, 748 S.W.2d 206, 1987 Tenn. Crim. App. LEXIS 2427 (Tenn. Crim. App. 1987).

The court of appeals may sua sponte review the record on appeal to determine if it properly has jurisdiction. Huntington Nat'l Bank v. Hooker, 840 S.W.2d 916, 1991 Tenn. App. LEXIS 177 (Tenn. Ct. App. 1991).

An appeal was allowed to proceed where the notice of appeal sent by facsimile was initially received by the clerk of court of appeals within the requisite time period because of the unique circumstances presented. Cruse v. City of Columbia, 922 S.W.2d 492, 1996 Tenn. LEXIS 305 (Tenn. 1996).

Although T.R.A.P. 3(f) provides that the notice of appeal shall designate the judgment from which relief is sought, the notice of appeal filed by the citizen failed to designate the order appealed from; however, it being further provided at T.R.A.P. 3(f) that an appeal shall not be dismissed for informality of form, the appellate court proceeded with its review of the citizen's

case under the assumption that the orders appealed from were those entered on April 27, 2004, and May 10, 2004. Marceaux v. Thompson, 212 S.W.3d 263, 2006 Tenn. App. LEXIS 426 (Tenn. Ct. App. 2006), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 1068 (Tenn. Nov. 13, 2006).

Appellate court lacked jurisdiction to consider petitioner's appeal because all of petitioner's claims had not been adjudicated, and permission to file an interlocutory appeal had not been granted pursuant to T.R.A.P. 9 or T.R.A.P. 10, or the order appealed had not been made final pursuant to Tenn. R. Civ. P. 54.02; trial court did not address the request for a hearing on the conduct of the estate's attorney, and did not address the request for attorney fees and costs requested in the same motion. Boykin v. Casher (In re Estate of Boykin), 295 S.W.3d 632, 2008 Tenn. App. LEXIS 769 (Tenn. Ct. App. Dec. 30, 2008).

Defendant's appeal from the trial court restitution order on his reckless endangerment conviction was dismissed for lack of jurisdiction as the restitution order was incomplete and interlocutory in nature where the trial court intended to further adjudicate the particulars of payment at a future date. State v. Comer, 278 S.W.3d 758, 2008 Tenn. Crim. App. LEXIS 296 (Tenn. Crim. App. Apr. 21, 2008).

Although filed prematurely, a former employee's second notice of appeal was timely and vested the appellate court with jurisdiction because the trial court's purported final order failed to rule on all the issues, and, without ruling on these requests, the judgment was not final, so that the appellate court never acquired jurisdiction over the employee's first appeal. Thus, any order by the appellate court on that appeal was void and the trial court retained jurisdiction to adjudicate the claims until it filed its final order. Foster-Henderson v. Memphis Health Ctr., Inc., 479 S.W.3d 214, 2015 Tenn. App. LEXIS 582 (Tenn. Ct. App. July 22, 2015), appeal denied, Foster v. Memphis Health Ctr., Inc., — S.W.3d —, 2015 Tenn. LEXIS 1074 (Tenn. Dec. 14, 2015).

Although no right of direct appeal lied for the state of Tennessee, because a trial court's application of an amended sentencing statute to defendant's case and the resulting modification of defendant's sentence exceeded the court's authority, the appellate court elected to treat the state of Tennessee's improperly-filed appeal as of right as a petition for the common law writ of certiorari and reviewed the matter. State v. Tolle, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 203 (Tenn. Crim. App. Mar. 19, 2018), aff'd, 591 S.W.3d 539, 2019 Tenn. LEXIS 514 (Tenn. Nov. 27, 2019).

Trial court's failure to separately analyze a local government's compliance with Metropolitan Government of Nashville and Davidson County, Tenn., Charter § 11.602(a), was not a bar to finality where the fairground users failed to include any specific argument on that subsection in their response to a summary judgment motion and failed to sufficiently brief the issue. Save Our Fairgrounds v. Metro. Gov't, — S.W.3d —, 2019 Tenn. App. LEXIS 355 (Tenn. Ct. App. July 18, 2019).

Appeal of the fairground users' claims under Metropolitan Government of Nashville and Davidson County, Tenn., Charter art. II, §§ 8 and 10, was dismissed for lack of a final order where the provisions had been raised in the first amended complaint, compliance with § 11.602(d) was not dispositive of whether the government's actions also complied with art. II, §§ 8 and 10, and the users were under no obligation to raise art. II, §§ 8 and 10, as the government's summary judgment motion did not mention those provisions. Save Our Fairgrounds v. Metro. Gov't, — S.W.3d —, 2019 Tenn. App. LEXIS 355 (Tenn. Ct. App. July 18, 2019).

Because dismissal of a surviving spouse's appeal would only have served to delay resolution of a discrete issue between the parties in a probate proceeding, the appellate court concluded that in the interest of judicial economy, good cause existed that allowed the court to suspend the finality requirements in the matter and to proceed to address the substantive issues presented regarding the surviving spouse's claims for exempt property and a year's support. In re Estate of Baker, — S.W.3d —, 2019 Tenn. App. LEXIS 565 (Tenn. Ct. App. Nov. 22, 2019).

Because this action was to establish paternity and visitation and not related to dependency or neglect, the circuit court did not err in finding a lack of subject matter jurisdiction, as the appeal to the circuit court was improper as any appeal rested within the court's jurisdiction; because the mother did not properly file an appeal to the circuit court, the jurisdiction of that court did not attach and the juvenile court retained jurisdiction to hear father's motion because an appeal as of right had not been perfected. In re Easton W., — S.W.3d —, 2020 Tenn. App. LEXIS 305 (Tenn. Ct. App. July 1, 2020).

Although the order appealed from was not a final order as the trial court failed to rule on several issues concerning the allocation of the decedent's estate and did not certify the order appealed from as final, the appellate court suspended the finality requirements because the interests of justice and judicial economy were best served by the court exercising jurisdiction over the appeal given the protracted litigation, a prior appeal, and the necessity of providing a determination to facilitate the remainder of the distribution of the estate. In re Estate of Schubert, — S.W.3d —, 2020 Tenn. App. LEXIS 419 (Tenn. Ct. App. Sept. 18, 2020).

Appellate court found good cause to suspend the requirements of this rule and exercise jurisdiction over the appeal because it was apparent that, if a decision was not rendered due to a lack of finality, the same appeal would almost certainly be presented to the appellate court in the future once the trial court rendered a decision regarding the exact parameters of the child's potential visitation with the father; remanding the case would only contribute to further delay; and the case, which concerned potential visitation with a minor child, warranted some urgency in rendering a decision without additional delay. Baxter v. Rowan, — S.W.3d —, 2020 Tenn. App. LEXIS 569 (Tenn. Ct. App. Dec. 15, 2020).

12. Evidentiary Rulings.

Tennessee Rules of Appellate Procedure did not permit an interlocutory appeal of the trial court's ruling on the admissibility of evidence of defendant's prior acts of physical abuse against the victim in a murder trial under Tenn. R. Evid. 404(b); the criteria for appellate review was not met, and because the trial had yet to begin, the interlocutory appeal was largely advisory in nature. State v. Gilley, 173 S.W.3d 1, 2005 Tenn. LEXIS 789 (Tenn. 2005).

13. Appeal by State in Criminal Case.

Where the trial court granted defendant's motion for judgment of acquittal and set the jury's verdict aside, but the evidence established beyond a reasonable doubt defendant's guilt, the court set aside the trial court's judgment of acquittal and remanded those courts so that the error could be corrected by the trial court entering a judgment of conviction upon the jury verdict. State v. McMahan, 614 S.W.2d 83, 1981 Tenn. Crim. App. LEXIS 326 (Tenn. Crim. App. 1981).

Although state did not appeal from an order merging defendant's convictions for burglary and attempted petit larceny, it may seek review and relief of the action of the trial court in effectively setting aside and dismissing the indictment charging the defendant with petit larceny and the jury verdict finding him guilty of attempting to commit petit larceny. State v. Valentine, 659 S.W.2d 27, 1983 Tenn. Crim. App. LEXIS 360 (Tenn. Crim. App. 1983).

Suppression of evidence seized under color of search warrant was proper. State v. Lee, 836 S.W.2d 126, 1991 Tenn. Crim. App. LEXIS 903 (Tenn. Crim. App. 1991).

Appeal as of right under T.R.A.P. 3 was the proper remedy for the state from a judgment of the trial court setting aside a conviction and granting defendant's post-trial motion for judgment of acquittal. State v. Adams, 916 S.W.2d 471, 1995 Tenn. Crim. App. LEXIS 876 (Tenn. Crim. App. 1995).

The state has the right to appeal the dismissal of an arrest warrant. State v. Wilson, 6 S.W.3d 504, 1998 Tenn. Crim. App. LEXIS 1176 (Tenn. Crim. App. 1998).

An appeal under T.R.A.P. 3 by the state seeking relief from suppression of a confession can only be sought where the substantive effect of the ruling results in a dismissal of the indictment; since the state can ordinarily proceed with prosecution despite the suppression, the state should not seek an appeal under T.R.A.P. 3 in such situations. Because the state expressly represented that it could not prosecute without defendant's pretrial statement, the court of criminal appeals entertained the appeal under T.R.A.P. 3 as of right. State v. Phillips, 30 S.W.3d 372, 2000 Tenn. Crim. App. LEXIS 284 (Tenn. Crim. App. 2000).

If the suppression order relates to the suppression of seized drugs, the state ordinarily and properly files an appeal as of right under T.R.A.P. 3; in such a case the state is truly unable to prosecute without the admission of the contraband. State v. Phillips, 30 S.W.3d 372, 2000 Tenn. Crim. App. LEXIS 284 (Tenn. Crim. App. 2000).

Had the state wished to appeal the order of the trial court mandating the disclosure of the identity of the confidential informant, it should have filed an interlocutory appeal pursuant to either T.R.A.P. 9 or 10; the issue could not be brought before the court pursuant to T.R.A.P. 3(c)(1), which only allows an appeal from an order that results in dismissal of the indictment. State v. Collins, 35 S.W.3d 582, 2000 Tenn. Crim. App. LEXIS 247 (Tenn. Crim. App. 2000).

Supreme court of Tennessee held that the plain language of T.R.A.P. 3(c) enumerates the six instances in which the state could appeal as of right and stated that they are the "only" instances that gave the state such a right; therefore state did not have the right to appeal the expungement of defendant's criminal records where he had been found guilty of a lesser charge. State v. Adler, 92 S.W.3d 397, 2002 Tenn. LEXIS 703 (Tenn. 2002).

Denying the state an interlocutory appeal when the trial court precluded the death penalty by finding that defendant was mentally retarded left no appellate recourse; thus, the conclusion that the matter in defendant's capital case was appropriate for interlocutory appeal was affirmed. State v. Strode, 232 S.W.3d 1, 2007 Tenn. LEXIS 666 (Tenn. Aug. 14, 2007).

Although the state of Tennessee could not appeal its claim that the trial court erred by applying the amended version of a sentencing statute, appellate jurisdiction existed over the claim because, once defendant filed a notice of appeal, the court acquired jurisdiction of the entire case and any properly-preserved, cognizable claims. Because the determination of the appropriate version of the statute to be applied qualified as a question of law, it was permitted to be raised by either party, regardless of which

party initiated the appeal. State v. Keese, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 193 (Tenn. Crim. App. Mar. 15, 2018), overruled in part, State v. Jones, 589 S.W.3d 747, 2019 Tenn. LEXIS 505 (Tenn. Nov. 13, 2019).

Although defendant asserted that the state of Tennessee had no appeal as of right flowing from the trial court's order, because the order did not result in the dismissal of the entire indictment in the case, when the trial court dismissed the indictment charging defendant with vehicular assault, the state had a right to appeal that decision in that each count of the multiple-count indictment was a separate indictment. State v. Welch, 586 S.W.3d 399, 2019 Tenn. Crim. App. LEXIS 326 (Tenn. Crim. App. May 23, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 485 (Tenn. Sept. 18, 2019).

14. Appeal from Diversion Decision.

An appeal by either side questioning diversion decisions, either granted or denied, must be brought under T.R.A.P. 9 or 10 and cannot come by T.R.A.P. 3. (but see, State v. Montgomery, 623 S.W.2d 116, 1981 Tenn. Crim. App. LEXIS 374 (Tenn. Crim. App. 1981)State v. Harris, — S.W.3d —, 1999 Tenn. Crim. App. LEXIS 557 (Tenn. Crim. App. June 4, 1999), aff'd, 33 S.W.3d 767, 2000 Tenn. LEXIS 690 (Tenn. 2000); State v. McDuff, 691 S.W.2d 569, 1984 Tenn. Crim. App. LEXIS 2687 (Tenn. Crim. App. 1984); State v. Wilson, 713 S.W.2d 85, 1986 Tenn. Crim. App. LEXIS 2221 (Tenn. Crim. App. 1986).

Where defendant enters a best interest guilty plea and is judicially diverted pursuant to T.C.A. § 40-35-313, defendant is not authorized to appeal a certified question. State v. Norris, 47 S.W.3d 457, 2000 Tenn. Crim. App. LEXIS 437 (Tenn. Crim. App. 2000).

Defendant waived her right to appeal the denial of her request for pretrial diversion under T.C.A. § 40-15-105 by failing to seek review of the trial court's decision pursuant to T.R.A.P. 9 or 10 prior to pleading guilty to some of the charges. An appeal pursuant to Tenn. R. Crim. P. 38(b) was required to be made under T.R.A.P. 3(b), which had no provision for appeal of the denial of pretrial diversion following a guilty plea. State v. Robinson, 328 S.W.3d 513, 2010 Tenn. Crim. App. LEXIS 268 (Tenn. Crim. App. Mar. 30, 2010).

Defendant's appeal of his conviction of two counts of aggravated perjury was dismissed for lack of jurisdiction because he did not have a right to appeal as he was granted judicial diversion and therefore no judgment of conviction was entered which was required for an appeal under this rule. State v. Begtrup, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 775 (Tenn. Crim. App. Dec. 2, 2020).

15. Post-Trial Motions.

Under T.R.A.P. 3(a), if part of a judgment is challenged by a post-trial motion and the power of the trial court is extended to change such challenged part, then the trial court has not finally adjudicated all of the claims, rights and liabilities; and the judgment is subject to revision, including setting aside, before entry of final judgment adjudicating all claims, rights and liabilities of the parties. Grissim v. Grissim, 637 S.W.2d 873, 1982 Tenn. App. LEXIS 389 (Tenn. Ct. App. 1982).

T.R.A.P. 3 does not require more than a single motion as a prerequisite to appellate review. McCormic v. Smith, 659 S.W.2d 804, 1983 Tenn. LEXIS 735 (Tenn. 1983).

Where judge fixed fees subsequent to jury verdict, appellants were not required to file for new trial under Tenn. R. Civ. P. 59, before appealing as of right under T.R.A.P. 3(e). McCormic v. Smith, 659 S.W.2d 804, 1983 Tenn. LEXIS 735 (Tenn. 1983).

An appeal as of right is initiated by the filing of a notice of appeal within 30 days of the entry of the judgment being appealed; however, if a timely motion for judgment of acquittal, for a new trial, for arrest of judgment, or for a suspended sentence is filed, the 30 days run from the entry of the order determining such motion. State v. Lock, 839 S.W.2d 436, 1992 Tenn. Crim. App. LEXIS 428 (Tenn. Crim. App. 1992).

Although a motion for a new trial is a prerequisite to appellate review in certain cases, in accordance with T.R.A.P. 3(e), such motion is not necessarily warranted in all cases wherein review by the Court of Appeals is sought. Cortez v. Alutech, Inc., 941 S.W.2d 891, 1996 Tenn. App. LEXIS 463 (Tenn. Ct. App. 1996), rehearing denied, — S.W.2d —, 1996 Tenn. App. LEXIS 579 (Tenn. Ct. App. Sept. 13, 1996).

Appellate review of motion for directed verdict was precluded by T.R.A.P. 3(e) where defendant moved for a directed verdict at the end of trial, but failed to file a post-trial motion for J.N.O.V. or a motion for a new trial. Mires v. Clay, 3 S.W.3d 463, 1999 Tenn. App. LEXIS 564 (Tenn. Ct. App. 1999).

Plaintiffs' notice of appeal was filed more than 30 days after the entry of summary judgment for defendants in a slander of title action, therefore the court lacked jurisdiction to hear the appeal and was required to dismiss the appeal. Also under T.R.A.P. 2, an appellate court is not authorized to extend the time for filing a notice of appeal. Briley v. Chapman, 182 S.W.3d 884, 2005 Tenn. App. LEXIS 466 (Tenn. Ct. App. 2005), appeal denied, — S.W.3d —, 2005 Tenn. LEXIS 1105 (Tenn. Dec. 5, 2005).

Appellant's motion for discretionary costs filed after a final order did not arrest the finality of the trial court's judgment. Thus, despite the trial court's apparent failure to rule on this motion, the appellate court retained jurisdiction to consider the appeal. Payne v. Tipton County, 448 S.W.3d 891, 2014 Tenn. App. LEXIS 183 (Tenn. Ct. App. Mar. 31, 2014),

appeal denied, Payne ex rel. Payne v. Tipton County, — S.W.3d —, 2014 Tenn. LEXIS 709 (Tenn. Sept. 18, 2014).

16. Timeliness of Motion.

Where plaintiff filed only two motions within 30 days of the entry of the judgment on the jury verdict, one for reinstatement and one for attorney's fees and costs, the trial judge overruled both motions on October 15, and it was not until October 25 that the plaintiff moved for a new trial on the issue of front pay and for an increase in the judgment for back pay, both of which issues had been decided by the jury and a judgment entered on the verdict on June 19, the motions came too late under Tenn. R. Civ. P. 59.02, and the plaintiff was precluded from raising those issues on appeal. Flynn v. Shoney's, Inc., 850 S.W.2d 458, 1992 Tenn. App. LEXIS 883 (Tenn. Ct. App. 1992), rehearing denied, — S.W.2d —, 1992 Tenn. App. LEXIS 960 (Tenn. Ct. App. Dec. 2, 1992).

T.R.A.P. 3(f) did not apply to authorize treatment of a motion for interlocutory appeal as an informal notice of appeal for the purpose of avoiding time limitations for filing a notice of appeal. Dewees v. Sweeney, 947 S.W.2d 861, 1996 Tenn. App. LEXIS 821 (Tenn. Ct. App. 1996).

In a workers' compensation appeal, the employer contended that because the statistical data (SD1) form was not filed "contemporaneously" with the judgment, the time for filing the notice of appeal began when the SD1 form was filed and the date the judgment was entered. The appellate court held that while the SD1 form had to be filed in accordance with T.C.A. § 50-6-244(a), to the extent T.C.A. § 50-6-244(a) conflicted with the 30-day time limit prescribed by T.R.A.P. 4, T.R.A.P. 4 controlled; therefore, the workers' compensation judgment was final on the date of entry stamped by the trial court clerk whether or not it was filed contemporaneously with the SD1 form, and the employer's appeal, filed 34 days after the judgment was entered, was untimely. Corum v. Holston Health & Rehab. Ctr., 104 S.W.3d 451, 2003 Tenn. LEXIS 338 (Tenn. 2003).

In a breach of contract case, an appeal was timely filed, because the 30-day time limit did not begin to run until a trial court ruled on a motion to alter or amend, which was filed after judgment was entered against a purchaser. Albert v. Frye, 145 S.W.3d 526, 2004 Tenn. LEXIS 654 (Tenn. 2004).

Appellate court did not err by permitting the state to pursue its appeal from trial court's November 9, 2005 suppression order because it was timely, as at the state's request trial court entered an order on May 19, 2006 dismissing indictments against defendants and the state filed its timely notice of appeal as permitted by T.R.A.P. 3(c)(1) within 30 days of trial court's order; because the state's appeal was timely filed, appellate court was not required to exercise discretion under T.R.A.P. 4(a) to excuse the state from timely filing of notice of appeal. State v. Meeks, 262 S.W.3d 710, 2008 Tenn. LEXIS 575 (Tenn. Sept. 2, 2008).

Thirty-day time period at issue began when defendant's judgment of conviction was filed by trial court; thus, his motion for a new trial was timely filed 30 days later, and all the issues appealed from were properly before the appellate court. State v. Vaughn, 279 S.W.3d 584, 2008 Tenn. Crim. App. LEXIS 442 (Tenn. Crim. App. June 16, 2008).

Motor vehicle accident victim lost the ability to appeal, the validity of a post-mediation agreement by failing to file a timely appeal because the trial court's order—that the victim's parent had legal authority to sign the agreement on the victim's behalf and that the agreement was an enforceable contract—was a final order so that the victim lost the ability to challenge the validity of the post-mediation agreement after the 30-day time period to appeal expired. Allen v. Am. Yeast, Inc., — S.W.3d —, 2018 Tenn. App. LEXIS 587 (Tenn. Ct. App. Oct. 4, 2018), appeal denied, Allen v. Am. Yeast Inc., — S.W.3d —, 2019 Tenn. LEXIS 114 (Tenn. Feb. 22, 2019).

Defendant's appeal of an order revoking his probation had to be dismissed as untimely, but even if defendant timely-filed his motion for new trial, the motion would not have tolled the time for filing the notice of appeal because a probation revocation hearing was not a "trial"; accordingly, defendant's notice of appeal was also untimely. State v. Vincent, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 318 (Tenn. Crim. App. May 5, 2020).

Defendant's appeal of an order revoking his probation had to be dismissed as untimely because defendant had until October 27, 2017 to file his notice of appeal, but instead, he filed a motion for new trial on November 9, 2017 and his notice of appeal on January 4, 2018. State v. Vincent, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 318 (Tenn. Crim. App. May 5, 2020).

Defendant's motion for new trial was filed well-beyond the 30-day time limit and thus his notice of appeal was also untimely; however, in the interests of justice, the court waived the timely filing of the notice of appeal. Still, because the new trial motion was untimely, defendant waived his issues except sufficiency of the evidence and sentencing. State v. Chaves-Abrego, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 422 (Tenn. Crim. App. June 18, 2020), appeal denied, State v. Chaves-Abrego, — S.W.3d —, 2020 Tenn. LEXIS 519 (Tenn. Oct. 7, 2020).

17. Final Judgment.

Certification by trial judge under Tenn. R. Civ. P. 54.02 that court has directed entry of final judgment as to one or more but fewer than

all claims, and express determination that there is no just reason for delay creates a final judgment appealable as of right under T.R.A.P. 3. Fox v. Fox, 657 S.W.2d 747, 1983 Tenn. LEXIS 644 (Tenn. 1983).

An order overruling a motion for summary judgment leaves the entire suit for later trial and disposition and is not a final, appealable judgment. In re Estate of McCord, 661 S.W.2d 890, 1983 Tenn. App. LEXIS 634 (Tenn. Ct. App. 1983).

A judgment of contempt, summary or otherwise becomes final upon the entering of punishment therefor, and is thus appealable as of right under T.R.A.P. 3, and it does not matter that the proceedings out of which the contempt arose are not complete. State v. Green, 689 S.W.2d 189, 1984 Tenn. Crim. App. LEXIS 2574 (Tenn. Crim. App. 1984).

Where following the trial judge's grant of a new trial to the plaintiff the judge granted plaintiff's voluntary nonsuit without prejudice, the order of nonsuit was a final judgment appealable under T.R.A.P. 3; however, whether the plaintiff had a right to a nonsuit without prejudice depended on whether the trial court was correct in granting a new trial. Panzer v. King, 743 S.W.2d 612, 1988 Tenn. LEXIS 5 (Tenn. 1988).

For an appellate court to consider the merits of a question of law certified pursuant to Tenn. R. Crim. P. 37, the final order or judgment from which the time begins to run to pursue an appeal under T.R.A.P. 3 must contain a statement of the dispositive certified question of law reserved by defendant for appellate review and the question of law must be stated so as to clearly identify the scope and the limits of the legal issue reserved. State v. Preston, 759 S.W.2d 647, 1988 Tenn. LEXIS 171 (Tenn. 1988).

An order overruling a motion to dismiss is not a final judgment; such an order does not end a lawsuit, but rather allows the lawsuit to continue and contemplates further litigation. C.O. Christian & Sons Co. v. Nashville P.S. Hotel, Ltd., 765 S.W.2d 754, 1988 Tenn. App. LEXIS 573 (Tenn. Ct. App. 1988).

A judgment of contempt without the designation of punishment is not a final appealable judgment. Hall v. Hall, 772 S.W.2d 432, 1989 Tenn. App. LEXIS 11 (Tenn. Ct. App. 1989).

A court order suggesting additur and granting a new trial is not a final judgment, and is not appealable as of right. If defendant does not accept the additur, the court must enter a further order granting the motion for a new trial. Evans v. Wilson, 776 S.W.2d 939, 1989 Tenn. LEXIS 394 (Tenn. 1989), rehearing denied, — S.W.2d —, 1989 Tenn. LEXIS 468 (Tenn. 1989).

Where judgment does not specify amount of attorneys fees or expenses and costs of collection it is not a final judgment appealable as of right. Until all issues are decided, actions of the trial court remain subject to revision and are not appealable as of right. Solomon v. First American Nat'l Bank, 774 S.W.2d 935, 1989 Tenn. App. LEXIS 170 (Tenn. Ct. App. 1989).

Order denying class certification but allowing the putative class representative to pursue its individual claim did not adjudicate the claims of any parties as is minimally required by Tenn. R. Civ. P. 54.02 and was not appealable under T.R.A.P. 3. Bayberry Assocs. v. Jones, 783 S.W.2d 553, 1990 Tenn. LEXIS 40 (Tenn. 1990).

In case involving multiple claims, chancellor's order dismissing defendants based on the defense of laches was not a final judgment because it did not dispose of all the claims of all the parties where the issue of paternity was still before the court. Woods v. Fields, 798 S.W.2d 239, 1990 Tenn. App. LEXIS 216 (Tenn. Ct. App. 1990), rehearing denied, 798 S.W.2d 239, 1990 Tenn. App. LEXIS 285 (Tenn. App. 1990).

The occurrence of a contingency terminating support was not a "final judgment" subject to the provisions of T.R.A.P. 3 and Tenn. R. Civ. P. 62.01. Waddey v. Waddey, 6 S.W.3d 230, 1999 Tenn. LEXIS 422 (Tenn. 1999).

Because the unfavorable rulings by the trial court did not become appealable for an employee until the trial court entered its order confirming that all claims of all parties had been adjudicated, for purposes of filing an appeal under T.R.A.P. 3, 4(a), the 30-day appeal period commenced on the date that the trial court entered its order, not on the date that the employer and related individual filed a notice of voluntary dismissal of its counterclaim pursuant to Tenn. R. Civ. P. 41.01; the court noted that under the plain language of Tenn. R. Civ. P. 58, the signature of the judge was mandatory to effectuate a judgment. Green v. Moore, 101 S.W.3d 415, 2003 Tenn. LEXIS 324 (Tenn. 2003).

There was a final appealable judgment for purposes of defendant's criminal contempt charges where a judgment of contempt, summary or otherwise, became final upon the entering of punishment, and was thus appealable as of right; it did not matter that the proceedings out of which the contempt arose were not complete. Moody v. Hutchison, 159 S.W.3d 15, 2004 Tenn. App. LEXIS 331 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 1102 (Tenn. Dec. 6, 2004).

Person found guilty of criminal contempt arising out of violation of injunction was permitted to appeal because contempt order constituted a final appealable order, even if the underlying case had not been disposed of yet. Bailey v. Crum, 183 S.W.3d 383, 2005 Tenn. App. LEXIS 362 (Tenn. Ct. App. 2005), review or rehearing denied, — S.W.3d —, 2005 Tenn. LEXIS 1076 (Tenn. 2005).

Although the judgment appealed from was not a final judgment, the issues which had already been adjudicated by the chancery court regarding the partition by cotenants were unlikely to be pretermitted by future events and rather than delaying the inevitable need to address those issues, judicial economy was best served by addressing the issues on their merits in the instant appeal. Parker v. Lambert, 206 S.W.3d 1, 2006 Tenn. App. LEXIS 224 (Tenn. Ct. App. 2006), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 958 (Tenn. 2006).

In a driver's personal injury action wherein the driver accepted the trial court's suggestion of remittitur in protest, an appellate court held the driver's appeal in abeyance because the trial court had not decided the insurer's motion for a new trial and, as such, the trial court improvidently certified the order suggesting remittitur as final under Tenn. R. Civ. P. 54.02. Johnson v. Beverly Nunis & Farmer's Ins. Exch., 383 S.W.3d 122, 2012 Tenn. App. LEXIS 277 (Tenn. Ct. App. Apr. 27, 2012).

Agreed order granting a voluntary nonsuit was not final because the court could not conclude that appellees' abandoned their claim for attorney's fees as a discovery sanction, and therefore the trial court's decision to consider the motion for sanctions notwithstanding the dismissal was affirmed, because the record showed that appellant knew of appellees' intention to pursue attorney's fees as sanctions early in the litigation, the language of the order did not indicate a total abandonment of appellees' claim for sanctions, and appellees raised the fact that their motion for sanctions was pending soon after the dismissal was entered. Menche v. White Eagle Prop. Grp., Llc, — S.W.3d —, 2019 Tenn. App. LEXIS 413 (Tenn. Ct. App. Aug. 26, 2019).

Defendant had a right of appeal from the criminal court's order modifying its order dismissing the indictments filed against him because subsection (b) afforded in criminal cases an appeal as of right from an order or judgment entered pursuant to Tenn. R. Crim. P. 36; to hold otherwise would exalt form over substance and deprive defendant of an opportunity to obtain the relief to which he was entitled since the criminal court lacked authority to modify its final order; State v. Allen, 593 S.W.3d 145, 2020 Tenn. LEXIS 15 (Tenn. Jan. 29, 2020).

As the trial court only addressed two of the four grounds for termination raised in the petition, the trial court's judgment was not final and thus the case was remanded for further proceedings. In re A.W., — S.W.3d —, 2020 Tenn. App. LEXIS 5 (Tenn. Ct. App. Jan. 8, 2020).

As the trial court's order acknowledged that further issues remained to be decided, there was no final judgment, and the trial court's certification was improvident; the rights at issue on appeal were clearly linked with the undecided issue of damages and the appeal was dismissed. Cross v. River Sound Homeowners Ass'n, — S.W.3d —, 2020 Tenn. App. LEXIS 94 (Tenn. Ct. App. Mar. 4, 2020).

In light of the absence of a final judgment, the appeal was dismissed; the trial court's own comments reflected that certain issues relevant to a child support calculation would be addressed at a later date. Wilder v. Wilder, — S.W.3d —, 2020 Tenn. App. LEXIS 96 (Tenn. Ct. App. Mar. 6, 2020).

Appellate court concluded that it lacked subject matter jurisdiction over this appeal because the trial court's order did not adjudicate any of the requests in petitioner's guardianship petition but merely transferred those claims to another court for future adjudication. All of the claims raised in petitioner's guardianship petitioned remained pending in the juvenile court. In re Hector G., — S.W.3d —, 2020 Tenn. App. LEXIS 153 (Tenn. Ct. App. Apr. 14, 2020).

Order setting aside the dismissal of an action was not a final judgment and was not certified as final for purposes of appeal; accordingly, the notice of appeal was prematurely filed, thereby depriving the court of appeals of subject matter jurisdiction. Hampton Reserve Homeowner's Ass'n v. Leipzig, — S.W.3d —, 2021 Tenn. App. LEXIS 70 (Tenn. Ct. App. Feb. 26, 2021).

Appellate court had jurisdiction over appeal of felony murder convictions, even though an aggravated burglary charge was still pending, because the trial court severed the aggravated burglary charge from the felony murder charges prior to trial, and therefore the judgments for the felony murder convictions were final. State v. Perry, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 105 (Tenn. Crim. App. Mar. 23, 2021).

Court rejected the city's suggestion that the judgment lacked finality because the court did not address the merits of the claims or deny the requested relief; the judgment dismissed the petition in its entirety, no further court action was necessary, and the remand to the pension board for a hearing did not make the dismissal any less final. Murrell v. Bd. of Admin. Memphis Pension & Ret. Sys., — S.W.3d —, 2021 Tenn. App. LEXIS 133 (Tenn. Ct. App. Mar. 31, 2021).

18. Writs of Error Abolished.

With the promulgation of T.R.A.P. 3(d), the supreme court announced the abolition of the writ of error as an appellate procedure, and § 27-6-101 et seq., as far as they are in conflict with T.R.A.P. 3, are effectively repealed. Haynes v. McKenzie Memorial Hospital, 667 S.W.2d 497, 1984 Tenn. App. LEXIS 3274 (Tenn. Ct. App. 1984).

19. Compensation Awards for Attorneys.

Where a claimant is dissatisfied with the compensation order of a municipal or general sessions judge, the procedure for review of

orders of those local courts shall be that the claimant may appeal to the circuit or criminal court of the county in which the services were rendered in accordance with existing provisions for appeals in such cases. If not satisfied with the resolution of the matter there, the claimant may proceed to seek further review in accordance with the procedure outlined in Huskey v. State, 688 S.W.2d 417, 1985 Tenn. LEXIS 475 (Tenn. 1985), appeal dismissed, Huskey v. Tennessee, 474 U.S. 936, 106 S. Ct. 299, 88 L. Ed. 2d 277, 1985 U.S. LEXIS 4168 (1985), which provides that a party dissatisfied with a trial court order awarding compensation may appeal as of right to the Tennessee court of criminal appeals pursuant to T.R.A.P. 3, and, thereafter the claim would proceed in accordance with the general rules governing appellate practice and procedure. Allen v. McWilliams, 715 S.W.2d 28, 1986 Tenn. LEXIS 840 (Tenn. 1986).

20. Loss of Right That Could Never be Recaptured.

The action of the trial judge in granting defendant's pretrial motion to strike from the indictment the allegation of a prior driving under the influence conviction resulted in the state losing a right that could never be recaptured, and appeal is under T.R.A.P. 10 rather than T.R.A.P. 3. State v. Gallaher, 730 S.W.2d 622, 1987 Tenn. LEXIS 1007 (Tenn. 1987).

21. Nolo Contendere Plea.

For the purposes of an appeal, the nolo contendere plea has the same effect as a guilty plea. In fact, upon the entry of a nolo contendere plea, any issue which might be dispositive of the case must be explicitly reserved with the consent of the state and the trial court; otherwise, it is waived. State v. Bilbrey, 816 S.W.2d 71, 1991 Tenn. Crim. App. LEXIS 555 (Tenn. Crim. App. 1991), superseded by statute as stated in, State v. Grissom, 956 S.W.2d 514, 1997 Tenn. Crim. App. LEXIS 676 (Tenn. Crim. App. 1997).

22. Guilty Plea.

T.R.A.P. 3 and Tenn. R. Crim. P. 37 did not apply to allow defendant to litigate the issue of the state's rebuttal of the presumption of prosecutorial vindictiveness on appeal since the issue was waived when defendant entered guilty pleas and because the trial court heard evidence, determined the credibility of witnesses, and applied legal principles in reaching its decision on the issue. State v. Turner, 919 S.W.2d 346, 1995 Tenn. Crim. App. LEXIS 779 (Tenn. Crim. App. 1995).

23. Appeal from Guilty Plea Convictions.

Defendant did not have the right to appeal after entering a valid plea of guilty and being sentenced pursuant to the terms of a plea bargain agreement. State v. McKissack, 917 S.W.2d 714, 1995 Tenn. Crim. App. LEXIS 941 (Tenn. Crim. App. 1995).

Under T.R.A.P. 3(b), a defendant who pleaded guilty may appeal the issue of whether or not the trial court had subject matter jurisdiction because jurisdictional defects were not waived by the plea; however, the trial court properly had subject matter jurisdiction, the indictments were orally amended during the guilty plea proceedings, and the judgments indicated agreed amendments to the indictments, such that none of the indictments was void on its face and as a result, no jurisdictional issue was present and defendants waived all other nonjurisdictional defects and constitutional irregularities by their pleas of guilty. State v. Yoreck, 133 S.W.3d 606, 2004 Tenn. LEXIS 330 (Tenn. 2004).

A motion to withdraw a guilty plea can be filed prior to sentencing– before a judgment would be considered final. Necessarily, it follows that an appeal from the denial of a motion to withdraw a guilty plea can be had from a judgment that is not final in the typical sense of the word. State v. Stevison, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 602 (Tenn. Crim. App. Sept. 26, 2019).

24. Waiver.

Petitioner knowingly waived his right to appeal where both his trial attorneys and the trial court advised petitioner of his waiver and he signed a document indicating he understood what he was doing. Carter v. State, 102 S.W.3d 113, 2002 Tenn. Crim. App. LEXIS 1014 (Tenn. Crim. App. 2002).

Where appellant raised her claim that the trial court gave erroneous jury instructions as to the definition of "knowingly" in a motion for new trial, any issue regarding jury instructions was waived on appeal. State v. Prater, 137 S.W.3d 25, 2003 Tenn. Crim. App. LEXIS 886 (Tenn. Crim. App. 2003), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 169 (Tenn. Mar. 1, 2004).

Although defendant claimed in defendant's motion to suppress that an unreasonable delay occurred between defendant's arrest and defendant's probable cause hearing before a judge or magistrate, the issue was not sufficiently raised in the motion to suppress or otherwise. Therefore, defendant waived appellate review for failure to present the issue to the trial court. State v. Taylor, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 147 (Tenn. Crim. App. Feb. 26, 2020).

Because defendant failed to specifically raise the alleged error of the trial court regarding its denial of his right to represent himself in his motion for a new trial, the issue was waived and he was not entitled to relief. State v. Myers, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 150 (Tenn. Crim. App. Apr. 14, 2021).

25. Post-conviction Appeals.

Trial court erred in denying petitioner's application for a writ of habeas corpus relief

because petitioner stated entitlement to habeas corpus relief in the form of the application of pretrial jail credit; petitioner had no direct appeal avenue to challenge the denial of pretrial jail credit. Anderson v. Washburn, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 79 (Tenn. Crim. App. Feb. 5, 2019), rev'd, — S.W.3d —, 2019 Tenn. LEXIS 248 (Tenn. June 27, 2019).

26. Order Appealed From.

Pursuant to T.R.A.P. 3(f), because appellants' notice of appeal designated the specific order dismissing their motion for reconsideration and they did not file a notice of appeal from the order granting appellees' judicial estoppel motion, the court's review was limited only to the dismissal of the motion for reconsideration and its underlying order. Cox v. Shell Oil Co., 196 S.W.3d 747, 2005 Tenn. App. LEXIS 683 (Tenn. Ct. App. 2005).

In a review of disciplinary procedures, appellate court lacked jurisdiction to hear inmate's writ of certiorari because the trial court had not fully adjudicated all of the inmate's claims; as a result, no final order was issued. Irwin v. Tenn. Dep't of Corr., 244 S.W.3d 832, 2007 Tenn. App. LEXIS 519 (Tenn. Ct. App. Aug. 13, 2007).

Appellant's notice of appeal listed only the order disposing of appellant's motion to reopen proof, but did not list the final decree of divorce. Accordingly, the transcript of the divorce hearing which appellant provided was not germane to the appeal of the disposition of the motion and was of no help in the appellate court's review of the trial court's denial of the motion. Westbrooks v. Westbrooks, — S.W.3d —, 2019 Tenn. App. LEXIS 520 (Tenn. Ct. App. Oct. 29, 2019).

27. Notice of Appeal.

Notice of appeal filed by the wife was prematurely filed and hence was treated as being filed on the date on which the final order in the case was entered; thus, appellate court had jurisdiction of the appeal. In re Ackerman, 280 S.W.3d 206, 2008 Tenn. App. LEXIS 427 (Tenn. Ct. App. July 29, 2008).

Notice of appeal filed by newspaper afforded sufficient notice to nursing home that it intended to raise issues adjudicated in trial court's order relating to unfiled discovery; nursing home did not argue that it was taken by surprise, and T.R.A.P. 3 was not intended to limit the scope of review so long as the notice of appeal informed the intention to seek further review of trial court's judgment. In re NHC — Nashville Fire Litig., 293 S.W.3d 547, 2008 Tenn. App. LEXIS 688 (Tenn. Ct. App. Nov. 21, 2008).

Appellate court had jurisdiction over insureds' appeal because the notice of appeal encompassed all of the orders of trial court despite the fact that the notice only designated the final judgment. Cox v. Tennessee Farmers Mut. Ins. Co., 297 S.W.3d 237, 2009 Tenn. App. LEXIS 62 (Tenn. Ct. App. Feb. 9, 2009), appeal denied, Cox v. Tenn. Farmers Mut. Ins. Co., — S.W.3d —, 2009 Tenn. LEXIS 579 (Tenn. Aug. 31, 2009).

28. No Right to Appeal.

No appeal as of right flowed from petitioner's filing of a motion for new trial, the substance of which pertained to the denial of his petition for post-conviction relief, because neither the rule nor the Post-Conviction Procedure Act provided for such a filing; the law does not provide for an appeal as of right from the denial of a motion to reconsider a post-conviction petition. Hassman v. State, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 152 (Tenn. Crim. App. Mar. 11, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 351 (Tenn. July 19, 2019).

Defendant was not entitled to an appeal as of right pursuant to this rule, after being placed on the sexual offender registry because a judgment of conviction had not been entered by the trial court, which granted defendant's request for judicial diversion after he plead guilty to statutory rape. State v. Holcomb, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 89 (Tenn. Crim. App. Mar. 12, 2021).

29. Subject-matter Jurisdiction.

While language contained in the judgment might satisfy the requirement of an express direction for the entry of judgment, the judgment lacked a finding that there was no just reason for delay; despite this, the court found good cause to exercise jurisdiction, given the grave nature of the termination proceedings and the importance that statutes placed on expeditious resolution of these matters. In re Josiah T., — S.W.3d —, 2019 Tenn. App. LEXIS 482 (Tenn. Ct. App. Oct. 2, 2019).

Trial court lost subject matter jurisdiction over a bail bonding company's motions to exonerate because the trial court lost subject matter jurisdiction to amend or modify its final judgment when the bail bonding company filed a notice of appeal seeking relief from the final judgment. State v. La Ron Houston-Church (In re 911 Bail Bonding, LLC, Surety), — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 46 (Tenn. Crim. App. Feb. 9, 2021).

30. Motion Improperly Granted.

Because there was sufficient evidence to support defendant's convictions, the trial court's order granting the motion for judgment of acquittal on the offense of aggravated robbery was vacated, and the jury's verdict finding defendant guilty of that offense was reinstated. State v. Harris, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 59 (Tenn. Crim. App. Feb. 23, 2021).

Rule 3. [Proposed rule. See Current rule and compiler's notes.] Appeal as of Right: Availability; Method of Initiation. — (a) Availability of Appeal as of Right in Civil Actions. — In civil actions every final judgment entered by a trial court from which an appeal lies to the Supreme Court or Court of Appeals is appealable as of right. Except as otherwise permitted in Rule 9 and in Rule 54.02 Tennessee Rules of Civil Procedure, if multiple parties or multiple claims for relief are involved in an action, any order that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties is not enforceable or appealable and is subject to revision at any time before entry of a final judgment adjudicating all the claims, rights, and liabilities of all parties.

(b) Availability of Appeal as of Right by Defendant in Criminal Actions. — In criminal actions an appeal as of right by a defendant lies from any judgment of conviction entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals: (1) on a plea of not guilty; and (2) on a plea of guilty or nolo contendere, if the defendant entered into a plea agreement but explicitly reserved the right to appeal a certified question of law dispositive of the case pursuant to and in compliance with the requirements of Rule 37(b)(2)(A) or (D) of the Tennessee Rules of Criminal Procedure, or if the defendant seeks review of the sentence and there was no plea agreement concerning the sentence, or if the issues presented for review were not waived as a matter of law by the plea of guilty or nolo contendere and if such issues are apparent from the record of the proceedings already had. The defendant may also appeal as of right from an order denying or revoking probation; an order denying a motion for reduction of sentence pursuant to Rule 35(d), Tennessee Rules of Criminal Procedure; an order or judgment entered pursuant to Rule 36 or Rule 36.1, Tennessee Rules of Criminal Procedure; from a final judgment in a criminal contempt, habeas corpus, extradition, or post-conviction proceeding; from a final order on a request for expunction; and from the denial of a motion to withdraw a guilty plea under Rule 32(f), Tennessee Rules of Criminal Procedure.

(c) Availability of Appeal as of Right by the State in Criminal Actions. — In criminal actions an appeal as of right by the state lies only from an order or judgment entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals: (1) the substantive effect of which results in dismissing an indictment, information, or complaint; (2) setting aside a verdict of guilty and entering a judgment of acquittal; (3) arresting judgment; (4) granting or refusing to revoke probation; or (5) remanding a child to the juvenile court. The state may also appeal as of right from a final judgment in a habeas corpus, extradition, or post-conviction proceeding; from the modification of a sentence pursuant to Rule 35(d), Tennessee Rules of Criminal Procedure; from an order or judgment entered pursuant to Rule 36 or Rule 36.1, Tennessee Rules of Criminal Procedure; and from a final order on a request for expunction.

(d) Definition; One Method of Appeal as of Right. — An appeal as of right is an appeal that does not require permission of the trial or appellate court as a prerequisite to taking an appeal. There shall be one method of appeal as of right to be known as an "appeal as of right." Writs of error, appeals in the

nature of a writ of error, and simple appeals are abolished.

(e) Initiation of Appeal as of Right. — An appeal as of right to the Supreme Court, Court of Appeals, or Court of Criminal Appeals shall be taken by timely filing a notice of appeal with the clerk of the appellate court as provided in Rule 4 and by service of the notice of appeal as provided in Rule 5. An appeal as of right may be taken without moving in arrest of judgment, praying for an appeal, entry of an order permitting an appeal or compliance with any other similar procedure. Provided, however, that in all cases tried by a jury, no issue presented for review shall be predicated upon error in the admission or exclusion of evidence, jury instructions granted or refused, misconduct of jurors, parties or counsel, or other action committed or occurring during the trial of the case, or other ground upon which a new trial is sought, unless the same was specifically stated in a motion for a new trial; otherwise such issues will be treated as waived. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal but is ground only for such action as the appellate court deems appropriate, which may include dismissal of the appeal.

(f) Content of the Notice of Appeal. — The notice of appeal shall specify the party or parties taking the appeal by naming each one in the caption or body of the notice (but an attorney representing more than one party may describe those parties with such terms as "all plaintiffs," "the defendants," "the plaintiffs A, B, et al.," or "all defendants except X"), shall designate the judgment from which relief is sought, and shall name the court to which the appeal is taken. The notice of appeal should include a list of the parties upon whom service of notice of docketing of the appeal is required by Rule 5 of these rules. An appeal shall not be dismissed for informality of form or title of notice of appeal.

(g) Definition of Judgment. — The term "judgment" as used in these rules includes a decree.

(h) Cross Appeals and Separate Appeals Not Required in Civil Cases. — Consistent with Rule 13(a), cross appeals and separate appeals are not required. Consequently, upon the filing of a single notice of appeal in a civil case, issues may be brought up for review and relief pursuant to these rules by any party.

(i) For purposes of this rule, the terms "party" and "parties" shall include any person filing a motion to intervene pursuant to Tenn. R. Civ. P. 24. [As amended effective July 1, 1980; as amended effective May 7, 1981; by order effective July 1, 1996; by order effective July 1, 1998; by order filed January 31, 2002, effective July 1, 2002; by order entered December 10, 2003, effective July 1, 2004; by order entered January 6, 2005, effective July 1, 2005; by order filed January 13, 2012, effective July 1, 2012; by order filed December 18, 2012, effective July 1, 2013; by order filed January 2, 2015, effective July 1, 2015; and by order filed December 21, 2016, effective July 1, 2017; by order filed January 8, 2018, effective July 1, 2018; and by order filed December 3, 2020, effective July 1, 2021.]

Advisory Commission Comments. *Subdivision (a).* This subdivision states the general rule that in civil actions an appeal as of right may be taken only after entry of a final judgment. In addition, the rule offers a definition of finality in those circumstances in which mul-

tiple claims or multiple parties are involved. The rule does not otherwise define a final judgment because it is typically clear whether an order is final or interlocutory. Interlocutory appeals are governed by Rules 9 and 10.

Subdivision (b). This subdivision specifies those situations in which the defendant in a criminal action may appeal as of right. Interlocutory appeals by the defendant may be sought as provided in Rules 9 and 10.

Subdivision (c). The only limitation placed upon the right of appeal by the state is that it may not appeal upon a judgment of acquittal. In addition, notions of double jeopardy place constitutional restrictions on the availability of appeals by the state. *See, e. g., United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977). This subdivision specifies situations, within constitutional limits, in which it seems desirable to recognize the state's right of appeal. In addition, the rule provides that appeals as of right lie only in those circumstances specified in the subdivision. Interlocutory appeals by the state may be sought as provided in Rules 9 and 10.

Subdivision (d). These rules recognize two types of appeals: appeals as of right and appeals by permission. This subdivision defines an appeal as of right as one that does not require the permission of either the trial or appellate court as a prerequisite to taking an appeal. Appeals by permission, on the other hand, require that either the trial court or the appellate court expressly authorize the taking of an appeal.

Subdivision (e). The intent of this subdivision is to provide a uniform and simplified method of taking an appeal as of right. This subdivision combined with Rules 4 and 5 require that a notice of appeal be filed with the clerk of the trial court within the time prescribed for taking an appeal and that a copy of the notice of appeal be served on all parties. The form and content of the notice of appeal are set out in official form 1, and Rule 48 specifically provides that the use of this form is sufficient under these rules.

Rule 36 provides that relief need not be granted to a party who fails to take whatever action is reasonably available to prevent or nullify the harmful effect of error. Failure to present an issue to the trial court, therefore, will typically not merit appellate relief. In addition, under Rule 13(c) the appellate court is generally limited in its review to those facts set forth in the record. Thus matters that can only be made a part of the record by a new trial motion must be so included in order to gain appellate review. Jury misconduct provides one example.

Under Rule 16, two or more persons may proceed on appeal jointly. Thus it is entirely proper for parties to file a joint notice of appeal; however, a joint notice of appeal must comply with subdivision (f) of this rule.

Subdivision (f). This subdivision specifies the content of the notice of appeal. The purpose of the notice of appeal is simply to declare in a formal way an intention to appeal. As long as this purpose is met, it is irrelevant that the paper filed is deficient in some other respect. Similarly, the notice of appeal plays no part in defining the scope of appellate review. Scope of review is treated in Rule 13. This subdivision read in conjunction with Rule 13(a) permits any question of law to be brought up for review [except as otherwise provided in Rule 3(e)] as long as any party formally declares an intention to appeal in a timely fashion.

Subdivision (g). This subdivision makes clear that the term "judgment" as used in these rules is not limited to its strict common-law definition but includes equitable decrees. This subdivision is derived from Rule 54.01 of the Tennessee Rules of Civil Procedure.

Advisory Commission Comments [1980]. This amendment adds the following instances in which the state may appeal as of right from a final judgment in criminal actions: (1) habeas corpus proceedings, (2) extradition proceedings, and (3) post conviction relief proceedings. This amendment does not represent any change in existing law.

Advisory Commission Comments [1996]. The final sentence of Rule 3(e) ensures that trial judges will know what decisions have been appealed.

Advisory Commission Comments [1998]. Because the trial clerk rather than the appellant's lawyer is now responsible for serving the appellate clerk with a copy of the notice of appeal, the words "and service" were deleted from subdivision (e).

Advisory Commission Comments [1999]. It is the policy of the appellate court clerk's office in cases involving cross appeals to consider the appellant to be the party who first files a notice of appeal; in the event that the notices are filed on the same day, the plaintiff in the proceeding below is considered to be the appellant unless the parties otherwise agree or the court otherwise directs.

Advisory Commission Comments [2000]. The third sentence of Rule 3(e) does not bar an appellee who failed to move for a new trial from raising issues on appeal under Rule 13(a). That has been the practice since adoption of the Appellate Rules, and it is the conclusion reached by Prof. John Sobieski—Reporter at the time—in 46 Tenn. L. Rev. at 732-4 (1979).

Advisory Commission Comments [2002]. Specific reference to Criminal Rule 37(b)(2)(i) and (iv) was added to subdivision (b)(2) to ensure awareness of the strict requirements for appealing a certified question of law. See *State v. Preston*, 759 S.W.2d 647, (Tenn. 1988).

Advisory Commission Comments [2004]. The language of paragraph (f) in parentheses, taken from Federal Rule of Appellate Procedure

3(c), provides a lawyer representing appellants with options other than listing each appellant by name. The lawyer should consult with clients to make sure each wants to appeal, thereby avoiding problems with court costs.

Termination of Parental Rights Proceedings. Rule 8A imposes special requirements governing the appeal of any termination of parental rights proceeding. In particular, Rule 8A(a)(2) imposes a special provision regarding the content of a notice of appeal in such a proceeding.

Advisory Commission Comments [2005]. Former subdivision (h) (pertaining to "assignments of error") is deleted because it is obsolete.

Advisory Commission Comments [2012]. *Generally.* Effective July 1, 2012, the Supreme Court adopted Tenn. Sup. Ct. R. 10B, governing motions seeking disqualification or recusal of a judge. Section 2 of Rule 10B provides the procedural framework for appealing the denial of a disqualification or recusal motion by a judge of a court of record. Section 2.01 of the rule provides that such appeals may be effected either by filing an interlocutory appeal as of right authorized by the rule or by raising the disqualification or recusal issue in an appeal as of right at the conclusion of the case. Under Section 2.01, those two methods of appeal are "the exclusive methods for seeking appellate review of any issue concerning the trial court's ruling on a motion filed pursuant to this Rule." (Emphasis added.) As a result, "neither Tenn. R. App. P. 9 nor Tenn. R. App. P. 10 may be used to seek an interlocutory or extraordinary appeal by permission concerning the judge's ruling on such a motion." Tenn. Sup. Ct. R. 10B, Explanatory Comment to Section 2. Attorneys or self-represented litigants therefore should consult Tenn. Sup. Ct. R. 10B concerning the procedure for appealing from the denial of a disqualification or recusal motion.

Subdivisions (b) and (c). Tenn. R. App. P. 3(b) is amended to update an obsolete cross-reference to Tenn. R. Crim. P. 37(b)(2), changing the subparagraph designations from "(i) or (iv)" to "(A) or (D)."

Rule 3(b) and (c) are amended to provide for an appeal as of right from the trial court's filing of a corrected judgment or order pursuant to Tenn. R. Crim. P. 36.

Advisory Commission Comments [2013]. Tenn. R. Crim. P. 36.1 was adopted in 2013 to provide a mechanism for the defendant or the state to seek to correct an illegal sentence. With the adoption of that rule, this rule (Tenn. R. App. P. 3) was amended to provide for an appeal as of right, by either the defendant (see paragraph 3(b)) or the state (see paragraph 3(c)), from the trial court's ruling on a motion filed under Tenn. R. Crim. P. 36.1 to correct an illegal sentence.

Paragraphs (b) and (c) also were amended to permit appeals as a matter of right for the defendant and the state in expunction requests. The amendments were designed to address the decision in *State v. Adler*, 92 S.W.3d 397 (Tenn. 2002), which held that rulings on expunction requests could only be appealed by use of the writ of certiorari, pursuant to Tenn. Code Ann. § 27-8-101 (2000). Since these matters can be appealed, they now are included under Tenn. R. App. P. 3 as a matter that can be appealed as of right.

Advisory Commission Comments [2014]. The third paragraph of "Subdivision (e)" in the original Advisory Commission was amended by substituting the word "subdivision" for the word "subparagraph." The text of the rule and the text of the other Advisory Commission Comments were not changed.

Advisory Commission Comments [2015]. The amendment added subdivision (h), which refers to Tenn. R. App. P. 13(a)'s statement that "[c]ross appeals...[and] separate appeals" are not required. Subdivision (h) goes on to state that, upon the filing of a single notice of appeal in a civil case, issues may be raised pursuant to these rules by any party. Thus, after the filing of a single notice of appeal by one or more parties, other parties are not required to file a separate notice of appeal in order to raise their own issues in the appellate court.

Advisory Commission Comments [2017]. In 2017, the Appellate Court Clerk's office will implement electronic filing and begin charging fees at the initiation of an appeal. To accommodate these initiatives, subdivision (e) of this rule is amended to change the location for filing the notice of appeal from the office of the trial court clerk to the office of the appellate court clerk. Subdivision (f) is also amended to be consistent with amended Form 1 ("Notice of Appeal") in the Appendix to the rules.

This paragraph of the Comment is added to cross-reference the 2017 amendment to Tenn. R. Crim. P. 36, which provides that an appeal as of right is available following the trial court's *denial* of a motion filed pursuant to Tenn. R. Crim. P. 36, in addition to cases in which the court files a corrected judgment or order. That amendment makes Tenn. R. Crim. P. 36 consistent with the text of the 2012 amendment to Tenn. R. App. P. 3(b) and (c), which authorized an appeal as of right from "an order or judgment entered pursuant to Rule 36..., Tennessee Rules of Criminal Procedure[.]" As a result of the 2017 amendment to Tenn. R. Crim. P. 36, the second paragraph of the 2012 Advisory Commission Comment to Tenn. R. App. P. 3(b) and (c) is superseded.

Advisory Commission Comments [2018]. The 2018 amendment adds to the list in subsection (b) a motion for withdrawal of a plea of guilty. *See State v. Peele*, 59 S.W.3d 701 (Tenn. 2001). The 2018 amendment also adds a new subsection (i) to clarify that the terms "party" and "parties" include persons who have filed motions to intervene and desire to take an

appeal of right, as is permitted by the 2018 amendments to Rules 24 and 54, Tennessee Rules of Civil Procedure. Effective July 1, 2018, any order granting or denying a motion to intervene shall be a final judgment, and a timely appeal of that final judgement shall be the only method to appeal the grant or denial of a motion to intervene.

Advisory Commission Comments [2021]. Rule 35(d), Tennessee Rules of Criminal Procedure provides that a defendant may appeal the denial of a motion for reduction of sentence and that the State may appeal from a modification of a sentence. The 2021 amendment adds to the list of available appeals in subsection (b) a motion for reduction of sentence and in subsection (c) from a modification of a sentence.

Compiler's Notes. T.R.A.P. 3(d) may supersede Tenn. Code Ann. §§ 27-3-107, 27-6-102, 27-6-108, 27-6-112.

T.R.A.P. 3(d) may affect Tenn. Code Ann. §§ 8-47-123, 25-5-106, 27-1-114, 27-3-107, 27-6-101, 36-830 [now § 36-4-123], 37-258(f) [now § 37-1-159], 40-11-113, 40-26-104, 40-30-102, 40-30-120, 40-30-122, 40-30-124 (repealed), 49-1417 [now § 49-5-513], 50-1018 [now § 50-6-225].

T.R.A.P. 3(e) may supersede Tenn. Code Ann. §§ 27-6-107, 27-6-108.

T.R.A.P. 3(e) may affect Tenn. Code Ann. §§ 27-9-112, 30-518 [now § 30-2-315], 40-26-102, 49-1759 [now § 49-6-3205], 49-3258 [now § 49-8-304], 50-560 [now § 50-3-806], 58-1-230(d), 70-1006 [now § 69-6-406].

The amendment of Rule 3, as promulgated and adopted by the Supreme Court in its order dated December 10, 2003, was ratified and approved by 2004 House Resolution 234 and Senate Resolution 117. The order promulgating the amendment of Rule 3 provided that it take effect July 1, 2004.

The deletion of Rule 3(h), as promulgated and adopted by the Supreme Court in its order dated January 6, 2005, was ratified and approved by 2005 House Resolution 14 and Senate Resolution 10. The order promulgating the deletion of Rule 3(h) provided that it take effect July 1, 2005.

The amendment of Rule 3, as promulgated and adopted by the Supreme Court in its order dated January 13, 2012, was ratified and approved by 2012 House Resolution 194 and Senate Resolution 80. The order promulgating the amendment of Rule 3 provided that it take effect July 1, 2012.

The amendment of Rule 3, which amended subsections (b) and (c) and added the 2013 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 18, 2012, was ratified and approved by House Resolution 35 and Senate Resolution 13. The order promulgating the amendment of subsections (b) and (c) and the addition of the 2013 Advisory Commission Comments provided that it take effect July 1, 2013.

The amendment of Rule 3, which amended the third paragraph of "Subdivision (e)" in the original Advisory Commission Comments and added the 2014 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 16, 2013, as amended, March 14, 2014, was ratified and approved by House Resolution 156 and Senate Resolution 75. The order promulgating the amendment of the third paragraph of "Subdivision (e)" in the original Advisory Commission Comments and the addition of the 2014 Advisory Commission Comments provided that it take effect July 1, 2014.

The amendment of rule 3, which added subdivision (h) and added the 2015 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated January 2, 2015, was ratified and approved by 2015 House Resolution 3 and Senate Resolution 13. The order promulgating the amendment of this rule provided that it take effect on July 1, 2015.

The amendment of Rule 3, which amended subdivisions (e) and (f) and added the [2017] Advisory Comments, as promulgated and adopted by the Supreme Court in its order dated December 21, 2016, was ratified and approved by 2017 House Resolution 19 and Senate Resolution 16. The order promulgating the amendment of subdivisions (e) and (f) and the addition of the [2017] Advisory Comments, provided that it take effect July 1, 2017.

In its order filed January 8, 2018, the Supreme Court adopted amendments to this rule, effective July 1, 2018, subject to approval by resolution of the General Assembly.

The amendment of Rule 3, which amended subdivisions (b) and (i) and added the [2018] Advisory Comments, as promulgated and adopted by the Supreme Court in its order dated January 8, 2018, was ratified and approved by 2018 House Resolution 200 and Senate Resolution 165. The order promulgating the amendment of subdivisions (b) and (i8 and the addition of the [2017] Advisory Comments, provided that it take effect July 1, 2018.

In its order filed December 3, 2020, the Supreme Court adopted the amendment to this rule, effective July 1, 2021, subject to approval by resolution of the General Assembly.

The amendment of Rule 3, which amended subdivisions (b) through (c) and added the [2021] Advisory Comments, as promulgated and adopted by the Supreme Court in its order dated December 3, 2020, was ratified and approved by 2021 House Resolution 22 and Senate Resolution 20. The order promulgating the amendment of subdivisions (b) through (c) and the addition of the [2021] Advisory Comments, provided that it take effect July 1, 2021.

Cross-References. Appeal of order requiring person gathering information for publication or broadcast to disclose, T.C.A. § 24-1-208.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 214, 236, 659, 667.

Tennessee Forms (Robinson, Ramsey and Harwell), No. 2-3-2.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 4-6, 16, 18-33, 36, 41-59, 61, 63, 67-70, 75, 78, 81-86, 99-120, 127, 130-138; 3 Tenn. Juris., Attachment and Garnishment, § 170; 4 Tenn. Juris., Bail and Recognizance, § 16; 5 Tenn. Juris., Carriers, § 58; 5 Tenn. Juris., Certiorari, §§ 10, 11; 7 Tenn. Juris. Corporations, § 117; 8 Tenn. Juris., Costs, §§ 42, 65; 8 Tenn. Juris., Criminal Procedure, § 39; 9 Tenn. Juris., Dismissal, Discontinuance and Nonsuit, § 15; 11 Tenn. Juris., Evidence, § 80; 12 Tenn. Juris., Exceptions, Bill of, § 4; 13 Tenn. Juris., Forcible Entry and Detainer, §§ 17, 19; 14 Tenn. Juris., Habeas Corpus, § 11; 16 Tenn. Juris., Intoxicating Liquors, § 7; 16 Tenn. Juris., Judges, § 15; 16 Tenn. Juris., Judgments and Decrees, § 45; 16 Tenn. Juris., Judicial Sales, § 48; 17 Tenn. Juris., Larceny, § 13; 18 Tenn. Juris., Lis Pendens, § 5; 19 Tenn. Juris., Motions and Summary Proceedings, § 2; 20 Tenn. Juris., New Trials, §§ 27, 29; 20 Tenn. Juris., Pleading, § 10; 21 Tenn. Juris., Reference and Commissioners, § 13; 23 Tenn. Juris., Streets and Highways, § 35.

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1. Construction.

The inference in T.R.A.P. 3(e) that the timely filing and service of a notice of appeal affects the validity of the appeal is a general reference rather than a specific reference to the subject of suspension of rules. G. F. Plunk Constr. Co. v. Barrett Properties, Inc., 640 S.W.2d 215, 1982 Tenn. LEXIS 435 (Tenn. 1982).

The express language of T.R.A.P. 2, the rule that grants the appellate courts authority to suspend the rules and at the same time prohibits waiver of the rules in three instances, must prevail over the conflicting language of Rule 3(e). G. F. Plunk Constr. Co. v. Barrett Properties, Inc., 640 S.W.2d 215, 1982 Tenn. LEXIS 435 (Tenn. 1982).

T.R.A.P. 3(e) is consistent with Tenn. R. Civ. P. 50, and is limited to issues which were tried to the jury, to jury misconduct and to other events occurring during a jury trial or in some other way involving the jury, its verdict or instructions to that body. McCormic v. Smith, 659 S.W.2d 804, 1983 Tenn. LEXIS 735 (Tenn. 1983).

Where a plea agreement stated that the defendant retained his right to "appeal legal issues," this did not mean all legal issues but rather those reserved in the plea agreement. To hold otherwise would have exceeded the legal bounds of Tenn. R. Crim. P. 37(b)(2)(i) or T.R.A.P. 3(b). State v. Shults, 684 S.W.2d 108, 1984 Tenn. Crim. App. LEXIS 2983 (Tenn. Crim. App. 1984).

The right to counsel on a first tier appeal derives from notions of equal protection and due process under the fourteenth amendment. State v. Gillespie, 898 S.W.2d 738, 1994 Tenn. Crim. App. LEXIS 602 (Tenn. Crim. App. 1994).

There is no constitutional right of appeal, but where appellate review is provided by statute, the proceedings must comport with constitutional standards. State v. Gillespie, 898 S.W.2d 738, 1994 Tenn. Crim. App. LEXIS 602 (Tenn. Crim. App. 1994).

There is nothing in the Rules of Appellate Procedure that requires a defendant to raise the sufficiency of evidence either in a motion for judgment of acquittal or in a motion for new trial in order to preserve the issue for appellate review. When the issue, if found to be meritorious, would result in dismissal of the prosecution against the accused the T.R.A.P. 3 waiver provisions do not apply. State v. Electroplating, Inc., 990 S.W.2d 211, 1998 Tenn. Crim. App. LEXIS 618 (Tenn. Crim. App. 1998), rehearing denied, — S.W.2d —, 1998 Tenn. Crim. App. LEXIS 799 (Tenn. Crim. App. Aug. 7, 1998), overruled in part, State v. King, — S.W.3d —, 2013 Tenn. Crim. App. LEXIS 192 (Tenn. Crim. App. Mar. 4, 2013), overruled in part, State v. King, 432 S.W.3d 316, 2014 Tenn. LEXIS 351 (Tenn. Apr. 23, 2014).

As a general matter, appellate courts will decline to consider issues raised for the first time on appeal that were not raised and considered in the trial court; however, T.R.A.P. 3(b) and T.R.A.P. 36(a) give appellate courts considerable discretion to consider issues that have not been properly presented in order to achieve fairness and justice. Heatherly v. Merrimack Mut. Fire Ins. Co., 43 S.W.3d 911, 2000 Tenn. App. LEXIS 751 (Tenn. Ct. App. 2000).

An improperly filed T.R.A.P. 3 appeal may be treated as a T.R.A.P. 10 extraordinary appeal. State v. Norris, 47 S.W.3d 457, 2000 Tenn. Crim. App. LEXIS 437 (Tenn. Crim. App. 2000).

Before an issue can be properly preserved in a motion for a new trial under T.R.A.P. 3(e), a well pleaded motion should: (1) Allege a sufficient factual basis for the error by setting forth the specific circumstances giving rise to the alleged error; and (2) Allege a sufficient legal basis for the error by identifying the trial court's claimed legal basis for its action and some articulation of why the court erred in taking such actions. Fahey v. Eldridge, 46 S.W.3d 138, 2001 Tenn. LEXIS 233 (Tenn. 2001).

Precise citation to a rule, statute, or case as the legal ground for the alleged error is normally not required to preserve the issue for appeal under T.R.A.P. 3(e), although to the extent that citation to authority aids in fairly bringing the legal nature of the error to the attention of the trial judge, such a practice ought to be encouraged. Fahey v. Eldridge, 46 S.W.3d 138, 2001 Tenn. LEXIS 233 (Tenn. 2001).

Although defendants' motions were not models to be followed when seeking to bring alleged errors to the attention of the trial court or to preserve those alleged errors for appeal, it was possible to identify, with diligent and patient effort, at least 12 alleged errors that were stated with sufficient specificity as to be preserved for appellate review; therefore, the court erred in dismissing the appeal pursuant to T.R.A.P. 3(e). Fahey v. Eldridge, 46 S.W.3d 138, 2001 Tenn. LEXIS 233 (Tenn. 2001).

As petitioner's document entitled "notice of appeal" included a reference to the trial judge's order, the issue sought to be raised, i.e., the legality of his sentence, and the argument that the sentence violated the Sixth Amendment, it was sufficient to comply with the rule. Graham v. State, 90 S.W.3d 687, 2002 Tenn. LEXIS 548 (Tenn. 2002), rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 66 (Tenn. 2003).

Denial of the attorney's request that the trial court expunge the public records relating to the charge of criminal contempt was improper, where T.C.A. § 40-32-101(a)(1) applied insofar as the contempt charges were criminal in nature; further, the attorney's petition was properly treated as a petition for a writ of certiorari, because there was no right to appeal an unfavorable ruling on expungement, pursuant to T.R.A.P. 3(c), and thus, there was no other plain, speedy, or adequate remedy without granting the writ. Robinson v. Fulliton, 140 S.W.3d 304, 2003 Tenn. App. LEXIS 789 (Tenn. Ct. App. 2003).

2. Construction with Other Rules.

Good cause existed to allow victims to proceed with their appeal of the trial court's denial of their petition to intervene because judicial economy would not be served by dismissing the appeal and remanding to the trial court until the resolution of all of the issues in the underlying action; if the victims were entitled to intervene, a delay in allowing them to participate could prejudice their rights. White v. Johnson, 522 S.W.3d 417, 2016 Tenn. App. LEXIS 474 (Tenn. Ct. App. July 7, 2016).

3. Purpose of Subsection (e).

The reason for T.R.A.P. 3(e) is to allow the trial court to rectify any errors that might have been made at trial and to avoid appeal by ambush. Mason v. Tennessee Farmers Mut. Ins. Co., 640 S.W.2d 561, 1982 Tenn. App. LEXIS 412 (Tenn. Ct. App. 1982).

Pursuant to T.R.A.P. 3(e), appellate courts should review a motion for a new trial in the light most likely to preserve the issue alleged, although courts cannot create an error where none has been legitimately preserved. Fahey v. Eldridge, 46 S.W.3d 138, 2001 Tenn. LEXIS 233 (Tenn. 2001).

4. Appeal Dismissed.

Appeal from a non-final order granting an allegedly untimely motion for relief from a default judgment was dismissed because no per se exception to the finality rule was proper, as (1) such an exception conflicted with the policy against piecemeal appeals, (2) a trial court still had subject matter jurisdiction to consider the motion, and (3) Tennessee law provided multiple avenues of review. Levitt, Hamilton, & Rothstein, LLC v. Asfour, 587 S.W.3d 1, 2019 Tenn. App. LEXIS 162 (Tenn. Ct. App. Mar. 29, 2019).

Appeal from a non-final order granting an allegedly untimely motion for relief from a default judgment was dismissed because it was not appropriate to suspend the final judgment rule, as (1) more than tertiary issues were unadjudicated, (2) the case did not involve multiple appeals, (3) the order did not adjudicate all of one party's claims or impose one party's possible incarceration, (4) the ruling did not decide all other issues, (5) judicial economy did not justify suspending finality, and (6) an immediate appeal was unnecessary to prevent needless litigation or irreparable injury. Levitt, Hamilton, & Rothstein, LLC v. Asfour, 587 S.W.3d 1, 2019 Tenn. App. LEXIS 162 (Tenn. Ct. App. Mar. 29, 2019).

When defendant, after pleading guilty to aggravated statutory rape, completed judicial diversion and charges were dismissed with prejudice, defendant's appeal of an order finding no jurisdiction to order defendant's removal from the sexual offender registry was dismissed because, upon dismissal, there was no criminal case for an appellate court to review, as the trial court then had no subject matter or personal jurisdiction, and defendant had no appeal as of right. State v. Seymour, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 253 (Tenn. Crim. App. Apr. 22, 2019).

If co-defendant successfully completes his probationary period, no judgments of conviction would be entered, and if his probation was revoked and his convictions subsequently reinstated, he would be entitled to a Tenn. R. App. P. 3 appeal at that time; court declined to convert the appeal into a Tenn. R. App. P. 10 appeal by permission and ordered that his appeal be dismissed. State v. Sullivan, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 101 (Tenn. Crim. App. Mar. 22, 2021).

5. Discretion of Trial Judge.

Defendant's failure to take any action to call issue of trial court's instruction to the trial court's attention and his active procurement of an instruction he now claims was erroneous would preclude review on appeal; however, if defendant was tried under law inapplicable to his case, his substantial rights may have been affected, and under these circumstances the supreme court will exercise its discretion to review issue in order to insure substantial justice is done. State v. Brimmer, 876 S.W.2d 75, 1994 Tenn. LEXIS 15 (Tenn. 1994), rehearing denied, 876 S.W.2d 75, 1994 Tenn. LEXIS 136 (1994), cert. denied, Brimmer v. Tennessee, 513 U.S. 1020, 115 S. Ct. 585, 130 L. Ed. 2d 499, 1994 U.S. LEXIS 8413 (1994).

6. Vested Right of Appeal.

A defendant has a vested right of appellate review of the action of the trial judge in granting plaintiff a new trial. Panzer v. King, 743 S.W.2d 612, 1988 Tenn. LEXIS 5 (Tenn. 1988).

T.R.A.P. 3(b) did not specifically enumerate that a defendant may appeal as of right a denial of a motion to modify a condition of probation; thus, defendant did not have appeal as of right to challenge trial court's decision. State v. Lane, 254 S.W.3d 349, 2008 Tenn. LEXIS 365 (Tenn. May 20, 2008).

7. Contents of New Trial Motion.

To comply with T.R.A.P. 3(e) of this rule, the motion for new trial must specify the portion of the oral argument complained of with reasonable certainty, or the matter cannot be considered by the trial court on the motion for new trial or by an appellate court on appeal. State v. McKinney, 603 S.W.2d 755, 1980 Tenn. Crim. App. LEXIS 289 (Tenn. Crim. App. 1980).

The grounds relied upon in a motion for new trial must be specified with reasonable certainty so as to advise the trial court and opposing counsel of the alleged error or irregularity relied upon and to enable the appellate courts to see that the alleged error was presented to the trial court for correction as required by T.R.A.P. 36(a); otherwise, the matter cannot be considered by the trial court on the motion for a new trial or by an appellate court on appeal. State v. King, 622 S.W.2d 77, 1981 Tenn. Crim. App. LEXIS 373 (Tenn. Crim. App. 1981); State v. Gauldin, 737 S.W.2d 795, 1987 Tenn. Crim. App. LEXIS 2594 (Tenn. Crim. App. 1987).

It is not sufficient that the defendant file some document within 30 days of the date of the sentence order; he must file a motion for a new trial containing specific grounds for relief. State v. Blunkall, 731 S.W.2d 72, 1987 Tenn. Crim. App. LEXIS 2103 (Tenn. Crim. App. 1987).

8. Failure to Raise Issue in New Trial Motion.

Untimely filing of a motion for new trial waives appellant's right to present those issues on appeal. The court, however, has the authority to review the record for apparent errors, assuming a timely notice of appeal has been filed. State v. Givhan, 616 S.W.2d 612, 1981 Tenn. Crim. App. LEXIS 335 (Tenn. Crim. App. 1981).

A finding that the evidence was insufficient to support the verdict would mandate a dismissal, and thus such ground would be subject to

review even though it was not listed in a motion for a new trial. State v. Durham, 614 S.W.2d 815, 1981 Tenn. Crim. App. LEXIS 331 (Tenn. Crim. App. 1981).

Where appellant's motion for new trial alleged that the jury's verdict was based on passion, sympathy, prejudice and caprice, it did not properly allege juror misconduct. The court was foreclosed from considering that issue by the appellant's failure to state the grounds in its motion, raising the issue for the first time on appeal. Terry v. Plateau Electric Coop., 825 S.W.2d 418, 1991 Tenn. App. LEXIS 98 (Tenn. Ct. App. 1991), rehearing denied, Terry v. Plateau Electric Co., — S.W.2d —, 1991 Tenn. App. LEXIS 520 (Tenn. Ct. App. July 9, 1991).

Alleged errors were waived because of failure to raise them in the motion for new trial. State v. Caughron, 855 S.W.2d 526, 1993 Tenn. LEXIS 189 (Tenn. 1993), cert. denied, Caughron v. Tennessee, 510 U.S. 979, 114 S. Ct. 475, 126 L. Ed. 2d 426, 1993 U.S. LEXIS 7207 (1993).

The waiver provision of T.R.A.P. 3(e) does not apply when the issue, if found to be meritorious, would result in the dismissal of the prosecution against the accused. State v. Keel, 882 S.W.2d 410, 1994 Tenn. Crim. App. LEXIS 270 (Tenn. Crim. App. 1994).

The waiver provision of T.R.A.P. 3(e) did not apply to the issue of a variance between a conspiracy charge and proof at the trial, even though the issue was not raised in defendant's motion for a new trial. State v. Keel, 882 S.W.2d 410, 1994 Tenn. Crim. App. LEXIS 270 (Tenn. Crim. App. 1994).

Issues concerning instructions given or refused by the trial court are waived if the issues were not included in the motion for a new trial. State v. Keel, 882 S.W.2d 410, 1994 Tenn. Crim. App. LEXIS 270 (Tenn. Crim. App. 1994).

Defendant waived the issue of ineffective assistance of counsel when he failed to raise it in his motion for new trial. State v. Meade, 942 S.W.2d 561, 1996 Tenn. Crim. App. LEXIS 673 (Tenn. Crim. App. 1996).

Where the jury charge is not included in the transcript, the appellate court must presume that the trial court charged the jury fully and correctly. Norman v. Prather, 971 S.W.2d 398, 1997 Tenn. App. LEXIS 923 (Tenn. Ct. App. 1997).

Since motion for continuance was not made until after the jury was impaneled, and the alleged error was not cited in a motion for a new trial, the issue was precluded pursuant to T.R.A.P. 3(e). Mires v. Clay, 3 S.W.3d 463, 1999 Tenn. App. LEXIS 564 (Tenn. Ct. App. 1999).

Because defendants did not raise the defense of equitable estoppel in their respective motions for a new trial, the issue was waived and the court of appeals should not have considered the defense. Alexander v. Armentrout, 24 S.W.3d 267, 2000 Tenn. LEXIS 305 (Tenn. 2000).

As petitioner's document entitled "notice of appeal" included a reference to the trial judge's order, the issue sought to be raised, i.e., the legality of his sentence, and the argument that the sentence violated the Sixth Amendment, it was sufficient to comply with the rule. Graham v. State, 90 S.W.3d 687, 2002 Tenn. LEXIS 548 (Tenn. 2002), rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 66 (Tenn. 2003).

In an action seeking to establish that a public road extended to a company's northern property line, because the adjoining property owners and the city failed to raise the issue of admitting evidence of motive of the city officials in their motion for a new trial, the issue was waived. Brandy Hills Estates, LLC v. Reeves, 237 S.W.3d 307, 2006 Tenn. App. LEXIS 794 (Tenn. Ct. App. Dec. 15, 2006), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 607 (Tenn. June 25, 2007).

During defendant's criminal trial, he did not object to either the inclusion of the "obtaining" element in the theft jury instruction or the omission of an accomplice jury instruction; because defendant failed to raise the issue in his motion for new trial, it was deemed waived under Tenn. R. Crim. P. 30(b). State v. Bowman, 327 S.W.3d 69, 2009 Tenn. Crim. App. LEXIS 35 (Tenn. Crim. App. Jan. 14, 2009), appeal denied, — S.W.3d —, 2009 Tenn. LEXIS 395 (Tenn. June 15, 2009), cert. denied, Bowman v. Tennessee, 175 L. Ed. 2d 388, 130 S. Ct. 559, 2009 U.S. LEXIS 8080 (U.S. 2009).

Issue of whether the trial court erred in admitting the statements of an eyewitness to a shooting through the testimony of a police officer was precluded from plenary appellate review because it should have been raised in a timely filed motion for new trial. The appellate court could then review for plain error only. State v. Branch, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 79 (Tenn. Crim. App. Feb. 11, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 362 (Tenn. June 3, 2020).

Defendant waived consideration of additional claims regarding the admission of evidence which defendant raised on appeal because defendant did not raise those claims in defendant's motion for new trial Moreover, defendant did not argue that defendant was entitled to plain error relief on those claims. State v. Jackson, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 353 (Tenn. Crim. App. May 14, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 454 (Tenn. Aug. 5, 2020).

Defendant waived the issue of whether the trial court erred by allowing the State of Tennessee to play an audio recording of a controlled drug buy because defendant failed to raise the issue in defendant's motion for a new trial or at the hearing on the motion. State v. Strong, —

S.W.3d —, 2021 Tenn. Crim. App. LEXIS 66 (Tenn. Crim. App. Feb., 28, , 2021).

9. Preservation for Review.

On appeal from his convictions for first-degree premeditated murder and abuse of a corpse, defendant's claim that the trial court erred by permitting the state to argue that defendant raped the victim and then killed her to cover up the rape was waived for failing to lodge a contemporaneous objection, T.R.A.P. 36(a), 3(e). Although the prosecutor's statement arguably included facts not in evidence, defense counsel did not object to the argument, and the prosecutor admitted that she could not prove her assertions beyond a reasonable doubt; under those circumstances, the record did not establish either that defendant did not waive the issue for tactical reasons or that consideration of the error was necessary to do substantial justice and thus, the prosecutor's argument, even if improper, did not rise to the level of plain error. State v. Hill, 333 S.W.3d 106, 2010 Tenn. Crim. App. LEXIS 371 (Tenn. Crim. App. May 12, 2010), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 953 (Tenn. Oct. 12, 2010).

Defendant did not properly preserve for plenary appellate review an election of the facts the state was relying upon to establish the charge of rape of a child because defendant did not object to the inaccuracy in the election and the jury instruction or raise it in his motion for new trial; defendant challenged only the sufficiency of the evidence. State v. Knowles, 470 S.W.3d 416, 2015 Tenn. LEXIS 591 (Tenn. July 31, 2015).

Defendant's argument that the trial court erred in refusing to allow defendant to sit at counsel table was properly preserved for appeal because during the course of his argument at trial, defendant argued the counsel table issue, and the trial court ruled on the issue on the merits. State v. Smith, 492 S.W.3d 224, 2016 Tenn. LEXIS 383 (Tenn. June 24, 2016).

Defendant did not waive the issue of double jeopardy because defendant's amended motion for new trial was sufficient to direct the trial court's and the state of Tennessee's attention to defendant's challenge to multiple convictions for employing a firearm during the commission of a dangerous felony when defendant fired a single weapon. Moreover, the intermediate appellate court construed defendant's argument as a challenge to defendant's firearm convictions based on double jeopardy grounds. State v. Harbison, 539 S.W.3d 149, 2018 Tenn. LEXIS 7 (Tenn. Jan. 9, 2018).

When defendant appealed the denial of defendant's motion for modification of sentence, the appellate court did not extend its review to defendant's issue concerning the trial court's revocation of defendant's probation without notice because defendant did not raise that issue in the notice of appeal. State v. Smith, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 258 (Tenn. Crim. App. Apr. 15, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 551 (Tenn. Sept. 16, 2020).

Although defendant waived the issue of a mistrial based on the State of Tennessee's failure to produce evidence related to a photographic line-up prior to trial by failing to include the issue in defendant's motion for a new trial, defendant properly preserved the challenge to the trial court's denial of defendant's motion for a continuance based on the alleged violation. State v. Ward, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 516 (Tenn. Crim. App. July 28, 2020).

10. Certified Questions of Law.

Where defendant's counsel announced that defendant was not giving up his right to contest the constitutionality of the statute under which he was convicted at the time he entered a nolo contendere plea, but there was no mention of the reservation in the plea agreement or judgment of the court, the issue was not reserved for consideration on appeal. State v. Caldwell, 924 S.W.2d 117, 1995 Tenn. Crim. App. LEXIS 983 (Tenn. Crim. App. 1995).

Where judgment makes no reference to reservation of dispositive question of law for appellate review, and where it does not refer to nor incorporate independent document which identifies scope of issue, requirements of rule are not met. State v. Irwin, 962 S.W.2d 477, 1998 Tenn. LEXIS 90 (Tenn. 1998).

Trial court's order did not reserve a certified question of law in compliance with the guidelines of *Preston* where, although it appeared that the trial court, while still retaining jurisdiction, entered the order containing the second version of the certified question in response to the defendant's motion for new trial, it did not enter an amended judgment form indicating a certified question of law different from the original certification. State v. Bowery, 189 S.W.3d 240, 2004 Tenn. Crim. App. LEXIS 690 (Tenn. Crim. App. 2004).

11. Jurisdiction of Appellate Court.

The jurisdiction of the Court of Criminal Appeals of Tennessee attaches with the filing of the notice of appeal. State v. Givhan, 616 S.W.2d 612, 1981 Tenn. Crim. App. LEXIS 335 (Tenn. Crim. App. 1981).

Jurisdiction of an appeal under T.R.A.P. 3 in a tort action lies in the court of appeals, not the supreme court. Smith v. Lincoln Brass Works, Inc., 712 S.W.2d 470, 1986 Tenn. LEXIS 759 (Tenn. 1986).

Failure to comply with time limits for filing new trial motions does not divest appellate courts of jurisdiction to hear appeals. State v. Givhan, 616 S.W.2d 612, 1981 Tenn. Crim. App. LEXIS 335 (Tenn. Crim. App. 1981); State v. Davis, 748 S.W.2d 206, 1987 Tenn. Crim. App. LEXIS 2427 (Tenn. Crim. App. 1987).

The court of appeals may sua sponte review the record on appeal to determine if it properly has jurisdiction. Huntington Nat'l Bank v. Hooker, 840 S.W.2d 916, 1991 Tenn. App. LEXIS 177 (Tenn. Ct. App. 1991).

An appeal was allowed to proceed where the notice of appeal sent by facsimile was initially received by the clerk of court of appeals within the requisite time period because of the unique circumstances presented. Cruse v. City of Columbia, 922 S.W.2d 492, 1996 Tenn. LEXIS 305 (Tenn. 1996).

Although T.R.A.P. 3(f) provides that the notice of appeal shall designate the judgment from which relief is sought, the notice of appeal filed by the citizen failed to designate the order appealed from; however, it being further provided at T.R.A.P. 3(f) that an appeal shall not be dismissed for informality of form, the appellate court proceeded with its review of the citizen's case under the assumption that the orders appealed from were those entered on April 27, 2004, and May 10, 2004. Marceaux v. Thompson, 212 S.W.3d 263, 2006 Tenn. App. LEXIS 426 (Tenn. Ct. App. 2006), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 1068 (Tenn. Nov. 13, 2006).

Appellate court lacked jurisdiction to consider petitioner's appeal because all of petitioner's claims had not been adjudicated, and permission to file an interlocutory appeal had not been granted pursuant to T.R.A.P. 9 or T.R.A.P. 10, or the order appealed had not been made final pursuant to Tenn. R. Civ. P. 54.02; trial court did not address the request for a hearing on the conduct of the estate's attorney, and did not address the request for attorney fees and costs requested in the same motion. Boykin v. Casher (In re Estate of Boykin), 295 S.W.3d 632, 2008 Tenn. App. LEXIS 769 (Tenn. Ct. App. Dec. 30, 2008).

Defendant's appeal from the trial court restitution order on his reckless endangerment conviction was dismissed for lack of jurisdiction as the restitution order was incomplete and interlocutory in nature where the trial court intended to further adjudicate the particulars of payment at a future date. State v. Comer, 278 S.W.3d 758, 2008 Tenn. Crim. App. LEXIS 296 (Tenn. Crim. App. Apr. 21, 2008).

Although filed prematurely, a former employee's second notice of appeal was timely and vested the appellate court with jurisdiction because the trial court's purported final order failed to rule on all the issues, and, without ruling on these requests, the judgment was not final, so that the appellate court never acquired jurisdiction over the employee's first appeal. Thus, any order by the appellate court on that appeal was void and the trial court retained jurisdiction to adjudicate the claims until it filed its final order. Foster-Henderson v. Memphis Health Ctr., Inc., 479 S.W.3d 214, 2015 Tenn. App. LEXIS 582 (Tenn. Ct. App. July 22, 2015), appeal denied, Foster v. Memphis Health Ctr., Inc., — S.W.3d —, 2015 Tenn. LEXIS 1074 (Tenn. Dec. 14, 2015).

Although no right of direct appeal lied for the state of Tennessee, because a trial court's application of an amended sentencing statute to defendant's case and the resulting modification of defendant's sentence exceeded the court's authority, the appellate court elected to treat the state of Tennessee's improperly-filed appeal as of right as a petition for the common law writ of certiorari and reviewed the matter. State v. Tolle, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 203 (Tenn. Crim. App. Mar. 19, 2018), aff'd, 591 S.W.3d 539, 2019 Tenn. LEXIS 514 (Tenn. Nov. 27, 2019).

Trial court's failure to separately analyze a local government's compliance with Metropolitan Government of Nashville and Davidson County, Tenn., Charter § 11.602(a), was not a bar to finality where the fairground users failed to include any specific argument on that subsection in their response to a summary judgment motion and failed to sufficiently brief the issue. Save Our Fairgrounds v. Metro. Gov't, — S.W.3d —, 2019 Tenn. App. LEXIS 355 (Tenn. Ct. App. July 18, 2019).

Appeal of the fairground users' claims under Metropolitan Government of Nashville and Davidson County, Tenn., Charter art. II, §§ 8 and 10, was dismissed for lack of a final order where the provisions had been raised in the first amended complaint, compliance with § 11.602(d) was not dispositive of whether the government's actions also complied with art. II, §§ 8 and 10, and the users were under no obligation to raise art. II, §§ 8 and 10, as the government's summary judgment motion did not mention those provisions. Save Our Fairgrounds v. Metro. Gov't, — S.W.3d —, 2019 Tenn. App. LEXIS 355 (Tenn. Ct. App. July 18, 2019).

Because dismissal of a surviving spouse's appeal would only have served to delay resolution of a discrete issue between the parties in a probate proceeding, the appellate court concluded that in the interest of judicial economy, good cause existed that allowed the court to suspend the finality requirements in the matter and to proceed to address the substantive issues presented regarding the surviving spouse's claims for exempt property and a year's support. In re Estate of Baker, — S.W.3d —, 2019 Tenn. App. LEXIS 565 (Tenn. Ct. App. Nov. 22, 2019).

Because this action was to establish paternity and visitation and not related to dependency or neglect, the circuit court did not err in finding a lack of subject matter jurisdiction, as the appeal to the circuit court was improper as any appeal rested within the court's jurisdiction; because the mother did not properly file an appeal to the circuit court, the jurisdiction of that court did not attach and the juvenile court

retained jurisdiction to hear father's motion because an appeal as of right had not been perfected. In re Easton W., — S.W.3d —, 2020 Tenn. App. LEXIS 305 (Tenn. Ct. App. July 1, 2020).

Although the order appealed from was not a final order as the trial court failed to rule on several issues concerning the allocation of the decedent's estate and did not certify the order appealed from as final, the appellate court suspended the finality requirements because the interests of justice and judicial economy were best served by the court exercising jurisdiction over the appeal given the protracted litigation, a prior appeal, and the necessity of providing a determination to facilitate the remainder of the distribution of the estate. In re Estate of Schubert, — S.W.3d —, 2020 Tenn. App. LEXIS 419 (Tenn. Ct. App. Sept. 18, 2020).

Appellate court found good cause to suspend the requirements of this rule and exercise jurisdiction over the appeal because it was apparent that, if a decision was not rendered due to a lack of finality, the same appeal would almost certainly be presented to the appellate court in the future once the trial court rendered a decision regarding the exact parameters of the child's potential visitation with the father; remanding the case would only contribute to further delay; and the case, which concerned potential visitation with a minor child, warranted some urgency in rendering a decision without additional delay. Baxter v. Rowan, — S.W.3d —, 2020 Tenn. App. LEXIS 569 (Tenn. Ct. App. Dec. 15, 2020).

12. Evidentiary Rulings.

Tennessee Rules of Appellate Procedure did not permit an interlocutory appeal of the trial court's ruling on the admissibility of evidence of defendant's prior acts of physical abuse against the victim in a murder trial under Tenn. R. Evid. 404(b); the criteria for appellate review was not met, and because the trial had yet to begin, the interlocutory appeal was largely advisory in nature. State v. Gilley, 173 S.W.3d 1, 2005 Tenn. LEXIS 789 (Tenn. 2005).

13. Appeal by State in Criminal Case.

Where the trial court granted defendant's motion for judgment of acquittal and set the jury's verdict aside, but the evidence established beyond a reasonable doubt defendant's guilt, the court set aside the trial court's judgment of acquittal and remanded those courts so that the error could be corrected by the trial court entering a judgment of conviction upon the jury verdict. State v. McMahan, 614 S.W.2d 83, 1981 Tenn. Crim. App. LEXIS 326 (Tenn. Crim. App. 1981).

Although state did not appeal from an order merging defendant's convictions for burglary and attempted petit larceny, it may seek review and relief of the action of the trial court in effectively setting aside and dismissing the indictment charging the defendant with petit larceny and the jury verdict finding him guilty of attempting to commit petit larceny. State v. Valentine, 659 S.W.2d 27, 1983 Tenn. Crim. App. LEXIS 360 (Tenn. Crim. App. 1983).

Suppression of evidence seized under color of search warrant was proper. State v. Lee, 836 S.W.2d 126, 1991 Tenn. Crim. App. LEXIS 903 (Tenn. Crim. App. 1991).

Appeal as of right under T.R.A.P. 3 was the proper remedy for the state from a judgment of the trial court setting aside a conviction and granting defendant's post-trial motion for judgment of acquittal. State v. Adams, 916 S.W.2d 471, 1995 Tenn. Crim. App. LEXIS 876 (Tenn. Crim. App. 1995).

The state has the right to appeal the dismissal of an arrest warrant. State v. Wilson, 6 S.W.3d 504, 1998 Tenn. Crim. App. LEXIS 1176 (Tenn. Crim. App. 1998).

An appeal under T.R.A.P. 3 by the state seeking relief from suppression of a confession can only be sought where the substantive effect of the ruling results in a dismissal of the indictment; since the state can ordinarily proceed with prosecution despite the suppression, the state should not seek an appeal under T.R.A.P. 3 in such situations. Because the state expressly represented that it could not prosecute without defendant's pretrial statement, the court of criminal appeals entertained the appeal under T.R.A.P. 3 as of right. State v. Phillips, 30 S.W.3d 372, 2000 Tenn. Crim. App. LEXIS 284 (Tenn. Crim. App. 2000).

If the suppression order relates to the suppression of seized drugs, the state ordinarily and properly files an appeal as of right under T.R.A.P. 3; in such a case the state is truly unable to prosecute without the admission of the contraband. State v. Phillips, 30 S.W.3d 372, 2000 Tenn. Crim. App. LEXIS 284 (Tenn. Crim. App. 2000).

Had the state wished to appeal the order of the trial court mandating the disclosure of the identity of the confidential informant, it should have filed an interlocutory appeal pursuant to either T.R.A.P. 9 or 10; the issue could not be brought before the court pursuant to T.R.A.P. 3(c)(1), which only allows an appeal from an order that results in dismissal of the indictment. State v. Collins, 35 S.W.3d 582, 2000 Tenn. Crim. App. LEXIS 247 (Tenn. Crim. App. 2000).

Supreme court of Tennessee held that the plain language of T.R.A.P. 3(c) enumerates the six instances in which the state could appeal as of right and stated that they are the "only" instances that gave the state such a right; therefore state did not have the right to appeal the expungement of defendant's criminal records where he had been found guilty of a lesser charge. State v. Adler, 92 S.W.3d 397, 2002 Tenn. LEXIS 703 (Tenn. 2002).

Denying the state an interlocutory appeal when the trial court precluded the death penalty by finding that defendant was mentally retarded left no appellate recourse; thus, the conclusion that the matter in defendant's capital case was appropriate for interlocutory appeal was affirmed. State v. Strode, 232 S.W.3d 1, 2007 Tenn. LEXIS 666 (Tenn. Aug. 14, 2007).

Although the state of Tennessee could not appeal its claim that the trial court erred by applying the amended version of a sentencing statute, appellate jurisdiction existed over the claim because, once defendant filed a notice of appeal, the court acquired jurisdiction of the entire case and any properly-preserved, cognizable claims. Because the determination of the appropriate version of the statute to be applied qualified as a question of law, it was permitted to be raised by either party, regardless of which party initiated the appeal. State v. Keese, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 193 (Tenn. Crim. App. Mar. 15, 2018), overruled in part, State v. Jones, 589 S.W.3d 747, 2019 Tenn. LEXIS 505 (Tenn. Nov. 13, 2019).

Although defendant asserted that the state of Tennessee had no appeal as of right flowing from the trial court's order, because the order did not result in the dismissal of the entire indictment in the case, when the trial court dismissed the indictment charging defendant with vehicular assault, the state had a right to appeal that decision in that each count of the multiple-count indictment was a separate indictment. State v. Welch, 586 S.W.3d 399, 2019 Tenn. Crim. App. LEXIS 326 (Tenn. Crim. App. May 23, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 485 (Tenn. Sept. 18, 2019).

In an appeal by the State from an Agreed Order entered between the inmate and the District Attorney General for Davidson County, the State had a right to appeal to challenge the jurisdiction of the post-conviction court under this rule because the post-conviction court exceeded the authority granted by Tenn. R. Crim. P. 36, and the jurisdiction issue was not waived by the agreement of the parties in the court below. Abdur'Rahman v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 764 (Tenn. Crim. App. Nov. 30, 2020).

14. Appeal from Diversion Decision.

An appeal by either side questioning diversion decisions, either granted or denied, must be brought under T.R.A.P. 9 or 10 and cannot come by T.R.A.P. 3. (but see, State v. Montgomery, 623 S.W.2d 116, 1981 Tenn. Crim. App. LEXIS 374 (Tenn. Crim. App. 1981)State v. Harris, — S.W.3d —, 1999 Tenn. Crim. App. LEXIS 557 (Tenn. Crim. App. June 4, 1999), aff'd, 33 S.W.3d 767, 2000 Tenn. LEXIS 690 (Tenn. 2000); State v. McDuff, 691 S.W.2d 569, 1984 Tenn. Crim. App. LEXIS 2687 (Tenn. Crim. App. 1984); State v. Wilson, 713 S.W.2d 85, 1986 Tenn. Crim. App. LEXIS 2221 (Tenn. Crim. App. 1986).

Where defendant enters a best interest guilty plea and is judicially diverted pursuant to T.C.A. § 40-35-313, defendant is not authorized to appeal a certified question. State v. Norris, 47 S.W.3d 457, 2000 Tenn. Crim. App. LEXIS 437 (Tenn. Crim. App. 2000).

Defendant waived her right to appeal the denial of her request for pretrial diversion under T.C.A. § 40-15-105 by failing to seek review of the trial court's decision pursuant to T.R.A.P. 9 or 10 prior to pleading guilty to some of the charges. An appeal pursuant to Tenn. R. Crim. P. 38(b) was required to be made under T.R.A.P. 3(b), which had no provision for appeal of the denial of pretrial diversion following a guilty plea. State v. Robinson, 328 S.W.3d 513, 2010 Tenn. Crim. App. LEXIS 268 (Tenn. Crim. App. Mar. 30, 2010).

Defendant's appeal of his conviction of two counts of aggravated perjury was dismissed for lack of jurisdiction because he did not have a right to appeal as he was granted judicial diversion and therefore no judgment of conviction was entered which was required for an appeal under this rule. State v. Begtrup, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 775 (Tenn. Crim. App. Dec. 2, 2020).

15. Post-Trial Motions.

Under T.R.A.P. 3(a), if part of a judgment is challenged by a post-trial motion and the power of the trial court is extended to change such challenged part, then the trial court has not finally adjudicated all of the claims, rights and liabilities; and the judgment is subject to revision, including setting aside, before entry of final judgment adjudicating all claims, rights and liabilities of the parties. Grissim v. Grissim, 637 S.W.2d 873, 1982 Tenn. App. LEXIS 389 (Tenn. Ct. App. 1982).

T.R.A.P. 3 does not require more than a single motion as a prerequisite to appellate review. McCormic v. Smith, 659 S.W.2d 804, 1983 Tenn. LEXIS 735 (Tenn. 1983).

Where judge fixed fees subsequent to jury verdict, appellants were not required to file for new trial under Tenn. R. Civ. P. 59, before appealing as of right under T.R.A.P. 3(e). McCormic v. Smith, 659 S.W.2d 804, 1983 Tenn. LEXIS 735 (Tenn. 1983).

An appeal as of right is initiated by the filing of a notice of appeal within 30 days of the entry of the judgment being appealed; however, if a timely motion for judgment of acquittal, for a new trial, for arrest of judgment, or for a suspended sentence is filed, the 30 days run from the entry of the order determining such motion. State v. Lock, 839 S.W.2d 436, 1992 Tenn. Crim. App. LEXIS 428 (Tenn. Crim. App. 1992).

Although a motion for a new trial is a prerequisite to appellate review in certain cases, in accordance with T.R.A.P. 3(e), such motion is not necessarily warranted in all cases wherein

review by the Court of Appeals is sought. Cortez v. Alutech, Inc., 941 S.W.2d 891, 1996 Tenn. App. LEXIS 463 (Tenn. Ct. App. 1996), rehearing denied, — S.W.2d —, 1996 Tenn. App. LEXIS 579 (Tenn. Ct. App. Sept. 13, 1996).

Appellate review of motion for directed verdict was precluded by T.R.A.P. 3(e) where defendant moved for a directed verdict at the end of trial, but failed to file a post-trial motion for J.N.O.V. or a motion for a new trial. Mires v. Clay, 3 S.W.3d 463, 1999 Tenn. App. LEXIS 564 (Tenn. Ct. App. 1999).

Plaintiffs' notice of appeal was filed more than 30 days after the entry of summary judgment for defendants in a slander of title action, therefore the court lacked jurisdiction to hear the appeal and was required to dismiss the appeal. Also under T.R.A.P. 2, an appellate court is not authorized to extend the time for filing a notice of appeal. Briley v. Chapman, 182 S.W.3d 884, 2005 Tenn. App. LEXIS 466 (Tenn. Ct. App. 2005), appeal denied, — S.W.3d —, 2005 Tenn. LEXIS 1105 (Tenn. Dec. 5, 2005).

Appellant's motion for discretionary costs filed after a final order did not arrest the finality of the trial court's judgment. Thus, despite the trial court's apparent failure to rule on this motion, the appellate court retained jurisdiction to consider the appeal. Payne v. Tipton County, 448 S.W.3d 891, 2014 Tenn. App. LEXIS 183 (Tenn. Ct. App. Mar. 31, 2014), appeal denied, Payne ex rel. Payne v. Tipton County, — S.W.3d —, 2014 Tenn. LEXIS 709 (Tenn. Sept. 18, 2014).

16. Timeliness of Motion.

Where plaintiff filed only two motions within 30 days of the entry of the judgment on the jury verdict, one for reinstatement and one for attorney's fees and costs, the trial judge overruled both motions on October 15, and it was not until October 25 that the plaintiff moved for a new trial on the issue of front pay and for an increase in the judgment for back pay, both of which issues had been decided by the jury and a judgment entered on the verdict on June 19, the motions came too late under Tenn. R. Civ. P. 59.02, and the plaintiff was precluded from raising those issues on appeal. Flynn v. Shoney's, Inc., 850 S.W.2d 458, 1992 Tenn. App. LEXIS 883 (Tenn. Ct. App. 1992), rehearing denied, — S.W.2d —, 1992 Tenn. App. LEXIS 960 (Tenn. Ct. App. Dec. 2, 1992).

T.R.A.P. 3(f) did not apply to authorize treatment of a motion for interlocutory appeal as an informal notice of appeal for the purpose of avoiding time limitations for filing a notice of appeal. Dewees v. Sweeney, 947 S.W.2d 861, 1996 Tenn. App. LEXIS 821 (Tenn. Ct. App. 1996).

In a workers' compensation appeal, the employer contended that because the statistical data (SD1) form was not filed "contemporaneously" with the judgment, the time for filing the notice of appeal began when the SD1 form was filed and the date the judgment was entered. The appellate court held that while the SD1 form had to be filed in accordance with T.C.A. § 50-6-244(a), to the extent T.C.A. § 50-6-244(a) conflicted with the 30-day time limit prescribed by T.R.A.P. 4, T.R.A.P. 4 controlled; therefore, the workers' compensation judgment was final on the date of entry stamped by the trial court clerk whether or not it was filed contemporaneously with the SD1 form, and the employer's appeal, filed 34 days after the judgment was entered, was untimely. Corum v. Holston Health & Rehab. Ctr., 104 S.W.3d 451, 2003 Tenn. LEXIS 338 (Tenn. 2003).

In a breach of contract case, an appeal was timely filed, because the 30-day time limit did not begin to run until a trial court ruled on a motion to alter or amend, which was filed after judgment was entered against a purchaser. Albert v. Frye, 145 S.W.3d 526, 2004 Tenn. LEXIS 654 (Tenn. 2004).

Appellate court did not err by permitting the state to pursue its appeal from trial court's November 9, 2005 suppression order because it was timely, as at the state's request trial court entered an order on May 19, 2006 dismissing indictments against defendants and the state filed its timely notice of appeal as permitted by T.R.A.P. 3(c)(1) within 30 days of trial court's order; because the state's appeal was timely filed, appellate court was not required to exercise discretion under T.R.A.P. 4(a) to excuse the state from timely filing of notice of appeal. State v. Meeks, 262 S.W.3d 710, 2008 Tenn. LEXIS 575 (Tenn. Sept. 2, 2008).

Thirty-day time period at issue began when defendant's judgment of conviction was filed by trial court; thus, his motion for a new trial was timely filed 30 days later, and all the issues appealed from were properly before the appellate court. State v. Vaughn, 279 S.W.3d 584, 2008 Tenn. Crim. App. LEXIS 442 (Tenn. Crim. App. June 16, 2008).

Motor vehicle accident victim lost the ability to appeal, the validity of a post-mediation agreement by failing to file a timely appeal because the trial court's order—that the victim's parent had legal authority to sign the agreement on the victim's behalf and that the agreement was an enforceable contract—was a final order so that the victim lost the ability to challenge the validity of the post-mediation agreement after the 30-day time period to appeal expired. Allen v. Am. Yeast, Inc., — S.W.3d —, 2018 Tenn. App. LEXIS 587 (Tenn. Ct. App. Oct. 4, 2018), appeal denied, Allen v. Am. Yeast Inc., — S.W.3d —, 2019 Tenn. LEXIS 114 (Tenn. Feb. 22, 2019).

Defendant's appeal of an order revoking his probation had to be dismissed as untimely, but even if defendant timely-filed his motion for new trial, the motion would not have tolled the time for filing the notice of appeal because a

probation revocation hearing was not a "trial"; accordingly, defendant's notice of appeal was also untimely. State v. Vincent, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 318 (Tenn. Crim. App. May 5, 2020).

Defendant's appeal of an order revoking his probation had to be dismissed as untimely because defendant had until October 27, 2017 to file his notice of appeal, but instead, he filed a motion for new trial on November 9, 2017 and his notice of appeal on January 4, 2018. State v. Vincent, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 318 (Tenn. Crim. App. May 5, 2020).

Defendant's motion for new trial was filed well-beyond the 30-day time limit and thus his notice of appeal was also untimely; however, in the interests of justice, the court waived the timely filing of the notice of appeal. Still, because the new trial motion was untimely, defendant waived his issues except sufficiency of the evidence and sentencing. State v. Chaves-Abrego, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 422 (Tenn. Crim. App. June 18, 2020), appeal denied, State v. Chaves-Abrego, — S.W.3d —, 2020 Tenn. LEXIS 519 (Tenn. Oct. 7, 2020).

17. Final Judgment.

Certification by trial judge under Tenn. R. Civ. P. 54.02 that court has directed entry of final judgment as to one or more but fewer than all claims, and express determination that there is no just reason for delay creates a final judgment appealable as of right under T.R.A.P. 3. Fox v. Fox, 657 S.W.2d 747, 1983 Tenn. LEXIS 644 (Tenn. 1983).

An order overruling a motion for summary judgment leaves the entire suit for later trial and disposition and is not a final, appealable judgment. In re Estate of McCord, 661 S.W.2d 890, 1983 Tenn. App. LEXIS 634 (Tenn. Ct. App. 1983).

A judgment of contempt, summary or otherwise becomes final upon the entering of punishment therefor, and is thus appealable as of right under T.R.A.P. 3, and it does not matter that the proceedings out of which the contempt arose are not complete. State v. Green, 689 S.W.2d 189, 1984 Tenn. Crim. App. LEXIS 2574 (Tenn. Crim. App. 1984).

Where following the trial judge's grant of a new trial to the plaintiff the judge granted plaintiff's voluntary nonsuit without prejudice, the order of nonsuit was a final judgment appealable under T.R.A.P. 3; however, whether the plaintiff had a right to a nonsuit without prejudice depended on whether the trial court was correct in granting a new trial. Panzer v. King, 743 S.W.2d 612, 1988 Tenn. LEXIS 5 (Tenn. 1988).

For an appellate court to consider the merits of a question of law certified pursuant to Tenn. R. Crim. P. 37, the final order or judgment from which the time begins to run to pursue an appeal under T.R.A.P. 3 must contain a statement of the dispositive certified question of law reserved by defendant for appellate review and the question of law must be stated so as to clearly identify the scope and the limits of the legal issue reserved. State v. Preston, 759 S.W.2d 647, 1988 Tenn. LEXIS 171 (Tenn. 1988).

An order overruling a motion to dismiss is not a final judgment; such an order does not end a lawsuit, but rather allows the lawsuit to continue and contemplates further litigation. C.O. Christian & Sons Co. v. Nashville P.S. Hotel, Ltd., 765 S.W.2d 754, 1988 Tenn. App. LEXIS 573 (Tenn. Ct. App. 1988).

A judgment of contempt without the designation of punishment is not a final appealable judgment. Hall v. Hall, 772 S.W.2d 432, 1989 Tenn. App. LEXIS 11 (Tenn. Ct. App. 1989).

A court order suggesting additur and granting a new trial is not a final judgment, and is not appealable as of right. If defendant does not accept the additur, the court must enter a further order granting the motion for a new trial. Evans v. Wilson, 776 S.W.2d 939, 1989 Tenn. LEXIS 394 (Tenn. 1989), rehearing denied, — S.W.2d —, 1989 Tenn. LEXIS 468 (Tenn. 1989).

Where judgment does not specify amount of attorneys fees or expenses and costs of collection it is not a final judgment appealable as of right. Until all issues are decided, actions of the trial court remain subject to revision and are not appealable as of right. Solomon v. First American Nat'l Bank, 774 S.W.2d 935, 1989 Tenn. App. LEXIS 170 (Tenn. Ct. App. 1989).

Order denying class certification but allowing the putative class representative to pursue its individual claim did not adjudicate the claims of any parties as is minimally required by Tenn. R. Civ. P. 54.02 and was not appealable under T.R.A.P. 3. Bayberry Assocs. v. Jones, 783 S.W.2d 553, 1990 Tenn. LEXIS 40 (Tenn. 1990).

In case involving multiple claims, chancellor's order dismissing defendants based on the defense of laches was not a final judgment because it did not dispose of all the claims of all the parties where the issue of paternity was still before the court. Woods v. Fields, 798 S.W.2d 239, 1990 Tenn. App. LEXIS 216 (Tenn. Ct. App. 1990), rehearing denied, 798 S.W.2d 239, 1990 Tenn. App. LEXIS 285 (Tenn. App. 1990).

The occurrence of a contingency terminating support was not a "final judgment" subject to the provisions of T.R.A.P. 3 and Tenn. R. Civ. P. 62.01. Waddey v. Waddey, 6 S.W.3d 230, 1999 Tenn. LEXIS 422 (Tenn. 1999).

Because the unfavorable rulings by the trial court did not become appealable for an employee until the trial court entered its order confirming that all claims of all parties had been adjudicated, for purposes of filing an appeal under T.R.A.P. 3, 4(a), the 30-day appeal

period commenced on the date that the trial court entered its order, not on the date that the employer and related individual filed a notice of voluntary dismissal of its counterclaim pursuant to Tenn. R. Civ. P. 41.01; the court noted that under the plain language of Tenn. R. Civ. P. 58, the signature of the judge was mandatory to effectuate a judgment. Green v. Moore, 101 S.W.3d 415, 2003 Tenn. LEXIS 324 (Tenn. 2003).

There was a final appealable judgment for purposes of defendant's criminal contempt charges where a judgment of contempt, summary or otherwise, became final upon the entering of punishment, and was thus appealable as of right; it did not matter that the proceedings out of which the contempt arose were not complete. Moody v. Hutchison, 159 S.W.3d 15, 2004 Tenn. App. LEXIS 331 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 1102 (Tenn. Dec. 6, 2004).

Person found guilty of criminal contempt arising out of violation of injunction was permitted to appeal because contempt order constituted a final appealable order, even if the underlying case had not been disposed of yet. Bailey v. Crum, 183 S.W.3d 383, 2005 Tenn. App. LEXIS 362 (Tenn. Ct. App. 2005), review or rehearing denied, — S.W.3d —, 2005 Tenn. LEXIS 1076 (Tenn. 2005).

Although the judgment appealed from was not a final judgment, the issues which had already been adjudicated by the chancery court regarding the partition by cotenants were unlikely to be pretermitted by future events and rather than delaying the inevitable need to address those issues, judicial economy was best served by addressing the issues on their merits in the instant appeal. Parker v. Lambert, 206 S.W.3d 1, 2006 Tenn. App. LEXIS 224 (Tenn. Ct. App. 2006), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 958 (Tenn. 2006).

In a driver's personal injury action wherein the driver accepted the trial court's suggestion of remittitur in protest, an appellate court held the driver's appeal in abeyance because the trial court had not decided the insurer's motion for a new trial and, as such, the trial court improvidently certified the order suggesting remittitur as final under Tenn. R. Civ. P. 54.02. Johnson v. Beverly Nunis & Farmer's Ins. Exch., 383 S.W.3d 122, 2012 Tenn. App. LEXIS 277 (Tenn. Ct. App. Apr. 27, 2012).

Agreed order granting a voluntary nonsuit was not final because the court could not conclude that appellees' abandoned their claim for attorney's fees as a discovery sanction, and therefore the trial court's decision to consider the motion for sanctions notwithstanding the dismissal was affirmed, because the record showed that appellant knew of appellees' intention to pursue attorney's fees as sanctions early in the litigation, the language of the order did not indicate a total abandonment of appellees' claim for sanctions, and appellees raised the fact that their motion for sanctions was pending soon after the dismissal was entered. Menche v. White Eagle Prop. Grp., Llc, — S.W.3d —, 2019 Tenn. App. LEXIS 413 (Tenn. Ct. App. Aug. 26, 2019).

Defendant had a right of appeal from the criminal court's order modifying its order dismissing the indictments filed against him because subsection (b) afforded in criminal cases an appeal as of right from an order or judgment entered pursuant to Tenn. R. Crim. P. 36; to hold otherwise would exalt form over substance and deprive defendant of an opportunity to obtain the relief to which he was entitled since the criminal court lacked authority to modify its final order; State v. Allen, 593 S.W.3d 145, 2020 Tenn. LEXIS 15 (Tenn. Jan. 29, 2020).

As the trial court only addressed two of the four grounds for termination raised in the petition, the trial court's judgment was not final and thus the case was remanded for further proceedings. In re A.W., — S.W.3d —, 2020 Tenn. App. LEXIS 5 (Tenn. Ct. App. Jan. 8, 2020).

As the trial court's order acknowledged that further issues remained to be decided, there was no final judgment, and the trial court's certification was improvident; the rights at issue on appeal were clearly linked with the undecided issue of damages and the appeal was dismissed. Cross v. River Sound Homeowners Ass'n, — S.W.3d —, 2020 Tenn. App. LEXIS 94 (Tenn. Ct. App. Mar. 4, 2020).

In light of the absence of a final judgment, the appeal was dismissed; the trial court's own comments reflected that certain issues relevant to a child support calculation would be addressed at a later date. Wilder v. Wilder, — S.W.3d —, 2020 Tenn. App. LEXIS 96 (Tenn. Ct. App. Mar. 6, 2020).

Appellate court concluded that it lacked subject matter jurisdiction over this appeal because the trial court's order did not adjudicate any of the requests in petitioner's guardianship petition but merely transferred those claims to another court for future adjudication. All of the claims raised in petitioner's guardianship petitioned remained pending in the juvenile court. In re Hector G., — S.W.3d —, 2020 Tenn. App. LEXIS 153 (Tenn. Ct. App. Apr. 14, 2020).

Appellate court had jurisdiction over appeal of felony murder convictions, even though an aggravated burglary charge was still pending, because the trial court severed the aggravated burglary charge from the felony murder charges prior to trial, and therefore the judgments for the felony murder convictions were final. State v. Perry, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 105 (Tenn. Crim. App. Mar. 23, 2021).

Court rejected the city's suggestion that the judgment lacked finality because the court did not address the merits of the claims or deny the

requested relief; the judgment dismissed the petition in its entirety, no further court action was necessary, and the remand to the pension board for a hearing did not make the dismissal any less final. Murrell v. Bd. of Admin. Memphis Pension & Ret. Sys., — S.W.3d —, 2021 Tenn. App. LEXIS 133 (Tenn. Ct. App. Mar. 31, 2021).

18. Writs of Error Abolished.

With the promulgation of T.R.A.P. 3(d), the supreme court announced the abolition of the writ of error as an appellate procedure, and § 27-6-101 et seq., as far as they are in conflict with T.R.A.P. 3, are effectively repealed. Haynes v. McKenzie Memorial Hospital, 667 S.W.2d 497, 1984 Tenn. App. LEXIS 3274 (Tenn. Ct. App. 1984).

19. Compensation Awards for Attorneys.

Where a claimant is dissatisfied with the compensation order of a municipal or general sessions judge, the procedure for review of orders of those local courts shall be that the claimant may appeal to the circuit or criminal court of the county in which the services were rendered in accordance with existing provisions for appeals in such cases. If not satisfied with the resolution of the matter there, the claimant may proceed to seek further review in accordance with the procedure outlined in Huskey v. State, 688 S.W.2d 417, 1985 Tenn. LEXIS 475 (Tenn. 1985), appeal dismissed, Huskey v. Tennessee, 474 U.S. 936, 106 S. Ct. 299, 88 L. Ed. 2d 277, 1985 U.S. LEXIS 4168 (1985), which provides that a party dissatisfied with a trial court order awarding compensation may appeal as of right to the Tennessee court of criminal appeals pursuant to T.R.A.P. 3, and, thereafter the claim would proceed in accordance with the general rules governing appellate practice and procedure. Allen v. McWilliams, 715 S.W.2d 28, 1986 Tenn. LEXIS 840 (Tenn. 1986).

20. Loss of Right That Could Never be Recaptured.

The action of the trial judge in granting defendant's pretrial motion to strike from the indictment the allegation of a prior driving under the influence conviction resulted in the state losing a right that could never be recaptured, and appeal is under T.R.A.P. 10 rather than T.R.A.P. 3. State v. Gallaher, 730 S.W.2d 622, 1987 Tenn. LEXIS 1007 (Tenn. 1987).

21. Nolo Contendere Plea.

For the purposes of an appeal, the nolo contendere plea has the same effect as a guilty plea. In fact, upon the entry of a nolo contendere plea, any issue which might be dispositive of the case must be explicitly reserved with the consent of the state and the trial court; otherwise, it is waived. State v. Bilbrey, 816 S.W.2d 71, 1991 Tenn. Crim. App. LEXIS 555 (Tenn. Crim. App. 1991), superseded by statute as stated in, State v. Grissom, 956 S.W.2d 514, 1997 Tenn. Crim. App. LEXIS 676 (Tenn. Crim. App. 1997).

22. Guilty Plea.

T.R.A.P. 3 and Tenn. R. Crim. P. 37 did not apply to allow defendant to litigate the issue of the state's rebuttal of the presumption of prosecutorial vindictiveness on appeal since the issue was waived when defendant entered guilty pleas and because the trial court heard evidence, determined the credibility of witnesses, and applied legal principles in reaching its decision on the issue. State v. Turner, 919 S.W.2d 346, 1995 Tenn. Crim. App. LEXIS 779 (Tenn. Crim. App. 1995).

23. Appeal from Guilty Plea Convictions.

Defendant did not have the right to appeal after entering a valid plea of guilty and being sentenced pursuant to the terms of a plea bargain agreement. State v. McKissack, 917 S.W.2d 714, 1995 Tenn. Crim. App. LEXIS 941 (Tenn. Crim. App. 1995).

Under T.R.A.P. 3(b), a defendant who pleaded guilty may appeal the issue of whether or not the trial court had subject matter jurisdiction because jurisdictional defects were not waived by the plea; however, the trial court properly had subject matter jurisdiction, the indictments were orally amended during the guilty plea proceedings, and the judgments indicated agreed amendments to the indictments, such that none of the indictments was void on its face and as a result, no jurisdictional issue was present and defendants waived all other nonjurisdictional defects and constitutional irregularities by their pleas of guilty. State v. Yoreck, 133 S.W.3d 606, 2004 Tenn. LEXIS 330 (Tenn. 2004).

A motion to withdraw a guilty plea can be filed prior to sentencing– before a judgment would be considered final. Necessarily, it follows that an appeal from the denial of a motion to withdraw a guilty plea can be had from a judgment that is not final in the typical sense of the word. State v. Stevison, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 602 (Tenn. Crim. App. Sept. 26, 2019).

24. Waiver.

Petitioner knowingly waived his right to appeal where both his trial attorneys and the trial court advised petitioner of his waiver and he signed a document indicating he understood what he was doing. Carter v. State, 102 S.W.3d 113, 2002 Tenn. Crim. App. LEXIS 1014 (Tenn. Crim. App. 2002).

Where appellant raised her claim that the trial court gave erroneous jury instructions as to the definition of "knowingly" in a motion for new trial, any issue regarding jury instructions was waived on appeal. State v. Prater, 137 S.W.3d 25, 2003 Tenn. Crim. App. LEXIS 886 (Tenn. Crim. App. 2003), appeal denied, —

S.W.3d —, 2004 Tenn. LEXIS 169 (Tenn. Mar. 1, 2004).

Although defendant claimed in defendant's motion to suppress that an unreasonable delay occurred between defendant's arrest and defendant's probable cause hearing before a judge or magistrate, the issue was not sufficiently raised in the motion to suppress or otherwise. Therefore, defendant waived appellate review for failure to present the issue to the trial court. State v. Taylor, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 147 (Tenn. Crim. App. Feb. 26, 2020).

Because defendant failed to specifically raise the alleged error of the trial court regarding its denial of his right to represent himself in his motion for a new trial, the issue was waived and he was not entitled to relief. State v. Myers, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 150 (Tenn. Crim. App. Apr. 14, 2021).

25. Post-conviction Appeals.

Trial court erred in denying petitioner's application for a writ of habeas corpus relief because petitioner stated entitlement to habeas corpus relief in the form of the application of pretrial jail credit; petitioner had no direct appeal avenue to challenge the denial of pretrial jail credit. Anderson v. Washburn, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 79 (Tenn. Crim. App. Feb. 5, 2019), rev'd, — S.W.3d —, 2019 Tenn. LEXIS 248 (Tenn. June 27, 2019).

26. Order Appealed From.

Pursuant to T.R.A.P. 3(f), because appellants' notice of appeal designated the specific order dismissing their motion for reconsideration and they did not file a notice of appeal from the order granting appellees' judicial estoppel motion, the court's review was limited only to the dismissal of the motion for reconsideration and its underlying order. Cox v. Shell Oil Co., 196 S.W.3d 747, 2005 Tenn. App. LEXIS 683 (Tenn. Ct. App. 2005).

In a review of disciplinary procedures, appellate court lacked jurisdiction to hear inmate's writ of certiorari because the trial court had not fully adjudicated all of the inmate's claims; as a result, no final order was issued. Irwin v. Tenn. Dep't of Corr., 244 S.W.3d 832, 2007 Tenn. App. LEXIS 519 (Tenn. Ct. App. Aug. 13, 2007).

Appellant's notice of appeal listed only the order disposing of appellant's motion to reopen proof, but did not list the final decree of divorce. Accordingly, the transcript of the divorce hearing which appellant provided was not germane to the appeal of the disposition of the motion and was of no help in the appellate court's review of the trial court's denial of the motion. Westbrooks v. Westbrooks, — S.W.3d —, 2019 Tenn. App. LEXIS 520 (Tenn. Ct. App. Oct. 29, 2019).

27. Notice of Appeal.

Notice of appeal filed by the wife was prematurely filed and hence was treated as being filed on the date on which the final order in the case was entered; thus, appellate court had jurisdiction of the appeal. In re Ackerman, 280 S.W.3d 206, 2008 Tenn. App. LEXIS 427 (Tenn. Ct. App. July 29, 2008).

Notice of appeal filed by newspaper afforded sufficient notice to nursing home that it intended to raise issues adjudicated in trial court's order relating to unfiled discovery; nursing home did not argue that it was taken by surprise, and T.R.A.P. 3 was not intended to limit the scope of review so long as the notice of appeal informed the intention to seek further review of trial court's judgment. In re NHC — Nashville Fire Litig., 293 S.W.3d 547, 2008 Tenn. App. LEXIS 688 (Tenn. Ct. App. Nov. 21, 2008).

Appellate court had jurisdiction over insureds' appeal because the notice of appeal encompassed all of the orders of trial court despite the fact that the notice only designated the final judgment. Cox v. Tennessee Farmers Mut. Ins. Co., 297 S.W.3d 237, 2009 Tenn. App. LEXIS 62 (Tenn. Ct. App. Feb. 9, 2009), appeal denied, Cox v. Tenn. Farmers Mut. Ins. Co., — S.W.3d —, 2009 Tenn. LEXIS 579 (Tenn. Aug. 31, 2009).

28. No Right to Appeal.

No appeal as of right flowed from petitioner's filing of a motion for new trial, the substance of which pertained to the denial of his petition for post-conviction relief, because neither the rule nor the Post-Conviction Procedure Act provided for such a filing; the law does not provide for an appeal as of right from the denial of a motion to reconsider a post-conviction petition. Hassman v. State, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 152 (Tenn. Crim. App. Mar. 11, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 351 (Tenn. July 19, 2019).

29. Subject-matter Jurisdiction.

While language contained in the judgment might satisfy the requirement of an express direction for the entry of judgment, the judgment lacked a finding that there was no just reason for delay; despite this, the court found good cause to exercise jurisdiction, given the grave nature of the termination proceedings and the importance that statutes placed on expeditious resolution of these matters. In re Josiah T., — S.W.3d —, 2019 Tenn. App. LEXIS 482 (Tenn. Ct. App. Oct. 2, 2019).

Rule 4. Appeal as of Right: Time for Filing Notice of Appeal. — (a) Generally. — In an appeal as of right to the Supreme Court, Court of Appeals or Court of Criminal Appeals, the notice of appeal required by Rule 3 shall be filed with the clerk of the appellate court within 30 days after the date of entry of the judgment appealed from; however, in all criminal cases the "notice of appeal" document is not jurisdictional and the timely filing of such document may be waived in the interest of justice. The appropriate appellate court shall be the court that determines whether such a waiver is in the interest of justice. Any party may serve notice of entry of an appealable judgment in the manner provided in Rule 20 for the service of papers.

Transitional Provision. — Effective July 1, 2017, Rule 4(a) is amended to require that the notice of appeal be filed with the appellate court clerk, instead of the trial court clerk. In the event a party, on or after July 1, 2017, incorrectly attempts to file a notice of appeal with the trial court clerk, the trial court clerk shall note the date and time of receipt of the attempted filing and shall immediately notify the party attempting to file the notice of appeal that the notice must be filed with the appellate court clerk. If the attempted filing of the notice of appeal with the trial court clerk was received by the trial court clerk within 30 days after the date of entry of the judgment, the party attempting to file the notice with the trial court clerk shall have 20 additional days, counting from the 30th day after the date of entry of the judgment, within which to file the notice of appeal with the appellate court clerk; a notice of appeal filed with the appellate court clerk during the additional period allowed by this transitional provision shall be deemed to have been timely filed. This transitional provision shall expire at 11:59 p.m., appellate court clerk's local time, on June 29, 2018, after which this transitional provision shall automatically be repealed. During the period this transitional provision is in effect, this provision shall govern all cases meeting its requirements, notwithstanding any other provision of these Rules. See Tenn. R. App. P. 2 and Tenn. R. App. P. 21(b) (stating, in summary, that the time for filing a notice of appeal cannot be suspended or extended by the appellate court).

(b) Termination by Specified Timely Motions in Civil Actions. — In a civil action, if a timely motion under the Tennessee Rules of Civil Procedure is filed in the trial court by any party: (1) under Rule 50.02 for judgment in accordance with a motion for a directed verdict; (2) under Rule 52.02 to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) under Rule 59.07 for a new trial; (4) under Rule 59.04 to alter or amend the judgment; the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion.

(c) Termination by Specified Timely Motions in Criminal Actions. — In a criminal action, if a timely motion or petition under the Tennessee Rules of Criminal Procedure is filed in the trial court by the defendant: (1) under Rule 29(c) for a judgment of acquittal; (2) under Rule 32(a) for a suspended sentence; (3) under Rule 32(f) for withdrawal of a plea of guilty; (4) under Rule 33(a) for a new trial; or (5) under Rule 34 for arrest of judgment, the time for appeal for all parties shall run from entry of the order denying a new trial or granting or denying any other such motion or petition.

(d) Premature Filing of Notice of Appeal. — A prematurely filed notice of appeal shall be treated as filed after the entry of the judgment from which the appeal is taken and on the day thereof.

(e) Effect of Specified Timely Motions on Trial Court's Jurisdiction. — The trial court retains jurisdiction over the case pending the court's ruling on any timely filed motion specified in subdivision (b) or (c) of this rule. If a motion specified in either subdivision (b) or (c) is filed within the time permitted by the applicable rule referred to in that subdivision, the filing of a notice of appeal prior to the filing of the motion, or the filing of a notice of appeal prior to the trial court's ruling on an earlier filed motion, does not deprive the trial court of jurisdiction to rule upon the motion. A notice of appeal filed prior to the trial court's ruling on a timely specified motion shall be deemed to be premature and shall be treated as filed after the entry of the order disposing of the motion and on the day thereof. If an appellant named in a premature notice of appeal decides to terminate the appeal as a result of the trial court's disposition of a motion listed in subdivision (b) or (c) of this rule, the appellant shall file in the appellate court a motion to dismiss the appeal pursuant to Rule 15.

(f) For purposes of this rule, the terms "party" and "parties" shall include any person filing a motion to intervene pursuant to Tenn. R. Civ. P. 24. [As amended by orders entered January 31, 1984, effective August 15, 1984, January 23, 1986, effective August 1, 1986, February 12, 1986, and filed February 1, 1995, effective July 1, 1995; and filed January 30, 2002, effective July 1, 2002; and by order entered December 10, 2003, effective July 1, 2004; by order entered January 6, 2005, effective July 1, 2005; by order entered December 21, 2010, effective July 1, 2011; by order filed December 18, 2012, effective July 1, 2013; by order filed March 14, 2014, effective July 1, 2014; and by order filed December 21, 2016, effective July 1, 2017; and by order filed January 8, 2018, effective July 1, 2018.]

Advisory Commission Comments. *Subdivision (a).* The 30-day period specified in this subdivision in which to file notice of appeal is to be uniformly applied. It applies to appeals by the state as well as private parties, and in all civil and criminal proceedings. Statutes prescribing some other time period for an appeal are in conflict with these rules and of no further force or effect.

Thirty days is sufficient time particularly in light of the fact that a party is required to do nothing to initiate the appellate process except file and serve notice of appeal. On the other hand, if it is desirable to expedite decision on any matter, notice of appeal may be filed and served immediately upon entry of the judgment appealed from, and an expedited schedule of appellate review may be established as permitted by Rule 2.

The third sentence of this subdivision is intended to alleviate the problem that results if the appellant is unaware that a judgment has been entered by the trial court. This problem can arise, particularly in nonjury actions, because under Tennessee Rule of Civil Procedure 58 a judgment, signed by the judge, is considered entered for purpose of determining the timeliness of an appeal when it is filed with the clerk of the trial court. No notice of the filing need be given. By giving notice under this subdivision of the entry of an appealable judgment, the party in whose favor the judgment was entered may be able effectively to thwart resort to Tennessee Rule of Civil Procedure 60.02 in an attempt to extend the time for appealing beyond the 30 days specified in this rule on the grounds of mistake, inadvertence, surprise or excusable neglect. Nothing in this rule or any other rule permits the time for filing notice of appeal to be extended beyond the specified 30 days, although in appropriate circumstances an otherwise untimely appeal may be taken by first securing relief under Tennessee Rule of Civil Procedure 60.02.

Subdivisions (b), (c), and (d). Subdivisions (b) and (c) specify certain post trial motions that, if timely filed, terminate the running of the time for filing notice of appeal. These tolling provisions may unduly lengthen litigation if such motions are not ruled on promptly by the trial court. However, unless these motions are abolished, it would be undesirable to proceed with

the appeal while the trial court has before it a motion the granting of which would vacate or alter the judgment appealed from, and which might affect either the availability of or the decision whether to seek appellate review. Subdivision (d) establishes the general rule that the right to appeal is not lost by filing a notice of appeal before entry of the judgment appealed from.

Advisory Commission Comments [1995]. This is an amendment to conform Appellate Rule 4 to Civil Rule 59. A motion for discretionary costs does not toll the time for filing a notice of appeal.

Advisory Commission Comments [1999]. If a bankruptcy automatic stay prevents filing a notice of appeal, the appellant has 30 days after lifting of the stay in which to file the notice. *See* 11 U.S.C. § 108(c).

Advisory Commission Comments [2000]. A notice of appeal filed by a pro se litigant incarcerated in a correctional facility is governed by the prisoner-filing provision in Rule 20(a).

Advisory Commission Comments [2002]. The amendment to Appellate Rule 4(c) corrects an obsolete reference to Criminal Rule 32(f)(1).

Advisory Commission Comments [2004]. The amendment adds to the list in subdivision (c) a motion for withdrawal of a plea of guilty. See *State v. Peele*, 58 S.W.3d 701 (Tenn. 2001).

Termination of Parental Rights Proceedings. Rule 8A imposes special requirements governing the appeal of any termination of parental rights proceeding. In particular, Rule 8A(a)(2) imposes a special provision regarding the filing of a notice of appeal in such a proceeding.

Advisory Commission Comments [2005]. Paragraphs (b) and (c) of this rule provide that the time for filing a notice of appeal "shall run from the entry of the order denying a new trial or granting or denying any other such motion." Nonetheless, some parties have filed notices of appeal before post-trial motions specified in this rule were filed or while such motions were pending decision, raising questions about the jurisdiction of a trial court to consider such motions. New paragraph (e) makes clear that a trial court retains jurisdiction over such motions despite the premature filing of a notice of appeal.

If a post-trial motion specified in Rule 4 is timely filed after the filing of a notice of appeal and after the trial court clerk's service of the notice of appeal on the clerk of the appellate court pursuant to Rule 5(a), the trial court clerk must notify the clerk of the appellate court of the filing of the motion; in addition, the trial court clerk must promptly notify the clerk of the appellate court of the entry of the trial court's order disposing of the motion.

Advisory Commission Comments [2011]. The amendment of paragraph (b) corrects an erroneous cross-reference, changing "59.02" to "59.07."

Advisory Commission Comments [2013]. Subparagraph (e) of the rule is amended to clarify that a trial court does not lose jurisdiction to rule upon a motion referred to in subparagraph (b) or (c) if the motion was filed within the time permitted by the applicable rule. A notice of appeal filed prior to the timely filing of one of the listed motions, or prior to the court's ruling on the motion, is deemed to be premature and does not deprive the court of jurisdiction to rule upon the motion.

Advisory Commission Comments [2014]. Subdivision (e) was amended by adding the following text to the second sentence: "or the filing of a notice of appeal prior to the trial court's ruling on an earlier filed motion[.]" That text was added to clarify that the filing of a notice of appeal prior to the trial court's ruling on a timely motion specified in subdivision (b) or (c) does not affect the trial court's ability to rule on the pending motion, so long as the motion was timely filed before or after the filing of the notice of appeal.

Subdivision (e) also was amended by substituting (in four places) the word "subdivision" for the word "subparagraph."

Advisory Commission Comments [2017]. In 2017, the Appellate Court Clerk's office will implement electronic filing and begin charging fees at the initiation of an appeal. To accommodate these initiatives, subdivision (a) of this rule is amended to change the location for filing the notice of appeal from the office of the trial court clerk to the office of the appellate court clerk. The word "timely" is also added to the second clause of the first sentence in subdivision (a) for the purpose of clarification. The rule is further amended to add a one year transitional rule to lessen the detrimental effect for those who mistakenly attempt to file their notice of appeal at the last minute with the trial court clerk.

Advisory Commission Comments [2018]. The 2018 amendment adds a new subsection (f) to clarify that the terms "party" and "parties" include persons who file motions to intervene and desire to take an appeal of right, as is permitted by the 2018 amendments to Rule 3, Tennessee Rules of Appellate Procedure and Rules 24 and 54, Tennessee Rules of Civil Procedure. Effective July 1, 2018, any order granting or denying a motion to intervene shall be a final judgment, and a timely appeal of that final judgement shall be the only method to appeal the grant or denial of a motion to intervene.

Compiler's Notes. T.R.A.P. 4 may supersede Tenn. Code Ann. §§ 27-6-104, 27-6-105, 27-6-108.

The amendment of Rule 4, as promulgated and adopted by the Supreme Court in its order dated December 10, 2003, was ratified and

approved by 2004 House Resolution 234 and Senate Resolution 117. The order promulgating the amendment of Rule 4 provided that it take effect July 1, 2004.

The amendment of Rule 4, as promulgated and adopted by the Supreme Court in its order dated January 6, 2005, was ratified and approved by 2005 House Resolution 14 and Senate Resolution 10. The order promulgating the amendment of Rule 4 provided that it take effect July 1, 2005.

The amendment of Rule 4, as promulgated and adopted by the Supreme Court in its order dated December 21, 2010, was ratified and approved by 2011 House Resolution 35 and Senate Resolution 13. The order promulgating the amendment of Rule 4 provided that it take effect July 1, 2011.

The amendment of Rule 4, which added the second sentence in subsection (e) and added the 2013 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 18, 2012, was ratified and approved by House Resolution 35 and Senate Resolution 13. The order promulgating the addition of the second sentence in Rule 4(e) and the addition of the 2013 Advisory Commission Comments provided that it take effect July 1, 2013.

The amendment of Rule 4, which amended subdivision (e) and added the 2014 Advisory Commission Comments, promulgated and adopted by the Supreme Court in its order dated December 16, 2013, as amended, March 14, 2014, was ratified and approved by 2014 House Resolution 156 and Senate Resolution 75. The order promulgating the 2014 amendment of subdivision (e) and the addition of the 2014 Advisory Commission Comments provided that it take effect on July 1, 2014.

The amendment of Rule 4, which amended subdivision (a) and added the the [2017] Advisory Comments, as promulgated and adopted by the Supreme Court in its order dated December 21, 2016, was ratified and approved by 2017 House Resolution 19 and Senate Resolution 16. The order promulgating the amendment of subdivision (a) and the addition of the [2017] Advisory Comments, provided that it take effect July 1, 2017.

In its order filed January 8, 2018, the Supreme Court adopted amendments to this rule, effective July 1, 2018, subject to approval by resolution of the General Assembly.

The amendment of Rule 4, which added subdivision (f) and added the the [2018] Advisory Comments, as promulgated and adopted by the Supreme Court in its order dated January 8, 2018, was ratified and approved by 2018 House Resolution 200 and Senate Resolution 165. The order promulgating the addition of subdivision (f) and the addition of the [2018] Advisory Comments, provided that it take effect July 1, 2018.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 232, 666.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 2-2-1, 2-4-1.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 30-51, 53, 57, 59, 63, 65-68, 74, 225; 12 Tenn. Juris., Exceptions, Bill of, § 13; 16 Tenn. Juris., Judgments and Decrees, § 45; 20 Tenn. Juris., New Trials, § 26.

Law Reviews. Criminal Appeals as of Right in Tennessee (W. Mark Ward), 31 No. 6 Tenn. B.J. 19 (1995).

New Evidence and New Trials (Gary C. Shockley), 19 No. 3 Tenn. B.J. 23 (1983).

1985 Tennessee Survey: Selected Developments in Tennessee Law, 53 Tenn. L. Rev. 291 (1986).

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1. Construction.

Relying upon United States v. Robinson, 361 U.S. 220, 80 S. Ct. 282, 4 L. Ed. 2d 259, 1960 U.S. LEXIS 2023 (1960), and other cases interpreting the federal counterpart of T.R.A.P. 4, court held that T.R.A.P. 4 is mandatory and jurisdictional. State v. Williams, 603 S.W.2d 157, 1980 Tenn. Crim. App. LEXIS 283 (Tenn. Crim. App. 1980); John Barb, Inc. v. Underwriters at Lloyds of London, 653 S.W.2d 422, 1983 Tenn. App. LEXIS 578 (Tenn. Ct. App. 1983).

The time limit in T.R.A.P. 4(a), after the 1983 amendment, is no longer jurisdictional in criminal cases, but remains jurisdictional in civil cases. Jefferson v. Pneumo Services Corp., 699 S.W.2d 181, 1985 Tenn. App. LEXIS 3418 (Tenn. Ct. App. 1985); State v. Davis, 748

S.W.2d 206, 1987 Tenn. Crim. App. LEXIS 2427 (Tenn. Crim. App. 1987).

Trial court properly dismissed petitioner's motion for post-conviction relief as time-barred under T.C.A. § 40-30-202(a) (now 40-30-102(a)), because petitioner failed to file the motion for relief within one year of the date on which the judgment of conviction became final, pursuant to T.R.A.P. 4(a) and (c); the court rejected petitioner's argument that the motion was timely as filed within one year of the court's denial of petitioner's motion for a waiver of the timely filing of a notice of appeal. Hill v. State, 111 S.W.3d 579, 2003 Tenn. Crim. App. LEXIS 21 (Tenn. Crim. App. 2003), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 513 (Tenn. May 27, 2003).

Taxation of costs is incidental and not a factor in determining whether a judgment is final. Brooks v. Woody, 577 S.W.3d 529, 2018 Tenn. App. LEXIS 656 (Tenn. Ct. App. Nov. 8, 2018).

2. Jurisdiction of Appellate Courts.

The jurisdiction of the Court of Criminal Appeals of Tennessee attaches with the filing of the notice of appeal. State v. Givhan, 616 S.W.2d 612, 1981 Tenn. Crim. App. LEXIS 335 (Tenn. Crim. App. 1981).

Failure to comply with time limits for filing new trial motions does not divest appellate courts of jurisdiction to hear appeals. State v. Givhan, 616 S.W.2d 612, 1981 Tenn. Crim. App. LEXIS 335 (Tenn. Crim. App. 1981); State v. Davis, 748 S.W.2d 206, 1987 Tenn. Crim. App. LEXIS 2427 (Tenn. Crim. App. 1987).

When appellant filed her first notice of appeal, the trial court had not yet entered a final judgment, and thus the court lacked subject matter jurisdiction at the initial notice of appeal filing; the court treated the appeal as prompted by a timely filed notice of appeal of the trial court's entire judgment in this matter. Mclaughlin v. McLaughlin, — S.W.3d —, 2019 Tenn. App. LEXIS 521 (Tenn. Ct. App. Oct. 28, 2019).

Appellate court considered defendant's issues on appeal notwithstanding appellate counsel's failure to address defendant's pro se notice of appeal. State v. Simpson, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 20 (Tenn. Crim. App. Jan. 13, 2021).

3. Time for Appeal.

The time for appeal does not begin to run until the trial court has disposed of all the timely filed motions specified in T.R.A.P. 4. Evans v. Wilson, 776 S.W.2d 939, 1989 Tenn. LEXIS 394 (Tenn. 1989), rehearing denied, — S.W.2d —, 1989 Tenn. LEXIS 468 (Tenn. 1989).

An appeal as of right is initiated by the filing of a notice of appeal within 30 days of the entry of the judgment being appealed; however, if a timely motion for judgment of acquittal, for a new trial, for arrest of judgment, or for a suspended sentence is filed, the 30 days run from the entry of the order determining such motion. State v. Lock, 839 S.W.2d 436, 1992 Tenn. Crim. App. LEXIS 428 (Tenn. Crim. App. 1992).

A trial court's judgment becomes final 30 days after its entry unless a timely notice of appeal or a post-trial motion is filed, and once the judgment is final, the trial court generally loses jurisdiction to amend it. State v. Lock, 839 S.W.2d 436, 1992 Tenn. Crim. App. LEXIS 428 (Tenn. Crim. App. 1992).

A motion to alter or amend under Tenn. R. Civ. P. 59.04, filed before the entry of final judgment, was timely and extended the 30 day time limit for filing notice of appeal. Hawkins v. Hawkins, 883 S.W.2d 622, 1994 Tenn. App. LEXIS 160 (Tenn. Ct. App. 1994), appeal denied, — S.W.2d —, 1994 Tenn. LEXIS 215 (Tenn. June 27, 1994).

A motion filed by the plaintiff requesting that the trial court alter or amend its judgment to find in her favor, which was entitled "Motion to Reconsider," was in substance a motion to alter or amend judgment; since this motion was filed within the time permitted, the chancellor retained jurisdiction and the time period for filing a notice of appeal did not commence until the trial court ruled on the motion. Tennessee Farmers Mut. Ins. Co. v. Farmer, 970 S.W.2d 453, 1998 Tenn. LEXIS 367 (Tenn. 1998).

In order to be legally effective, a notice of appeal had to have been filed on or before the 30 days following the entry of the first of two identical final orders. Arfken & Assocs., P.A. v. Simpson Bridge Co., 85 S.W.3d 789, 2002 Tenn. App. LEXIS 218 (Tenn. Ct. App. 2002).

Because the unfavorable rulings by the trial court did not become appealable for an employee until the trial court entered its order confirming that all claims of all parties had been adjudicated, for purposes of filing an appeal under T.R.A.P. 3 and 4(a), the 30-day appeal period commenced on the date that the trial court entered its order, not on the date that the employer and related individual filed a notice of voluntary dismissal of its counterclaim pursuant to Tenn. R. Civ. P. 41.01; the court noted that under the plain language of Tenn. R. Civ. P. 58, the signature of the judge is mandatory to effectuate a judgment. Green v. Moore, 101 S.W.3d 415, 2003 Tenn. LEXIS 324 (Tenn. 2003).

Where, 33 days after entry of the trial court's judgment, appellant contemnor filed a motion to alter or amend, that motion was untimely under Tenn. R. Civ. P. 58 and was therefore insufficient to toll commencement of the 30-day period for filing a notice of appeal, because Tenn. R. Civ. P. 6.05 did not apply to the mailing of a copy of entry of judgment requested pursuant to Tenn. R. Civ. P. 58; consequently, the "three-day rule" contained in Tenn. R. Civ. P. 6.05, and relied upon by the contemnor, did not

apply, because the contemnor failed to carry his burden of proving his compliance with Tenn. R. Civ. P. 58, i.e. he failed to prove the date on which the clerk mailed the notice of entry of the judgment. Binkley v. Medling, 117 S.W.3d 252, 2003 Tenn. LEXIS 850 (Tenn. 2003), rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 1262 (Tenn. 2003).

Appellate court dismissed a builder's appeal of an order denying its motion for relief from judgment based on excusable neglect where the trial court's decision denying the builder's motion was rendered after the 30-day period in T.R.A.P. 4(a) expired; hence, the trial court lacked subject matter jurisdiction over the case when it denied the builder's motion. Born Again Church & Christian Outreach Ministries, Inc. v. Myler Church Bldg. Sys. of the Midsouth, Inc., 266 S.W.3d 421, 2007 Tenn. App. LEXIS 774 (Tenn. Ct. App. Dec. 17, 2007), appeal denied, Born Again Church v. Myler Church Bldg. Sys., — S.W.3d —, 2008 Tenn. LEXIS 480 (Tenn. June 23, 2008).

Plaintiff filed her motion to alter or amend on September 29, 2017 and her notice of appeal on January 10, 2018, both long after thirty days had elapsed following entry of the March 9, 2017 final judgment. As plaintiff's notice of appeal was filed untimely, the appellate court lacked jurisdiction to consider her appeal. Brooks v. Woody, 577 S.W.3d 529, 2018 Tenn. App. LEXIS 656 (Tenn. Ct. App. Nov. 8, 2018).

4. Waiver of Service.

Service of a notice of appeal upon opposing counsel and the clerk of the appellate court may be waived upon good cause shown if appellant has timely filed a notice of appeal with the trial court. G. F. Plunk Constr. Co. v. Barrett Properties, Inc., 640 S.W.2d 215, 1982 Tenn. LEXIS 435 (Tenn. 1982).

5. Waiver of Notice of Appeal.

For purposes of T.R.A.P. 4, post-conviction proceedings are criminal in nature and the notice of appeal may be waived in the interest of justice. State v. Scales, 767 S.W.2d 157, 1989 Tenn. LEXIS 137 (Tenn. 1989).

Filing of a timely notice of appeal waived by court in the interest of justice. State v. Bilbrey, 816 S.W.2d 71, 1991 Tenn. Crim. App. LEXIS 555 (Tenn. Crim. App. 1991), superseded by statute as stated in, State v. Grissom, 956 S.W.2d 514, 1997 Tenn. Crim. App. LEXIS 676 (Tenn. Crim. App. 1997).

Appellate court waived the notice of appeal requirement where defendant initially decided to waive his right of appeal, changed his mind during the period in which he did not have the advice of counsel, attempted to perfect his appeal before the limitations period expired by seeking the assistance of his former attorney and filed a pro se motion only eleven days after the limitations period expired. Crittenden v. State, 978 S.W.2d 929, 1998 Tenn. LEXIS 574 (Tenn. 1998).

Nature of the issues for review and the reasons given by defendant for the delay in filing his notice of appeal did not merit waiver in the interest of justice defendant did not address in his brief any jail credits to which he claimed he was entitled other than those for his time at liberty; because defendant did not raise in the trial court the issue that evidence was improperly used to obtain the indictment, the issue was waived. State v. Russell, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 17 (Tenn. Crim. App. Jan. 14, 2020).

6. Waiver of Untimely Filing.

Although petitioner failed to timely file his notice of appeal, in view of the action taken by the court, no prejudice has accrued to the state and in the interest of justice, the untimely filing is waived. State v. Mullins, 767 S.W.2d 668, 1988 Tenn. Crim. App. LEXIS 651 (Tenn. Crim. App. 1988).

Where appointed counsel failed to inform applicant of the trial court's dismissal of his post-conviction petition, and failed to advise him of his right to appeal until the 30-day appeal period had lapsed, there being no evidence in the record to dispute applicant's claim, the court of appeal waived the timely filing of the notice of appeal. Warren v. State, 833 S.W.2d 101, 1992 Tenn. Crim. App. LEXIS 94 (Tenn. Crim. App. 1992).

State's appeal was presented in a timely fashion, even though filed 30 days after the court rendered its judgment, where the trial court inadvertently and unintentionally dismissed the case. State v. Lock, 839 S.W.2d 436, 1992 Tenn. Crim. App. LEXIS 428 (Tenn. Crim. App. 1992).

The 30-day rule for notices of appeal is mandatory and jurisdictional and may not be waived. American Steinwinter Investor Group ex rel. American Steinwinter v. American Steinwinter, 964 S.W.2d 569, 1997 Tenn. App. LEXIS 379 (Tenn. Ct. App. 1997), rehearing denied, Steinwinter Inv. Group v. American Steinwinter, — S.W.2d —, 1997 Tenn. App. LEXIS 417 (Tenn. Ct. App. 1997).

Appellate court granted defendant's request to waive the timely filing of the notice of appeal, when defendant's prior counsel sent in the notice of appeal by regular mail, due to a presumed misunderstanding of the filing procedures by prior counsel and defendant's then counsel presuming the notice of appeal was filed correctly when then counsel was substituted in representation. Sanders v. State, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 114 (Tenn. Crim. App. Feb. 21, 2019).

Interest of justice did not demand waiver of the timely filing requirement because the issues raised in petitioner's action had been waived since they could have been raised at his

previous revocation hearing or on appeal from the trial court's order revoking his probation; also, the merits of the post-conviction matter had been previously determined. Hassman v. State, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 152 (Tenn. Crim. App. Mar. 11, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 351 (Tenn. July 19, 2019).

Post-conviction court properly denied defendant's petition for relief because, while the appellate court waived the untimeliness of his appeal in the interest of justice, defendant failed to show that trial counsel performed deficiently or that he was prejudiced by any of trial counsel's actions where counsel's accredited testimony established that he thoroughly reviewed all discovery materials with defendant, communicated with him in preparation for trial, and discussed the guilty plea with him, defendant presented no evidence that his medications impaired his ability to understand his guilty plea, and trial counsel testified that he believed defendant understood the nature of the proceeding and understood what he was doing. Mason v. State, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 365 (Tenn. Crim. App. June 25, 2019).

Although a probationer filed a notice of appeal beyond the time limit when a trial court filed a probation revocation order, the appellate court, in the interest of justice, addressed the probationer's concerns. State v. Cook, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 433 (Tenn. Crim. App. July 16, 2019).

Although defendant filed a notice of appeal almost six months after the thirty-day deadline and asserted that post-conviction counsel did not receive defendant's request to file an appeal until month's later, the appellate court waived the requirement for a timely filing of the notice of appeal in the interest of justice. Delk v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 102 (Tenn. Crim. App. Feb. 19, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 444 (Tenn. July 7, 2020).

Defendant's appeal had to be dismissed as untimely because defendant did not request that the court of criminal appeals waive the timely filing requirement; given the procedural history of the case, the state of the appellate record, and the nature of the issues presented for review, the interests of justice did not require the court of criminal appeals to waive the timely filing of the notice of appeal. State v. Vincent, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 318 (Tenn. Crim. App. May 5, 2020).

Defendant's motion for new trial was filed well-beyond the 30-day time limit and thus his notice of appeal was also untimely; however, in the interests of justice, the court waived the timely filing of the notice of appeal. Still, because the new trial motion was untimely, defendant waived his issues except sufficiency of the evidence and sentencing. State v. Chaves-Abrego, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 422 (Tenn. Crim. App. June 18, 2020), appeal denied, State v. Chaves-Abrego, — S.W.3d —, 2020 Tenn. LEXIS 519 (Tenn. Oct. 7, 2020).

Although defendant's notice of appeal was not timely filed, the appellate court waived the timely filing of the notice of appeal in the interest of justice because the post-conviction court granted defendant's motion to file a delayed appeal, despite not having the authority to do so, when defendant alleged that defendant requested defendant's post-conviction counsel to appeal the denial of defendant's petition, but defendant discovered in the previous month that post-conviction counsel had not filed an appeal and had left private practice. Lee v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 706 (Tenn. Crim. App. Oct. 30, 2020).

7. Delayed Appeal.

The trial court's granting a "delayed appeal" triggers the 30-day period for filing a notice of appeal. State v. Cordell, 645 S.W.2d 763, 1982 Tenn. Crim. App. LEXIS 409 (Tenn. Crim. App. 1982).

Because the judgment of conviction from which defendant sought relief became final long ago, and it did not reserve certified question, it could not be amended; therefore, a "delayed appeal" was of no benefit. State v. Boyd, 51 S.W.3d 206, 2000 Tenn. Crim. App. LEXIS 672 (Tenn. Crim. App. 2000).

8. Delayed Order.

Where trial judge held a probation hearing more than 30 days after judgments against defendants had become final, and no written petition for probation had been filed on their behalf to toll the running of the time, his order in which he attempted partial suspensions of their sentences was void for lack of jurisdiction, and defendants' appeal from denial of their petitions for suspended sentences, although filed within 30 days of the judge's order, would be dismissed for lack of jurisdiction. State v. Hamlin, 655 S.W.2d 200, 1983 Tenn. Crim. App. LEXIS 348 (Tenn. Crim. App. 1983), superseded by statute as stated in, State v. Roach, — S.W.2d —, 1992 Tenn. Crim. App. LEXIS 320 (Tenn. Crim. App. Apr. 9, 1992).

9. Appeal of Directed Verdict.

An appeal of right is granted from the trial court's ruling on a Tenn. R. Civ. P. 50.02 motion for directed verdict only when no motion for a new trial has been filed. Hutchison v. ARO Corp., 653 S.W.2d 738, 1983 Tenn. App. LEXIS 584 (Tenn. Ct. App. 1983).

10. Pending Motion for New Trial.

Where notice of appeal was filed prior to disposition of motion for a new trial, which was still pending in the trial court, the notice was of

no effect, as there had been no final disposition below of the case, there was no appeal of right and the notice of appeal was of no effect. Hutchison v. ARO Corp., 653 S.W.2d 738, 1983 Tenn. App. LEXIS 584 (Tenn. Ct. App. 1983).

11. Premature Filing.

Disposition of post-judgment motions meant the entry of the order disposing of the post-judgment motions, and defendant's notice of appeal filed after an oral ruling on the post-judgment ruling, but before the ruling was filed, was premature and of no effect. Steele v. Wolfe Sales Co., 663 S.W.2d 799, 1983 Tenn. App. LEXIS 648 (Tenn. Ct. App. 1983).

Defendant's convictions for animal cruelty were proper under T.R.A.P. 4(d) because the "judgment" entered by the trial court was a preliminary sentencing order, and not a final judgment, since it was not in the form of a uniform judgment document and did not contain much of the information required in a final judgment form; the trial court also specifically reserved the determination of the restitution owed to the county to a later date following an evidentiary hearing. State v. Siliski, 238 S.W.3d 338, 2007 Tenn. Crim. App. LEXIS 390 (Tenn. Crim. App. May 15, 2007), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 878 (Tenn. Sept. 17, 2007).

Although filed prematurely, a former employee's second notice of appeal was timely and vested the appellate court with jurisdiction because the trial court's purported final order failed to rule on all the issues, and, without ruling on these requests, the judgment was not final, so that the appellate court never acquired jurisdiction over the employee's first appeal. Thus, any order by the appellate court on that appeal was void and the trial court retained jurisdiction to adjudicate the claims until it filed its final order. Foster-Henderson v. Memphis Health Ctr., Inc., 479 S.W.3d 214, 2015 Tenn. App. LEXIS 582 (Tenn. Ct. App. July 22, 2015), appeal denied, Foster v. Memphis Health Ctr., Inc., — S.W.3d —, 2015 Tenn. LEXIS 1074 (Tenn. Dec. 14, 2015).

Mother's notice of appeal filed before entry of a final order was timely because (1) a contempt order was immediately appealable despite pending proceedings from which the order arose, and (2) a premature notice of appeal was treated as having been filed after entry of the judgment appealed. Blakney v. White, — S.W.3d —, 2019 Tenn. App. LEXIS 498 (Tenn. Ct. App. Oct. 8, 2019).

12. Modification of Judgment.

In the absence of a pending motion for acquittal or a new trial, a motion for arrest of judgment, or suspended sentence, any purported modification of that judgment after the 30-day period is void, notwithstanding a judge's reservation to a later date of the determination of whether the sentences would run consecutively or concurrently. State v. Reed, 665 S.W.2d 405, 1983 Tenn. Crim. App. LEXIS 435 (Tenn. Crim. App. 1983).

13. Motions Not Contemplated.

A motion to remain free on bond pending appeal was not a motion contemplated by the provisions relating to specified timely motions in criminal actions. State v. Reed, 665 S.W.2d 405, 1983 Tenn. Crim. App. LEXIS 435 (Tenn. Crim. App. 1983).

A motion to file a third party complaint is not one of the motions which will extend the time for the filing of notice of appeal. Griswold v. Income Properties, II, 880 S.W.2d 672, 1993 Tenn. App. LEXIS 786 (Tenn. Ct. App. 1993), rehearing denied, — S.W.2d —, 1994 Tenn. App. LEXIS 16 (Tenn. Ct. App. 1994).

14. Untimely Notice of Appeal.

Tenn. R. Civ. P. 60 may not be used to provide relief to a party whose lawyer failed to file a timely notice of appeal because he was busy with other clients' work. Jefferson v. Pneumo Services Corp., 699 S.W.2d 181, 1985 Tenn. App. LEXIS 3418 (Tenn. Ct. App. 1985).

Trial courts can, in certain extraordinary circumstances, grant relief in accordance with the requirements of Tenn. R. Civ. P. 60.02 to parties who failed to file their notice of appeal within the period of time provided for in T.R.A.P. 4(a). Jefferson v. Pneumo Services Corp., 699 S.W.2d 181, 1985 Tenn. App. LEXIS 3418 (Tenn. Ct. App. 1985).

Mailing of a notice of appeal within two days of the deadline for so doing was not excusable neglect as that term is used in Tenn. R. Civ. P. 60. First Nat'l Bank v. Goss, 912 S.W.2d 147, 1995 Tenn. App. LEXIS 337 (Tenn. Ct. App. 1995), appeal denied, — S.W.2d —, 1995 Tenn. LEXIS 491 (Tenn. 1995).

The 30-day rule for notices of appeal is mandatory and jurisdictional and an appeal filed more than 30 days from the date of final judgment must be dismissed. American Steinwinter Investor Group ex rel. American Steinwinter v. American Steinwinter, 964 S.W.2d 569, 1997 Tenn. App. LEXIS 379 (Tenn. Ct. App. 1997), rehearing denied, Steinwinter Inv. Group v. American Steinwinter, — S.W.2d —, 1997 Tenn. App. LEXIS 417 (Tenn. Ct. App. 1997).

In a workers' compensation appeal, the employer contended that because the statistical data (SD1) form was not filed "contemporaneously" with the judgment, the time for filing the notice of appeal began when the SD1 form was filed and the date the judgment was entered. The appellate court held that while the SD1 form had to be filed in accordance with T.C.A. § 50-6-244(a), to the extent T.C.A. § 50-6-244(a) conflicted with the 30-day time limit prescribed by T.R.A.P. 4, T.R.A.P. 4 controlled; therefore, the workers' compensation judgment was final on the date of entry stamped by the trial court clerk whether or not it was filed

contemporaneously with the SD1 form, and the employer's appeal, filed 34 days after the judgment was entered, was untimely. Corum v. Holston Health & Rehab. Ctr., 104 S.W.3d 451, 2003 Tenn. LEXIS 338 (Tenn. 2003).

Plaintiffs' notice of appeal was filed more than 30 days after the entry of summary judgment for defendants in a slander of title action, therefore the court lacked jurisdiction to hear the appeal and was required to dismiss the appeal. Under T.R.A.P. 2, an appellate court is not authorized to extend the time for filing a notice of appeal and cannot enlarge the time for filing a notice of appeal prescribed in T.R.A.P. 4. Briley v. Chapman, 182 S.W.3d 884, 2005 Tenn. App. LEXIS 466 (Tenn. Ct. App. 2005), appeal denied, — S.W.3d —, 2005 Tenn. LEXIS 1105 (Tenn. Dec. 5, 2005).

Interest of justice did not demand that the appellate court waive the timely filing of the notice of appeal under T.R.A.P. 4 because a motion to rehear or reconsider did not toll the time for filing a notice of appeal, and absent from the state's argument was any explanation as to why the notice was filed more than 80 days late. State v. Rockwell, 280 S.W.3d 212, 2007 Tenn. Crim. App. LEXIS 641 (Tenn. Crim. App. Aug. 13, 2007).

Plaintiff's appeal was untimely because the trial court's order granting relief from its judgment was void where the plaintiffs' notice of appeal was received and docketed by the appellate court more than 30 days after the trial court's judgment became final and the appellate court denied their motion for leave to correct the trial court record. Burke v. Huntsville NH Operations LLC, 491 S.W.3d 683, 2015 Tenn. App. LEXIS 940 (Tenn. Ct. App. Nov. 30, 2015), appeal denied, Burke v. Huntsville NH Operations LLC, — S.W.3d —, 2016 Tenn. LEXIS 321 (Tenn. May 5, 2016).

Defendant waived consideration of the issues in defendant's appeal because defendant's notice of appeal was untimely filed as it was filed more than 30 days after the date of entry of the judgment and the envelope used to mail the notice of appeal was neither certified return receipt mail, nor registered return receipt mail. Furthermore, defendant did not address the untimely filing in defendant's brief or in a reply brief to the appellate court, and the court did not find that the interests of justice required waiving the timely filing. Sanders v. State, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 24 (Tenn. Crim. App. Jan. 11, 2019).

Petitioner's notice of appeal was untimely by nearly two months because his motion to reconsider did not toll the thirty-day filing period. Hassman v. State, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 152 (Tenn. Crim. App. Mar. 11, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 351 (Tenn. July 19, 2019).

Defendant's attempt to appeal a certified question was dismissed because the appeal was untimely, as the notice of appeal was filed one day late. State v. Bolka, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 279 (Tenn. Crim. App. Apr. 30, 2019).

Because defendant failed to include anything in the record with respect to the July 2016 revocation, the interests of justice did not require the appellate court to waive the timely filing of the notice of appeal; thus, defendant's claims with respect to the July 2016 revocation were not properly before the appellate court. State v. Silcox, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 509 (Tenn. Crim. App. Aug. 22, 2019).

Because the single issue presented on appeal with respect to defendant's ineffective assistance of counsel claim was waived and, in any event, would not entitle defendant to relief, the interests of justice did not warrant the waiver of the timely filing of the notice of appeal in this case. State v. Kennedy, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 796 (Tenn. Crim. App. Dec. 20, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 176 (Tenn. Apr. 16, 2020).

Because a party failed to timely appeal the order, his issues were not subject to review. Donovan v. Hastings, — S.W.3d —, 2020 Tenn. App. LEXIS 483 (Tenn. Ct. App. Oct. 30, 2020).

Appellate court lacked jurisdiction to consider an inmate's appeal because the inmate's notice of appeal was filed well outside the 30-day time period for filing and the notice was not timely delivered to the appropriate individual at the correctional facility under the so-called Prisoner Mailbox Rule as it could be inferred that the notice was still in the inmate's possession when the inmate signed the notice. Houston v. Brown, — S.W.3d —, 2020 Tenn. App. LEXIS 519 (Tenn. Ct. App. Nov. 18, 2020).

Defendant's notice of appeal was not timely filed because it was filed with the appellate court clerk more than thirty days after the judgment appealed from was entered; defendant had adequate time to comply with the rule but failed to do so because the order showed on its face that it was stamped "Filed January 15, 2019" by the circuit court clerk and that a deputy clerk certified that it was mailed to defendant the next day. State v. Russell, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 17 (Tenn. Crim. App. Jan. 14, 2020).

Defendant's appeal of an order revoking his probation had to be dismissed as untimely, but even if defendant timely-filed his motion for new trial, the motion would not have tolled the time for filing the notice of appeal because a probation revocation hearing was not a "trial"; accordingly, defendant's notice of appeal was also untimely. State v. Vincent, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 318 (Tenn. Crim. App. May 5, 2020).

Because a father attempted to raise an issue regarding a separate case, which was not timely appealed, and all issues with regard to

the instant case were waived, the appeal was dismissed. Specifically, the notice of appeal was not timely filed in accordance with Tenn. R. App. P. 4(a) with regard to the issue raised on appeal, and appellant waived any other issues which might have been raised. Wright v. Sieglitz, — S.W.3d —, 2021 Tenn. App. LEXIS 20 (Tenn. Ct. App. Jan. 13, 2021).

Appellate court lacked jurisdiction to consider a husband's appeal of a suit for divorce because the notice of appeal was not timely filed as the time period for filing the notice of appeal commenced to run when the trial court entered its order addressing the parties' first motions to alter or amend. The time period did not commence following the court's order pertaining to the wife's second motion to alter or amend because that motion constituted the filing of serial motions to alter or amend, which which was not permitted. Grissette v. Grissette, — S.W.3d —, 2021 Tenn. App. LEXIS 92 (Tenn. Ct. App. Mar. 9, 2021).

15. Timeliness.

Where inmate delivered his notice of appeal to appropriate prison personnel well within the period allowed, as provided in T.R.A.P. 20(a), his notice was deemed to have been timely filed even though it was not received and filed with the clerk until 31 days after the entry of the trial court's final order. Goodwin v. Hendersonville Police Dep't, 5 S.W.3d 633, 1999 Tenn. LEXIS 550 (Tenn. 1999), rehearing denied, — S.W.3d —, 1999 Tenn. LEXIS 651 (Tenn. Dec. 13, 1999).

In a breach of contract case, an appeal was timely filed because the 30-day time limit did not begin to run until a trial court ruled on a motion to alter or amend, which was filed after judgment was entered against a purchaser. Albert v. Frye, 145 S.W.3d 526, 2004 Tenn. LEXIS 654 (Tenn. 2004).

Contractor had the right to immediately appeal the issue of arbitration, but failed to file such an appeal in a timely manner, and had waived the issue of whether arbitration was appropriate; the contractor had until January 6, 2003, to file his notice of appeal, pursuant to T.R.A.P. 4(a), but he did not make any such filing by that date. Mitchell v. Owens, 185 S.W.3d 837, 2005 Tenn. App. LEXIS 648 (Tenn. Ct. App. 2005), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 215 (Tenn. Mar. 20, 2006).

Trial court did not abuse its discretion when it determined that it did not have jurisdiction to consider a builder's motion styled "motion to reconsider findings of fact and conclusions of law," because that motion was filed after the builder filed a notice of appeal. Although the motion was substantively a motion to amend or make additional findings of fact made pursuant to Tenn. R. Civ. P. 52.02 and Tenn. R. Civ. P. 59.01 and 59.02, the court stated that, had it considered the motion, it would have been denied. Holladay v. Speed, 208 S.W.3d 408, 2005 Tenn. App. LEXIS 828 (Tenn. Ct. App. 2005), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 743 (Tenn. Aug. 21, 2006).

Appellate court did not err by permitting the state to pursue its appeal from trial court's November 9, 2005 suppression order because it was timely, as at the state's request trial court entered an order on May 19, 2006 dismissing indictments against defendants and the state filed its timely notice of appeal as permitted by T.R.A.P. 3(c)(1) within 30 days of trial court's order; because the state's appeal was timely filed, appellate court was not required to exercise discretion under T.R.A.P. 4(a) to excuse the state from timely filing of notice of appeal. State v. Meeks, 262 S.W.3d 710, 2008 Tenn. LEXIS 575 (Tenn. Sept. 2, 2008).

Notice of appeal filed by the wife was prematurely filed and hence was treated as being filed on the date on which the final order in the case was entered; thus, appellate court had jurisdiction of the appeal. In re Ackerman, 280 S.W.3d 206, 2008 Tenn. App. LEXIS 427 (Tenn. Ct. App. July 29, 2008).

Thirty day time period for filing a notice of appeal contained in T.R.A.P. 4(a) plainly applied to the case, and by not appealing from the district court's dismissal of his 1991 petition, the inmate failed to comply with the rule; the state appellate court determined that the procedural bar governing the filing of a notice of appeal applied to the inmate's case, and the inmate did not allege that Rule 4(a) was not an independent and adequate state ground upon which to rest the procedural default determination. Wright v. Bell, 619 F.3d 586, 2010 FED App. 274P, 2010 U.S. App. LEXIS 18139 (6th Cir. Aug. 31, 2010).

Motor vehicle accident victim lost the ability to appeal, the validity of a post-mediation agreement by failing to file a timely appeal because the trial court's order—that the victim's parent had legal authority to sign the agreement on the victim's behalf and that the agreement was an enforceable contract—was a final order so that the victim lost the ability to challenge the validity of the post-mediation agreement after the 30-day time period to appeal expired. Allen v. Am. Yeast, Inc., — S.W.3d —, 2018 Tenn. App. LEXIS 587 (Tenn. Ct. App. Oct. 4, 2018), appeal denied, Allen v. Am. Yeast Inc., — S.W.3d —, 2019 Tenn. LEXIS 114 (Tenn. Feb. 22, 2019).

Appellate court lacked jurisdiction to consider defendant's appeal of the forfeiture because it was a civil action and defendant failed to file a notice of appeal within 30 days after the entry of judgment, filing the notice over three years after entry of judgment. State v. Tuttle, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 671 (Tenn. Crim. App. Aug. 31, 2018), review denied and ordered not published, — S.W.3d —, 2019 Tenn. LEXIS 14 (Tenn. Jan. 16, 2019).

While it appeared that appellant's notice of appeal was untimely, having been filed 31 days after entry of the final order, the appellant initially attempted to file the notice of appeal in the trial court. The notice of appeal was, thus, timely pursuant to the transitional provision. Singh v. Singh, — S.W.3d —, 2019 Tenn. App. LEXIS 334 (Tenn. Ct. App. July 3, 2019).

16. Jurisdiction of Lower Court.

Defendant filed his motion 29 days after entry of the circuit court's order of dismissal, and as the Tennessee Rules of Civil Procedure applied in the circuit court proceedings and defendant timely filed an appropriate post-trial motion, the circuit court retained jurisdiction to rule on defendant's motion. Ken Smith Auto Parts v. Thomas, — S.W.3d —, 2019 Tenn. App. LEXIS 17 (Tenn. Ct. App. Jan. 15, 2019), aff'd, 599 S.W.3d 555, 2020 Tenn. LEXIS 147 (Tenn. Apr. 17, 2020).

17. Appeal Timely.

As appellant's timely post-trial motion, asking the trial court to correct erroneous factual and evidentiary rulings and legal errors, was in substance a motion to alter or amend or for a new trial under Tenn. R. Civ. P. 52.02 and 59.04, and as appellant timely filed a notice of appeal after the trial court denied the motion, the appellate court had subject matter jurisdiction to hear the appeal under T.R.A.P. 4(b). U.S. Bank, N.A. v. Tenn. Farmers Mut. INS. Co., 410 S.W.3d 820, 2012 Tenn. App. LEXIS 826 (Tenn. Ct. App. Nov. 29, 2012), appeal denied, U.S. Bank v. Tenn. Farmers Mut. Ins. Co., — S.W.3d —, 2013 Tenn. LEXIS 468 (Tenn. May 8, 2013).

Defendant's notice of appeals was timely because defendant's timely motion for arrest of judgment, which motion challenged the trial court's jurisdiction, effectively continued the trial court's jurisdiction until 30 days after it disposed of that motion via its order. State v. Contreras, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 642 (Tenn. Crim. App. Oct. 9, 2019).

18. Appeal Dismissed.

No appeal as of right flowed from petitioner's filing of a motion for new trial, the substance of which pertained to the denial of his petition for post-conviction relief, because neither the rule nor the Post-Conviction Procedure Act provided for such a filing; the law does not provide for an appeal as of right from the denial of a motion to reconsider a post-conviction petition. Hassman v. State, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 152 (Tenn. Crim. App. Mar. 11, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 351 (Tenn. July 19, 2019).

Trial court lacked jurisdiction to grant defendant's delayed appeal because once the judgments became final, the trial court lost jurisdiction over the matter, and the trial court did not have the authority to extend the deadline for filing a motion for new trial or the authority to enlarge the time for filing a notice of appeal in the appellate court; thus, defendant's delayed appeal was dismissed. State v. Caudle, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 717 (Tenn. Crim. App. Nov. 12, 2019).

Defendant's appeal was dismissed because the post-conviction court's order denying relief was filed on December 7, 2018, but the notice of appeal was filed with the appellate court clerk on January 11, 2019, which exceeded the 30-day time frame in which to file a notice of appeal; defendant's appellate brief did not address the untimeliness of the notice of appeal; the State's appellate brief, which stated that the notice of appeal was untimely, was filed on July 25, 2019, and defendant did not submit a reply brief, file a motion, or otherwise respond to the State's request for a dismissal of the appeal; and the interests of justice did not warrant waiving the timely filing of the notice of appeal. Estrada v. State, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 805 (Tenn. Crim. App. Dec. 30, 2019).

Defendant's appeal of an order revoking his probation had to be dismissed as untimely because defendant had until October 27, 2017 to file his notice of appeal, but instead, he filed a motion for new trial on November 9, 2017 and his notice of appeal on January 4, 2018. State v. Vincent, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 318 (Tenn. Crim. App. May 5, 2020).

Defendant did not file his motion for new trial until more than one year after the judgments were entered, and because his motion for new trial was untimely, his notice of appeal was also untimely; he also did not provide any explanation for the untimely filings, and the absence of the sentence hearing transcript from the record precluded review of the sentence. The interest of justice did not require waiver of the timely notice of appeal requirement and the appeal was dismissed. State v. Cooke, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 460 (Tenn. Crim. App. July 2, 2020).

Petitioner's appeal was subject to dismissal where petitioner filed an untimely notice of appeal document, and the interest of justice did not favor waiver of the timely filing requirement. Although petitioner only missed the certified mailing deadline by three days, petitioner offered no reason for his failure to adhere to the procedural rules for timely filing a notice of appeal document. Echols v. State, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 119 (Tenn. Crim. App. Mar. 29, 2021).

19. Tolling.

Because a mother's motion to alter or amend was filed timely, the time for filing a notice of appeal of the trial court's underlying judgment was tolled until the entry of the order granting or denying the mother's post-trial motion; because the mother filed a timely motion and filed her notice of appeal within thirty days of the

denial of that motion, she was entitled to appeal both the underlying judgment and the denial of her post-trial motion. Burris v. Burris, 512 S.W.3d 239, 2016 Tenn. App. LEXIS 698 (Tenn. Ct. App. Sept. 20, 2016).

Appeal was timely filed following a court's resolution of several post-judgment motions because, while not titled as such, the post-judgment motions filed by appellants were most properly characterized as motions for additional findings. Such a motion tolled the time for the filing of a notice of appeal. U.S. Bank Nat'l Ass'n v. Ingram, — S.W.3d —, 2019 Tenn. App. LEXIS 196 (Tenn. Ct. App. Apr. 26, 2019).

20. Final Judgment.

Neither a February 6, 2019 order nor a subsequent April 9, 2019 order in an uninsured motorist case contained language stating that there was no just reason for delay of entry of a final order. In the absence of such language, neither order was final so as to confer subject matter jurisdiction over the appeal to the appellate court. Medders v. Newby, — S.W.3d —, 2020 Tenn. App. LEXIS 183 (Tenn. Ct. App. Apr. 24, 2020).

Statute requires that there be an unappealable final decision before a trial court can award attorney fees pursuant to the statute; in this case, the May 24, 2019 order resolved all claims and neither party appealed or filed a post-judgment motion. Thus, the order became final and unappealable on June 23, 2019, and because an award of fees was stayed until that time, appellant's motion for fees filed two weeks later was not too late to entitle her to an award of fees under the statute. Donovan v. Hastings, — S.W.3d —, 2020 Tenn. App. LEXIS 483 (Tenn. Ct. App. Oct. 30, 2020).

Rule 5. Appeal as of Right: Service of Notice of Appeal; Docketing of the Appeal. — (a) Service of Notice of Appeal in Civil Actions. — Not later than 7 days after filing the notice of appeal, the appellant in a civil action shall serve a copy of the notice of appeal on counsel of record for each party or, if a party is not represented by counsel, on the party. Proof of service in the manner provided in Rule 20(e) shall be filed with the clerk of the appellate court within 7 days after service. The appellant shall note on each copy served the date on which the notice of appeal was filed. Service shall be sufficient notwithstanding the death of a party or counsel. The clerk of the appellate court shall promptly send a copy of all filed notices of appeal to the trial court and the clerk of the trial court designated in the notice of appeal.

(b) Service of Notice of Appeal in Criminal Actions. — In criminal actions, when the defendant is the appellant and the action was prosecuted by the state, the defendant shall serve a copy of the notice of appeal on the district attorney general of the county in which the judgment was entered and on the attorney general at the Attorney General's Nashville, Tennessee office. When the defendant is the appellant and the action was prosecuted by a governmental entity other than the state for the violation of an ordinance, the copy of the notice of appeal shall be served on the chief legal officer of the entity or, if this officer's name and address does not appear of record, then on the chief administrative officer of the entity at his or her official address. When the state or other prosecuting entity is the appellant, a copy of the notice of appeal shall be served on the defendant and the defendant's counsel. Service shall be made not later than 7 days after filing notice of appeal and proof of service in the manner provided in Rule 20(e) shall be filed with the clerk of the appellate court within 7 days after service. The appellant shall note on each copy served the date on which the notice of appeal was filed. The clerk of the appellate court shall promptly send a copy of all filed notices of appeal to the trial court and the clerk of the trial court designated in the notice of appeal.

(c) Docketing of the Appeal. — The clerk of the appellate court shall enter the appeal on the docket immediately upon receipt of the notice of appeal or, in appeals other than appeals as of right pursuant to Rule 3, upon receipt of the application or petition initiating the appeal. The clerk of the appellate court

shall immediately serve notice on all parties of the docketing of the appeal. An appeal shall be docketed under the title given to the action in the trial court, with the appellant identified as such, but if such title does not contain the name of the appellant, the party's name, identified as appellant, shall be added to the title unless otherwise directed by the appellate court. With the service of the notice of docketing of the appeal, the clerk of the appellate court shall send to the appellant, and the appellant shall fully complete and return to the clerk, a docketing statement in the form prescribed by the clerk.

If more than one party files a notice of appeal in an action appealed to the Court of Appeals pursuant to Tenn. R. App. P. 3, the first party filing a notice of appeal shall be deemed to be the appellant, unless otherwise directed by the court. [As amended effective July 1, 1980, by orders entered January 31, 1984, effective August 15, 1984, January 28, 1985, effective October 1, 1985, January 25, 1991, effective July 1, 1991, and filed February 1, 1995, effective July 1, 1995; by order effective July 1, 1997; by order filed January 31, 2002, effective July 1, 2002; by order filed January 2, 2007, effective July 1, 2007; by order filed January 13, 2012, effective July 1, 2012; and by order filed December 21, 2016, effective July 1, 2017.]

Advisory Commission Comments [1997]. In order to assist the appellate court system in tracking all cases post trial, the amendment shifts the duty of serving copies of notices of appeal on appellate clerks from counsel to trial court clerks. Service of a copy on the appellate clerk is not jurisdictional.

Advisory Commission Comments [2007]. The amended language requires the trial court clerk to promptly serve either the appeal bond or affidavit of indigency with the notice of appeal upon the appellate court clerk. This amendment will ensure that appellants timely file their appeal bond with the notice of appeal. Failure to do so will result in the trial court clerk notifying the appellate court clerk that no appeal bond has been filed so that action can be taken to dismiss the appeal under Rule 6(a) prior to the filing of record.

Advisory Commission Comments [2012]. Tenn. R. App. P. 13(a) provides that "any question of law may be brought up for review and relief by any party" and that "[c]ross-appeals, separate appeals, and separate applications for permission to appeal are not required." Tenn. R. App. P. 13(a) goes on to provide that "[d]ismissal of the original appeal shall not preclude issues raised by another party from being considered by an appellate court." *See also* Tenn. R. App. P. 6(c) (providing that a party wanting to litigate appellate issues despite dismissal of the original appellant's appeal shall file a cost bond, with surety, to replace the cost bond filed by the original appellant); Tenn. R. App. P. 15(a) (providing for the voluntary dismissal of an appeal by stipulation or on motion, but also stating, "[a]ny party wanting to litigate appellate issues despite dismissal of the original appeal must provide notice of such intent in a response to the motion to dismiss"). Thus, once one party files a notice of appeal, other parties are not required to file a separate notice of appeal in order to raise any issue(s) in the appeal. Tenn. R. App. P. 13(a), Advisory Commission Comment (stating, "[t]he result of eliminating any requirement that an appellee file the appellee's own notice of appeal is that once any party files a notice of appeal the appellate court may consider the case as a whole"). As a practical matter, however, it is not uncommon for more than one party to file a notice of appeal.

Tenn. R. App. P. 5(c) is amended to state that, in cases appealed to the Court of Appeals pursuant to Tenn. R. App. P. 3, the first party to file a notice of appeal is considered to be the appellant. The purpose of the amendment is to clarify the application of other rules of appellate procedure, e.g., Tenn. R. App. P. 6 (governing bond for costs on appeal in civil actions), Tenn. R. App. P. 24 (governing the content and preparation of the record on appeal), and Tenn. R. App. P. 29 (governing the filing and service of briefs). A second (or later) party filing a notice of appeal may file a reply brief pursuant to Tenn. R. App. P. 27(c); that rule permits an appellee who is seeking relief from the judgment to file a brief in reply to the response of the appellant to the issues presented by appellee's request for relief.

The amendment does not apply to cases appealed to the Court of Criminal Appeals. In criminal cases involving more than one defendant, the trial court enters a separate judgment as to each defendant. For that reason, each defendant filing a notice of appeal (and also the State, when it files a notice of appeal) is considered to be an appellant. See Tenn. R. App. P.

3(b) and (c) (providing for appeals as of right by the defendant and/or the State in specified criminal proceedings) and Tenn. R. App. P. 5(b) (regarding service of the notice of appeal in criminal actions).

Advisory Commission Comments [2017]. In 2017, the Appellate Court Clerk's office will implement electronic filing and begin charging fees at the initiation of an appeal. To accommodate these initiatives, Rule 4 is amended to change the location for filing the notice of appeal from the office of the trial court clerk to the office of the appellate court clerk. Subdivisions (a), (b) and (c) of this rule are amended to reflect this change in Rule 4. Additionally, subdivision (c) is amended to clarify the appellate court's authority to designate the title given to the appellate action.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 2, 2007, was ratified and approved by 2007 House Resolution 19 and Senate Resolution 12. The order promulgating the 2007 amendment of this rule provided that it take effect July 1, 2007.

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 13, 2012, was ratified and approved by 2012 House Resolution 194 and Senate Resolution 80. The order promulgating the 2012 amendment of this rule provided that it take effect July 1, 2012.

The amendment of Rule 5, which amended subdivisions (a) through (c) and added the the [2017] Advisory Comments, as promulgated and adopted by the Supreme Court in its order dated December 21, 2016, was ratified and approved by 2017 House Resolution 19 and Senate Resolution 16. The order promulgating the amendment of subdivisions (a) through (c) and the addition of the [2017] Advisory Comments, provided that it take effect July 1, 2017.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 2-3-1, 2-5-1.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, § 57.

Law Reviews. The Theoretical Foundations of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 45 Tenn. L. Rev. 161.

NOTES TO DECISIONS

Analysis

1. Waiver.
2. Dismissal.

1. Waiver.

Service of a notice of appeal upon opposing counsel and the clerk of the appellate court may be waived upon good cause shown if appellant has timely filed a notice of appeal with the trial court. G. F. Plunk Constr. Co. v. Barrett Properties, Inc., 640 S.W.2d 215, 1982 Tenn. LEXIS 435 (Tenn. 1982).

2. Dismissal.

Plaintiff's failure to serve a copy of her notice of appeal on the appellate court clerk did not warrant a dismissal of the appeal. Donnelly v. Walter, 959 S.W.2d 166, 1997 Tenn. App. LEXIS 393 (Tenn. Ct. App. 1997).

Plaintiff's appeal was untimely because the trial court's order granting relief from its judgment was void where the plaintiffs' notice of appeal was received and docketed by the appellate court more than 30 days after the trial court's judgment became final and the appellate court denied their motion for leave to correct the trial court record. Burke v. Huntsville NH Operations LLC, 491 S.W.3d 683, 2015 Tenn. App. LEXIS 940 (Tenn. Ct. App. Nov. 30, 2015), appeal denied, Burke v. Huntsville NH Operations LLC, — S.W.3d —, 2016 Tenn. LEXIS 321 (Tenn. May 5, 2016).

Rule 6. Costs on Appeal. — (a) Unless an appellant is exempted by statute or these rules, or the Tennessee Rules of Civil Procedure, or has established indigency in accordance with Rule 18 and been permitted to proceed on appeal as an indigent person, the appellant shall pay to the clerk of the appellate court all applicable fees established by order or rule of the Supreme Court. Contemporaneous with the filing of appellant's notice of appeal or other initiating document, appellant shall (1) pay all applicable litigation taxes and all applicable fees required by the clerk of the appellate court, (2) establish to the satisfaction of the clerk of the appellate court the basis for an exemption, or (3) apply for, or establish proof of, indigency in accordance with Rule 18. If the appellant fails to pay the applicable litigation taxes or fees or to establish indigency or an appropriate exemption, the

appellate court may issue an order requiring the appellant to show cause why the appeal should not be dismissed for failure to pay the applicable litigation taxes or fees.

(b) [Reserved.]

(c) Any party wanting to litigate appellate issues despite dismissal of the original appellant's appeal shall comply with the requirements of this rule for payment of applicable fees and/or taxes as required by the clerk of the appellate court. [As amended by order entered January 24, 1992, effective July 1, 1992; by order entered January 30, 1998, effective July 1, 1998; by order entered January 28, 2000, effective July 1, 2000; by order filed January 31, 2002, effective July 1, 2002; by order filed January 8, 2008, effective July 1, 2008; by order filed December 18, 2012, effective July 1, 2013; and by order filed December 21, 2016, effective July 1, 2017.]

Advisory Commission Comments. The rule requires that the security be deposited with the filing of the notice of appeal, but the failure to file security contemporaneously is not in and of itself fatal to the validity of the appeal. The failure to file security may be remedied on motion of the appellee, and may ultimately include dismissal of the appeal.

Security given under Tennessee Rule of Civil Procedure 62 to stay execution on appeal includes security for costs. Accordingly, if security is given under that rule, no separate security for costs needs to be filed under this rule. Poor persons may be exempted from the security requirement of this rule pursuant to Rule 18 of these rules, and the state is exempt from any requirement of security by Tennessee Rule of Civil Procedure 62.06.

Advisory Commission Comments [2000]. This rule is intended to provide a simplified method of handling security for costs on appeal in civil actions. A $1,000 cash bond is considered sufficient in the absence of specific direction by the court as to some other amount. Under Rule 65A of the Tennessee Rules of Civil Procedure, the security may be given in the form of a bond or in any other form the court deems sufficient to secure the other party.

Advisory Commission Comments [2002]. New subdivision (b) states the procedure for payment of all litigation taxes applicable to the appeal. New subdivision (c) conforms to a similar provision in Appellate Rule 15(a).

Advisory Commission Comments [2008]. The 2008 amendment authorizes the appellate court clerk to require a surety to provide proof that the surety has sufficient assets in the State of Tennessee to pay the costs of the appeal. The purpose of this amendment is to establish a procedure by which the sufficiency of a surety can be reviewed in order to ensure that payment of the costs of an appeal are secured at the beginning of the appeal.

Advisory Commission Comments [2013]. Paragraph (b) of the rule was amended to replace the term "poor person" with the term "indigent person." The amendment was not intended to change the meaning or application of the rule.

Advisory Commission Comments [2014]. The 2002 Advisory Commission Comment was amended by substituting (in two places) the word "subdivision" for the word "subparagraph." The text of the rule and the text of the other Advisory Commission Comments were not changed.

Advisory Commission Comments [2017]. In 2017, the Appellate Court Clerk's office will implement electronic filing and begin charging fees at the initiation of an appeal. To accommodate these initiatives, Rule 4 is amended to change the location for filing the notice of appeal from the office of the trial court clerk to the office of the appellate court clerk. Subdivisions (a) and (c) of this rule are amended to reflect that fees and taxes are to be paid at the initiation of a case, except under limited circumstances. Subdivision (b) is deleted due to subdivision (a) being amended to address the payment of litigation taxes, which was previously addressed in subdivision (b). The amendment to Rule 6 requiring the payment of all applicable appellate fees to the clerk of the appellate court is not meant to address any additional statutory fees that might be due to the trial court clerk for preparation of the record on appeal or that are otherwise due to the trial court clerk.

Compiler's Notes. T.R.A.P. 6 may supersede Tenn. Code Ann. §§ 27-6-109, 27-6-110.

T.R.A.P. 6 may affect Tenn. Code Ann. §§ 20-12-125, 49-1417 [now § 49-5-513].

The amendment of Rule 6, as promulgated and adopted by the Supreme Court in its order dated January 8, 2008, was ratified and approved by 2008 House Resolution 238 and Senate Resolution 216. The order promulgating the amendment of Rule 6 provided that it take effect July 1, 2008.

The amendment of Rule 6, which substituted "an indigent person" for "a poor person" in the

first sentence of subsection (b) and added the 2013 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 18, 2012, was ratified and approved by House Resolution 35 and Senate Resolution 13. The order promulgating the amendment of Rule 6(b) and the addition of the 2013 Advisory Commission Comments provided that it take effect July 1, 2013.

The amendment of Rule 6, which amended the 2002 Advisory Commission Comments and added the 2014 Advisory Commission Comments as promulgated and adopted by the Supreme Court in its order dated December 16, 2013, as amended, March 14, 2014, was ratified and approved by 2014 House Resolution 156 and Senate Resolution 75. The order promulgating the 2014 amendment of the 2002 Advisory Commission Comments and the addition of the 2014 Advisory Commission Comments provided that it take effect on July 1, 2014.

The amendment of Rule 6, which amended subdivisions (a) through (c) and added the the [2017] Advisory Comments, as promulgated and adopted by the Supreme Court in its order dated December 21, 2016, was ratified and approved by 2017 House Resolution 19 and Senate Resolution 16. The order promulgating the amendment of subdivisions (a) through (c) and the addition of the [2017] Advisory Comments, provided that it take effect July 1, 2017.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), § 666.

Pritchard on Wills and Administration of Estates (4th ed., Phillips and Robinson), § 865.

Tennessee Jurisprudence. 1 Tenn. Juris., Accounts and Accounting, § 13; 2 Tenn. Juris., Appeal and Error, §§ 30-51, 53, 63, 65-82; 3 Tenn. Juris., Assumpsit, § 20; 8 Tenn. Juris., Costs, § 12; 12 Tenn. Juris., Exceptions, Bill of, § 13; 15 Tenn. Juris., Injunctions, § 64.

Law Reviews. The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 1.

NOTES TO DECISIONS

Analysis

1. Construction with Conflicting Statute.
2. Failure to File on Time.
3. Bond on Appeal.

1. Construction with Conflicting Statute.

Statutes in conflict with the Tennessee rules of appellate procedure have no force and effect. Bush v. Bradshaw, 615 S.W.2d 157, 1981 Tenn. LEXIS 431 (Tenn. 1981).

The terms of an appellate court cost bond, which provides, that in addition to covering the costs required by T.R.A.P. 6, it covers any damages awarded for the wrongful prosecution of the appeal, does not conflict with T.R.A.P. 6 and the trial court correctly held that the bond could be used to satisfy a judgment for attorney fees. Mills v. Hancock, 995 S.W.2d 110, 1998 Tenn. App. LEXIS 785 (Tenn. Ct. App. 1998), rehearing denied, — S.W.3d —, 1999 Tenn. App. LEXIS 11, (Tenn. Ct. App. 1999).

2. Failure to File on Time.

The failure to file security for costs contemporaneously with the notice of appeal is not in and of itself fatal to the validity of the appeal, and the failure to file security may be remedied on motion of appellee. Bush v. Bradshaw, 615 S.W.2d 157, 1981 Tenn. LEXIS 431 (Tenn. 1981).

An appellate court should waive the time requirement for the filing of an appeal bond in all cases where the appellant files the requisite bond on motion of appellee or on order of the court. Bush v. Bradshaw, 615 S.W.2d 157, 1981 Tenn. LEXIS 431 (Tenn. 1981).

3. Bond on Appeal.

Patient's cash bond was sufficient to perfect an appeal from a general sessions court to a circuit court because the bond vested jurisdiction in the circuit court since T.C.A. § 27-5-103 expressed no limitation as to the type of bond required, so a surety bond in an unlimited amount did not solely provide the "good security" required by T.C.A. § 27-5-103(a). Griffin v. Campbell Clinic, P.A., 439 S.W.3d 899, 2014 Tenn. LEXIS 566 (Tenn. July 21, 2014).

Rule 7. Stay or Injunction Pending Appeal. — (a) Review of Stay Orders. — Any party may obtain review of an order entered pursuant to Rule 62 of the Tennessee Rules of Civil Procedure by a trial court from which an appeal lies to the Supreme Court or Court of Appeals granting, denying, setting or altering the conditions of a stay of execution pending appeal, or granting, denying, setting or altering the conditions of additional or modified relief pending appeal. As a prerequisite to review, a written motion for the relief sought on review shall first be presented to the trial court unless a

motion in the trial court is not practicable.

Review may be had by filing a motion for review in the appellate court to which the appeal has been taken. The motion for review shall be accompanied by a copy of the motion filed in the trial court, any answer in opposition thereto, any written statement of reasons given by the trial court for its action, and shall state: (1) the court that entered the order; (2) the date of the order; (3) the substance of the order, including the amount of any bond or other conditions of stay of execution; (4) the facts relied on, including the facts showing relief in the trial court is not practicable if a motion for the relief sought on review has not been presented to the trial court; (5) the arguments supporting the motion; and (6) the relief sought. If the facts relied on are subject to dispute the motion shall be supported by affidavits or other sworn statements or copies thereof. Review shall be had without briefs after reasonable notice to the other parties, who shall be served with a copy of the motion. The other parties may promptly file an answer. The court, on its own motion or on motion of any party, may order preparation of a transcript of all proceedings had in the trial court on the question of stay. Review shall be completed promptly.

A party may appeal the Court of Appeals' decision on a motion for review by filing a motion for review in the Supreme Court within 15 days of filing of the Court of Appeals' order. The motion shall be accompanied by a copy of the trial court's order, the motion filed in the Court of Appeals, the order of the Court of Appeals, and all other documents (including transcripts) filed in the Court of Appeals on the issue of stay or injunction pending appeal. Review shall be had without briefs after reasonable notice to the other parties, who shall be served with a copy of the motion. The other parties may file an answer within 10 days of the filing of the motion in the Supreme Court. No oral argument shall be permitted except when ordered on the court's own motion. Review shall be completed promptly.

(b) Stay or Injunction May Be Conditioned on Giving of Bond; Proceedings Against Sureties. — Relief available in the appellate court under this rule may be conditioned on the filing of a bond in the trial court as provided in Tennessee Rules of Civil Procedure 62 and 65A. [As amended by order filed December 29, 2005, effective July 1, 2006.]

Advisory Commission Comments. The circumstances in which a stay may be obtained pending appeal in civil actions are specified in Tennessee Rule of Civil Procedure 62. This rule simply specifies the procedure for seeking appellate review of decisions made under Rule 62. This rule should be construed in connection with Tennessee Rule of Civil Procedure 62.08, which expressly preserves the power of an appellate court to stay proceedings or to suspend relief or grant whatever additional or modified relief is deemed appropriate during the pendency of an appeal.

Nothing in this or any other of these rules governs the availability of stays in criminal actions. Release orders of the trial court may be reviewed as provided in Rule 8 of these rules.

Advisory Commission Comments [2004]. *Termination of Parental Rights Proceedings.* Rule 8A imposes special requirements governing the appeal of any termination of parental rights proceeding. In particular, Rule 8A(b) imposes a special provision regarding a stay or injunction pending appeal of such a proceeding.

Advisory Commission Comments [2006]. A third paragraph is added to Rule 7(a) to provide a procedure for the Supreme Court's review of the Court of Appeals' decision on a Rule 7 motion.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated December 29, 2005, was ratified and approved by 2006 House Resolution 201 and Senate Resolution 99. The order promulgating the amendment of this rule provided that it take effect July 1, 2006.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 604, 701.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 2-7-1 — 2-7-4.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 83-88; 12 Tenn. Juris., Executions, §§ 52, 54; 16 Tenn. Juris., Judges, § 15.

Law Reviews. The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 1.

Rule 8. Release in Criminal Cases. — (a) Review of Release Orders by Defendant. — Before or after conviction the prosecution or defendant may obtain review of an order entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals granting, denying, setting or altering conditions of defendant's release. Before conviction, as a prerequisite to review, a written motion for the relief sought on review shall first be presented to the trial court. After conviction and after the action is pending on appeal, a written motion may be made either in the trial court in which judgment was entered or in the appellate court to which the appeal has been taken. On entry of an order granting or denying a motion for a change in bail or other conditions of release, the trial court shall state in writing the reasons for the action taken.

Review may be had at any time before an appeal of any conviction by filing a motion for review in the Court of Criminal Appeals or, if an appeal is pending, by filing a motion for review in the appellate court to which the appeal has been taken. The motion for review shall be accompanied by a copy of the motion filed in the trial court, any answer in opposition thereto, and the trial court's written statement of reasons, and shall state: (1) the court that entered the order, (2) the date of the order, (3) the crime or crimes charged or of which defendant was convicted, (4) the amount of bail or other conditions of release, (5) the arguments supporting the motion, and (6) the relief sought. Review shall be had without briefs after reasonable notice to the other parties, who shall be served with a copy of the motion. The other parties may promptly file an answer. The court, on its own motion or on motion of any party, may order preparation of a transcript of all proceedings had in the trial court on the question of release. No oral argument shall be permitted except when ordered on the court's own motion. Review shall be completed promptly.

A party may appeal a Court of Criminal Appeals' decision on a motion for review by filing a motion for review in the Supreme Court within 15 days of filing of the Court of Criminal Appeals' order. The motion shall be accompanied by a copy of the trial court's order, the motion filed in the Court of Criminal Appeals, the order of the Court of Criminal Appeals, and all other documents (including transcripts) filed in the Court of Criminal Appeals on the issue of release. Review shall be had without briefs after reasonable notice to the other parties, who shall be served with a copy of the motion. The other parties may file an answer within 10 days of the filing of the motion in the Supreme Court. No oral argument shall be permitted except when ordered on the court's own motion. Review shall be completed promptly.

(b) Release of Defendant Pending Appeal by the State. — A defendant shall not be held in jail or to bail during the pendency of an appeal by the state, or an application for permission to appeal by the state, unless there are compelling reasons for the defendant's continued detention or being held to bail.

(c) Release of Defendant Pending Review in the Supreme Court. — Upon affirmance of the conviction of a defendant in the Court of Criminal Appeals, the defendant may be admitted to bail on bond pending the filing and disposition of an application for permission to appeal to the Supreme Court under Rule 11 upon such terms and under such conditions as shall be fixed by the Court of Criminal Appeals. [As amended by order entered January 28, 2000, effective July 1, 2000.]

Advisory Commission Comments. *Subdivision (a).* This subdivision governs appellate review of release orders entered both before and after conviction of a defendant. The purpose of this subdivision is to ensure the expeditious review of release orders. It permits review by a simple motion for review. Equally important for appellate review is the requirement that the trial court state the reasons for its decision. When review is sought before conviction, this subdivision contemplates that the initial determination of whether defendant is to be released is to be made by the trial court. The circumstances in which release may be obtained are governed by statute. See Tenn. Code Ann. §§ 40-1201 to 40-1247 [now §§ 40-11-101 — 40-11-147], 40-3405 to 40-3408 [now §§ 40-26-101 — 40-26-104] (1975 & Supp. 1978).

Subdivision (b). This subdivision is designed to protect the defendant's interest in his liberty pending appellate review sought by the state.

Advisory Commission Comments [2000]. The third paragraph provides a method for appeal to the Supreme Court decisions on Rule 8 motions.

Compiler's Notes. T.R.A.P. 8(a) may affect Tenn. Code Ann. §§ 40-11-144, 40-26-102.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 2-8-1 — 2-8-3.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 27-84, 87.

Law Reviews. The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 1.

Attorney General Opinions. Effect of appeal on probation, OAG 89-106 (8/22/89).

A criminal defendant's failure to challenge the conditions of release on bail in a written motion in the trial court constitute a waiver of the issue, OAG 04-155 (10/13/04).

Because the imposition of conditions of release is a discretionary judicial function within the trial court's jurisdiction, a trial judge is immune from liability for any constitutional violations that arise in the context of imposing conditions upon a criminal defendant who is released on bail, OAG 04-155 (10/13/04).

NOTES TO DECISIONS

Analysis

1. Applicability.
2. Review of Release Conditions.

1. Applicability.

T.R.A.P. 8 should be followed promptly after bail is set, not after conviction. State v. Melson, 638 S.W.2d 342, 1982 Tenn. LEXIS 431 (Tenn. 1982), cert. denied, Melson v. Tennessee, 459 U.S. 1137, 103 S. Ct. 770, 74 L. Ed. 2d 983 (1983).

2. Review of Release Conditions.

Where defendant was unconditionally released, and at no time during the year defendant was in jail did he seek review of the release conditions imposed by the trial court, the issue as to whether the trial court was without authority to impose sentence, which exceeded maximum term for offense for which defendant was convicted, was moot. State v. Baby John Doe, 813 S.W.2d 150, 1991 Tenn. Crim. App. LEXIS 249 (Tenn. Crim. App. 1991).

Portion of defendant's appeal dealing with the propriety of drug testing as a condition of bond was dismissed due to defendant's failure to comply with T.R.A.P. 8. State v. Moore, 262 S.W.3d 767, 2008 Tenn. Crim. App. LEXIS 28 (Tenn. Crim. App. Jan. 18, 2008).

Rule 8A. Appeal as of Right in Termination of Parental Rights Cases. This rule shall govern any appeal as of right in a termination of parental rights proceeding. The other rules of appellate procedure also apply to such a appeal; however, when a provision of this rule conflicts with another rule of appellate procedure, the provision of this rule shall control.

(a) Appeal as of Right; Time for Filing Notice of Appeal. —

(1) It shall not be necessary for a party to file a motion to alter or amend the judgment or a motion for new trial in order to obtain appellate review of the judgment of the trial court.

(2) In addition to meeting the requirements of Rule 3(f) ("Content of the Notice of Appeal"), a notice of appeal in a termination of parental rights proceeding shall indicate that the appeal involves a termination of parental rights case.

(b) Stay or Injunction Pending Appeal. — Any party may obtain review of an order entered pursuant to Rule 62 of the Tennessee Rules of Civil Procedure or Rule 39(g)(4) of the Rules of Juvenile Procedure granting, denying, or altering the conditions of a stay of execution pending appeal, or granting, denying, or altering the conditions of additional or modified relief pending appeal; such appellate review shall be conducted pursuant to Rule 7 of the Rules of Appellate Procedure.

(c) Content and Preparation of the Record. — In addition to the papers excluded from the record pursuant to Rule 24(a), any portion of a juvenile court file of a child dependency, delinquency or status case that has not been properly admitted into evidence at the termination of parental rights trial shall be excluded from the record.

(1) Any transcript of the evidence or proceedings filed pursuant to Rule 24(b) shall be filed within 45 days after filing the notice of appeal. If the appellee has objections to the transcript as filed, the appellee shall file objections thereto with the clerk of the trial court within 10 days after service of notice of the filing of the transcript. Unless the time has been extended by order, if the appellant fails to file within 45 days from the filing of the notice of appeal either the transcript or statement of evidence or notice that no transcript or statement is to be filed, the clerk of the trial court shall provide written notice within 10 days to the clerk of the appellate court of the appellant's failure to comply with this subdivision, with a copy provided to counsel and pro se parties.

(2) Any statement of the evidence or proceedings filed pursuant to Rule 24(c) shall be filed within 45 days after filing the notice of appeal. If the appellee has objections to the statement as filed, the appellee shall file objections thereto with the clerk of the trial court within 10 days after service of the declaration and notice of the filing of the statement.

(3) If no transcript or statement of the evidence or proceedings is to be filed, the appellant shall, within 15 days after filing the notice of appeal, file with the clerk of the trial court and serve upon the appellee a notice that no transcript or statement is to be filed. If the appellee deems a transcript or statement of the evidence or proceedings to be necessary, the appellee shall, within 15 days after service of the appellant's notice, file with the clerk of the trial court and serve upon the appellant a notice that a transcript or statement is to be filed. The appellee shall prepare the transcript or statement at the appellee's own expense or apply to the trial court for an order requiring the appellant to assume the expense. Subdivisions (c)(1) and (c)(2) of this rule are applicable to the transcript or statement filed by the appellee under this subdivision, except that the appellee under this subdivision shall perform the duties assigned to the appellant in subdivisions (c)(1) and (c)(2) of this rule and the appellant under this subdivision shall perform the duties assigned to the appellee in such

subdivisions.

(d) Approval of the Record by the Trial Judge or Chancellor. — After the expiration of the 10-day period for objections by the appellee, the trial judge shall approve the transcript or statement of the evidence and shall authenticate the exhibits. If not approved within 20 days after the expiration of the period for filing objections by the appellee, the transcript or statement of the evidence and the exhibits shall be deemed to have been approved and shall be so considered by the appellate court, except in cases where such approval did not occur by reason of the death or inability to act of the trial judge, which cases shall be governed by Rule 24(f).

(e) Completion and Transmission of the Record. — The record on appeal shall be assembled, numbered and completed by the clerk of the trial court and transmitted to the clerk of the appellate court within 5 days of the approval of the record by the trial judge or by operation of the automatic-approval provision of subdivision (d), whichever occurs first.

(f) Extension of Time for Completion of the Record. — If the record cannot be completed within the time permitted by subdivision (e) of this rule, the clerk of the trial court shall request an extension of time from the appellate court to which the appeal has been taken. The request shall set forth the reasons for the requested extension and must be made within the time originally prescribed for completing the record or within an extension previously granted. Extensions of time for completion of the record in termination of parental rights cases are disfavored and will be granted by the appellate court only upon a particularized showing of good cause. Trial court clerks shall give priority to completion of the record in termination of parental rights cases over other types of cases. The time for completing the record shall not be extended to a day more than 60 days after the date of the filing of the transcript or statement of evidence or the appellant's notice that no transcript or statement is to be filed. In the event of the failure of the clerk of the trial court to complete the record within the time allowed, the clerk of the appellate court shall notify the trial court and take such other steps as may be directed by the appellate court.

(g) Filing and Service of Briefs. — The appellant shall serve and file a brief within 30 days after the date on which the record is filed with the clerk. The appellee shall serve and file a brief within 20 days after the appellant's brief is filed with the clerk. Reply briefs shall be served and filed within 14 days after filing of the preceding brief. All other matters regarding briefs of the appellant and appellee shall be governed by Rules 27, 28, 29, 30 and 32.

(h) Appeal by Permission from Court of Appeals to Supreme Court. — The provisions of Rule 11 control review by the Supreme Court in a termination of parental rights proceeding.

(i) Extension of Time. — Extensions of time in an appeal of a termination of parental rights proceeding are disfavored and will be granted by the appellate court only upon a particularized showing of good cause. [Adopted by order entered January 15, 2004, effective July 1, 2004.]

Compiler's Notes. The adoption of this rule, as promulgated and adopted by the Supreme Court in its order dated January 15, 2004, was ratified and approved by 2004 House Resolution 243 and Senate Resolution 121. The order promulgating the adoption of this rule provided

that it take effect July 1, 2004.

C. APPEAL BY PERMISSION

Rule 9. [Current rule. See Proposed rule and compiler's notes.] Interlocutory Appeal by Permission from the Trial Court. — (a) Application for Permission to Appeal; Grounds. — Except as provided in Rule 10, an appeal by permission may be taken from an interlocutory order of a trial court from which an appeal lies to the Supreme Court, Court of Appeals or Court of Criminal Appeals only upon application and in the discretion of the trial and appellate court. In determining whether to grant permission to appeal, the following, while neither controlling nor fully measuring the courts' discretion, indicate the character of the reasons that will be considered: (1) the need to prevent irreparable injury, giving consideration to the severity of the potential injury, the probability of its occurrence, and the probability that review upon entry of final judgment will be ineffective; (2) the need to prevent needless, expensive, and protracted litigation, giving consideration to whether the challenged order would be a basis for reversal upon entry of a final judgment, the probability of reversal, and whether an interlocutory appeal will result in a net reduction in the duration and expense of the litigation if the challenged order is reversed; and (3) the need to develop a uniform body of law, giving consideration to the existence of inconsistent orders of other courts and whether the question presented by the challenged order will not otherwise be reviewable upon entry of final judgment. Failure to seek or obtain interlocutory review shall not limit the scope of review upon an appeal as of right from entry of the final judgment.

(b) Procedure in the Trial Court. — The party seeking an appeal must file and serve a motion requesting such relief within 30 days after the date of entry of the order appealed from. When the trial court is of the opinion that an order, not appealable as of right, is nonetheless appealable, the trial court shall state in writing the reasons for its opinion. The trial court's statement of reasons shall specify: (1) the legal criteria making the order appealable, as provided in subdivision (a) of this rule; (2) the factors leading the trial court to the opinion those criteria are satisfied; and (3) any other factors leading the trial court to exercise its discretion in favor of permitting an appeal. The appellate court may thereupon in its discretion allow an appeal from the order.

(c) How Sought in Appellate Court; Clerk's Fees. — The appeal is sought by filing an application for permission to appeal with the clerk of the appellate court within 10 days after the date of entry of the order in the trial court or the making of the prescribed statement by the trial court, whichever is later. A sufficient number of copies shall be filed to provide the clerk and each judge of the appellate court with one copy. The application shall be served on all other parties in the manner provided in Rule 20 for the service of papers.

Applicable fees, taxes, or documentation required by Rule 6 shall be submitted with the application. An appeal from the denial of an application for interlocutory appeal by an intermediate appellate court is sought by filing an application in the Supreme Court as provided for in Rule 11, with the exception

that the application shall be filed within 30 days of the filing date of the intermediate appellate court's order; the application shall be entitled "Application for Permission to Appeal from Denial of Rule 9 Application."

(d) Content of Application; Answer. — The application shall contain: (1) a statement of the questions presented for review; (2) a statement of the facts necessary to an understanding of why an appeal by permission lies, with appropriate references to the documents contained in the appendix to the application; and (3) a statement of the reasons supporting an immediate appeal. A statement of reasons is sufficient if it simply incorporates by reference the trial court's reasons for its opinion that an appeal lies. The application shall be accompanied by an appendix containing copies of: (1) the order appealed from, (2) the trial court's statement of reasons, and (3) the other parts of the record necessary for determination of the application for permission to appeal. Within 10 days after filing of the application, any other party may file an answer in opposition, with copies in the number required for the application, together with an appendix containing any additional parts of the record such party desires to have considered by the appellate court; any statement of facts in the answer shall contain appropriate references to the documents contained in the appendix to the application or the appendix to the answer. The answer shall be served on all other parties in the manner provided in Rule 20 for the service of papers. If available, the color of the cover of the application shall be blue, and the cover of the answer shall be red. The color of the cover of an answer filed by an amicus curiae shall be green. The application and answer shall be submitted without oral argument unless otherwise ordered.

(e) Subsequent Procedure. — After the answer is filed, or if no answer is filed within the time permitted, the appellate court shall either grant or deny the application. If the application is granted, the trial court clerk must file the record on appeal within 30 days from the date of entry of the order granting permission to appeal. The filing of briefs following the granting of an application under this rule is governed by rules 27 - 30, unless otherwise ordered by the appellate court.

(f) Effect on Trial Court Proceedings. — The application for permission to appeal or the grant thereof shall not stay proceedings in the trial court unless the trial court or the appellate court or a judge thereof shall so order.

(g) Appeal in Criminal Actions. — Permission to appeal under this rule may be sought by the state and defendant in criminal actions. [As amended by order entered January 24, 1992, effective July 1, 1992; by order entered January 26, 1999, effective July 1, 1999; by order filed January 31, 2002, effective July 1, 2002; by order entered December 10, 2003, effective July 1, 2004; by order entered January 6, 2005, effective July 1, 2005; by order entered December 16, 2013, as amended, March 14, 2014, effective July 1, 2014; by order filed January 2, 2015, effective July 1, 2015; and by order filed December 21, 2016, effective July 1, 2017.]

Advisory Commission Comments [2002]. Refer to Rule 24 for details about the content and preparation of the record on appeal.

Advisory Commission Comments [2003]. T.R.A.P. 2 was amended to clarify that the thirty-day filing deadline to the Supreme Court under T.R.A.P. 9(c) is jurisdictional.

Advisory Commission Comments [2004].

The amendment deleted the second sentence in Rule 9(e) (relating to the docketing of an interlocutory appeal) because that sentence was rendered obsolete by an amendment to Rule 5(c), effective July 1, 2002.

Advisory Commission Comments [2005]. Rule 9(d) is amended to add a statement of the questions presented for review to the list of items that must be included in the application.

Advisory Commission Comments [2007]. When the intermediate court *grants* an interlocutory appeal under Rule 9, an appeal of the final decision of the intermediate court to the Supreme Court is governed by Rule 11. Accordingly, a party has 60 days from the date of the intermediate court's judgment in the interlocutory appeal to file an application for permission to appeal under Rule 11. Note, however, that when the intermediate court *denies* an interlocutory appeal, Rule 9(c) provides that an application for permission to appeal to the Supreme Court must be filed within 30 days of the intermediate court's order denying the interlocutory appeal.

Advisory Commission Comments [2012]. Effective July 1, 2012, the Supreme Court adopted Tenn. Sup. Ct. R. 10B, governing motions seeking disqualification or recusal of a judge. Section 2 of Rule 10B provides the procedural framework for appealing the denial of a disqualification or recusal motion by a judge of a court of record. Section 2.01 of the rule provides that such appeals may be effected either by filing an interlocutory appeal as of right authorized by the rule or by raising the disqualification or recusal issue in an appeal as of right at the conclusion of the case. Under Section 2.01, those two methods of appeal are "the exclusive methods for seeking appellate review of any issue concerning the trial court's ruling on a motion filed pursuant to this Rule." (Emphasis added.) As a result, "neither Tenn. R. App. P. 9 nor Tenn. R. App. P. 10 may be used to seek an interlocutory or extraordinary appeal by permission concerning the judge's ruling on such a motion." Tenn. Sup. Ct. R. 10B, Explanatory Comment to Section 2. Attorneys or self-represented litigants therefore should consult Tenn. Sup. Ct. R. 10B concerning the procedure for appealing from the denial of a disqualification or recusal motion.

Advisory Commission Comments [2014]. Subdivision (d) was amended to specify the color of the covers of applications and answers filed pursuant to Rule 9.

Advisory Commission Comments [2015]. Subdivision (e) was amended by: (1) changing the subtitle of the subdivision from "Filing the Record" to "Subsequent Procedure"; (2) adding the first sentence concerning the court's action on the application; and (3) adding the third sentence concerning the filing of briefs in cases in which the application is granted.

If the intermediate appellate court denies an application for an interlocutory appeal under Tenn. R. App. P. 9 and the Supreme Court subsequently grants permission to appeal, Tenn. R. App. P. 11(f), as amended in 2015, provides that the appellant's brief must be filed within thirty days of the filing of the record in the Supreme Court.

Advisory Commission Comments [2017]. In 2017, the Appellate Court Clerk's office will implement electronic filing and begin charging fees at the initiation of an appeal. To accommodate these initiatives, Rule 6 is amended to reflect that fees and taxes are to be paid at the initiation of a case, except under limited circumstances. Subdivision (c) of this rule is amended to reflect that fees are to be submitted with the application, rather than secured under the former procedure of filing a cost bond.

Rule 9(d) is amended to require that the statement of the facts in the application contain appropriate references to the documents contained in the appendix to the application. Subdivision (d) also is amended to require that any statement of facts in an answer to the application contain appropriate references to the documents contained in the appendix to the application or the appendix to the answer. These requirements are intended to facilitate the appellate court's efficient review of the application for an interlocutory appeal by permission from the trial court.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated December 10, 2003, was ratified and approved by 2004 House Resolution 234 and Senate Resolution 117. The order promulgating the amendment of this rule provided that it take effect July 1, 2004.

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 6, 2005, was ratified and approved by 2005 House Resolution 14 and Senate Resolution 10. The order promulgating the amendment of this rule provided that it take effect July 1, 2005.

The amendment of the Advisory Commission Comments, which added the 2007 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated January 2, 2007, was ratified and approved by House Resolution 19 and Senate Resolution 12. The order promulgating the amendment of the Advisory Commission Comments provided that it take effect July 1, 2007.

The addition of the 2012 Advisory Commission Comments for this rule, as promulgated and adopted by the Supreme Court in its order dated January 13, 2012, was ratified and approved by 2012 House Resolution 194 and Senate Resolution 80. The order promulgating the amendment of the comments provided that the amendment take effect July 1, 2012.

The amendment of Rule 9, which amended subdivision (d) and added the 2014 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 16, 2013, as amended, March 14, 2014, was ratified and approved by 2014 House Resolution 156 and Senate Resolution 75. The order promulgating the 2014 amendment of subdivision (d) and the addition of the 2014 Advisory Commission Comments provided that it take effect on July 1, 2014.

The amendment of Rule 9, which amended subdivision (e) and added the 2015 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated January 2, 2015, was ratified and approved by 2015 House Resolution 3 and Senate Resolution 13. The order promulgating the amendment of this rule provided that it take effect on July 1, 2015.

The amendment of Rule 9, which amended subdivisions (c) and (d) and added the [2017] Advisory Comments, as promulgated and adopted by the Supreme Court in its order dated December 21, 2016, was ratified and approved by 2017 House Resolution 19 and Senate Resolution 16. The order promulgating the amendment of subdivisions (c) and (d) and the addition of the [2017] Advisory Comments, provided that it take effect July 1, 2017.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 214, 235, 668.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-62.09-1, 2-9-1 — 2-9-3, 2-10-1, 2-12-2.

Tennessee Jurisprudence. 1 Tenn. Juris., Accounts and Accounting, § 13; 2 Tenn. Juris., Appeal and Error, §§ 16-51, 58, 72, 83, 131; 3 Tenn. Juris., Attachment and Garnishment, § 170; 4 Tenn. Juris., Bail and Recognizance, § 16; 15 Tenn. Juris., Injunctions, § 63; 16 Tenn. Juris., Judges, § 15.

Law Reviews. Seeking Justice on Appeal, 27 No. 4 Tenn. B.J. 28 (1991).

The Tennessee Pretrial Diversion Act: A Practitioner's Guide (Steven W. Feldman), 13 Mem. St. U.L. Rev. 285 (1983).

When Is Your Work Product "Work Product?" (Henry D. Finchere), 33 No. 1 Tenn. B.J. 22 (1997).

NOTES TO DECISIONS

Analysis

1. In General.
2. Permission Granted.
3. Permission Denied.
4. Applicability of Certiorari Cases.
5. Appeal from Diversion Decision.
6. Summary Judgment Orders.
7. Nondispositive Search Questions.
8. General Sessions Courts.
9. Judgment Granting New Trial.
10. Pleas of Guilty or Nolo Contendere.
11. Appeal from Order Not Dismissive of Case.
12. Final Judgment.

1. In General.

For interlocutory appeals under T.R.A.P. 9, the only issues that can be raised are those certified in the trial court's order granting permission to seek an interlocutory appeal and in the appellate court's order granting the interlocutory appeal. Heatherly v. Merrimack Mut. Fire Ins. Co., 43 S.W.3d 911, 2000 Tenn. App. LEXIS 751 (Tenn. Ct. App. 2000).

Because the purpose of Tenn. R. Crim. P. 5.1(a) is to provide the defense with material that can be used to prepare for trial, a defendant should raise, and the trial court should attempt to resolve, this critical issue prior to trial. If the trial court denies defendant's motion to dismiss the indictment for failure to comply with Rule 5.1(a), defendant may request an interlocutory or extraordinary appeal and attempt to demonstrate that appellate review is appropriate under T.R.A.P. 9 and 10. State v. Graves, 126 S.W.3d 873, 2003 Tenn. LEXIS 487 (Tenn. 2003).

Interlocutory appeal pursuant to T.R.A.P. 9 is available to the state under T.C.A. § 39-13-203(f) when the trial court determines that a defendant is mentally retarded. State v. Strode, 232 S.W.3d 1, 2007 Tenn. LEXIS 666 (Tenn. Aug. 14, 2007).

Suppression order that eliminates any reasonable probability of a successful prosecution provides a basis for interlocutory appeal under T.R.A.P. 9(a)(1), (3) or extraordinary appeal under T.R.A.P. 10(a). State v. Meeks, 262 S.W.3d 710, 2008 Tenn. LEXIS 575 (Tenn. Sept. 2, 2008).

It is important for appellate courts to exercise restraint in granting extraordinary appeals; unless the trial court's alleged error qualifies for immediate review under the specific criteria indicated by the rule, the appellate court must respect the trial court's discretionary decision not to grant permission to appeal under the rule regarding interlocutory appeals and refrain from granting an extraordinary appeal, and those alleged errors not rising to the level required can be reviewed in the normal course of an appeal after a final judgment has been entered. Gilbert v. Wessels, 458 S.W.3d 895, 2014 Tenn. LEXIS 1031 (Tenn. Dec. 18, 2014).

Appellate court's decision to grant interlocutory review is a separate exercise of judicial discretion, and the appellate court must exercise its discretion under the statute regardless

of any purported waiver of its consideration of the propriety of interlocutory appeal. State v. Simic, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 687 (Tenn. Crim. App. Oct. 24, 2019).

Plaintiffs claimed dismissal with prejudice for failure to comply with a court order that had been appealed pursuant to the rule was inappropriate; while plaintiffs did not file a motion to stay the proceeding pending the outcome of its motion for permission to appeal, much of plaintiffs' delay throughout the case was a result of counsel's longstanding failure to respond and her disregard of cour orders, and dismissal with prejudice would cause plaintiffs injustice. The trial court was to enter an order of dismissal without prejudice on remand. Diemoz v. Huneycutt, — S.W.3d —, 2020 Tenn. App. LEXIS 204 (Tenn. Ct. App. May 6, 2020).

To the extent appellants attempted to argue issues that were not specifically certified, the court would not address those arguments and limited its review to the certified questions. Howell v. Morisy, — S.W.3d —, 2020 Tenn. App. LEXIS 526 (Tenn. Ct. App. Nov. 20, 2020).

2. Permission Granted.

In a case in which the complaint sought punitive damages, the court of appeals granted interlocutory appeal of chancellor's decree denying motion for a protective order relating to the discovery of defendant's financial condition. Breault v. Friedli, 610 S.W.2d 134, 1980 Tenn. App. LEXIS 391 (Tenn. Ct. App. 1980).

In suit for rents wrongfully retained and for the removal as a cloud upon plaintiffs' title to real property of a certain deed to the defendants, wherein defendants counterclaimed seeking a declaration that title was in them, and the chancellor found in favor of plaintiffs and referred to the master the matter of rent and damages, the defendants sought and were granted by the trial court and the court of appeals an appeal from the interlocutory order of the chancellor decreeing title of the property in question to be in plaintiffs. Aclin v. Speight, 611 S.W.2d 54, 1980 Tenn. App. LEXIS 401 (Tenn. Ct. App. 1980).

A decision by a juvenile court on a question of law in a paternity suit is appealable to the court of appeals. Tennessee Dep't of Human Services v. Lumley, 638 S.W.2d 381, 1982 Tenn. LEXIS 341 (Tenn. 1982).

Where defendants were charged with false pretense and conspiracy to commit false pretense, district attorney did not abuse discretion in denying pretrial diversion to defendant, who had no prior criminal record and was a reputable person, where the criminal activity was extensive, was not impulsive but required considerable effort and planning, was a serious problem in the circuit and was in need of deterrence. State v. Holland, 661 S.W.2d 91, 1983 Tenn. Crim. App. LEXIS 363 (Tenn. Crim. App. 1983).

Because the order granting the interlocutory appeal did not set out the issues to be addressed and because the plaintiffs had subsequently filed a brief addressing the issues, it was appropriate for the court to address all the issues. Heatherly v. Merrimack Mut. Fire Ins. Co., 43 S.W.3d 911, 2000 Tenn. App. LEXIS 751 (Tenn. Ct. App. 2000).

Where defendant was charged with DUI and obstructing a highway, the trial court granted defendant's motion to suppress evidence obtain from the traffic stop; while the state failed to file an application for appeal within thirty days as required by T.R.A.P. 9, the order of suppression was dispositive and waived timely filing in the interest of justice. State v. Williams, 185 S.W.3d 311, 2006 Tenn. LEXIS 181 (Tenn. 2006).

Grant of an interlocutory appeal was appropriate under T.R.A.P. 9 where the trial court had specifically found that a trial was unnecessary if the defendant's position was well taken and that there was a need to establish a uniform body of law in determining whether information used to obtain a search warrant has been provided by a citizen informant. State v. Williams, 193 S.W.3d 502, 2006 Tenn. LEXIS 436 (Tenn. 2006).

Interlocutory appeal of a trial court's order setting forth a procedure for determining competency to proceed at the post-conviction level and adopting the *Nix* standard for mental incompetence was proper to clarify the standard and procedure for determining competency to proceed in a post-conviction motion. Reid v. State, 197 S.W.3d 694, 2006 Tenn. LEXIS 555 (Tenn. 2006), rehearing denied, — S.W.3d —, 2006 Tenn. LEXIS 643, (Tenn. 2006).

Interlocutory appeal of the denial of defendant's motion to suppress was proper because: (1) The suppression issue was dispositive in one of four other cases pending against defendant and would further assist the trial court in determining whether evidence against him in the three other cases should be suppressed; and (2) The constitutionality of T.C.A. § 40-35-321 was a matter of first impression before the court. State v. Scarborough, 201 S.W.3d 607, 2006 Tenn. LEXIS 758 (Tenn. 2006).

Denying the state an interlocutory appeal when the trial court precluded the death penalty by finding that defendant was mentally retarded left no appellate recourse; thus, the conclusion that the matter in defendant's capital case was appropriate for interlocutory appeal under T.R.A.P. 9 was affirmed. State v. Strode, 232 S.W.3d 1, 2007 Tenn. LEXIS 666 (Tenn. Aug. 14, 2007).

In a case in which a plea agreement was entered into by which defendant would plead guilty to one count of violating T.C.A. § 39-17-417(i) for an eight-year sentence and to petition the trial court for placement in a community corrections program, and, pursuant to T.R.A.P.

9, the appellate court granted defendant's application for an interlocutory appeal of the trial court's rejection of the agreement based on defendant's ineligibility for probation and consequent ineligibility for placement in a community corrections program, the trial court erred in withholding its approval of the plea agreement upon a finding that defendant was ineligible for consideration of community corrections under T.C.A. § 40-36-106(a) because he was ineligible for probation. State v. Johnson, 342 S.W.3d 520, 2009 Tenn. Crim. App. LEXIS 877 (Tenn. Crim. App. Oct. 19, 2009).

Although an appeal was intended to be an interlocutory appeal pursuant to T.R.A.P. 9 from a disputed parentage order, despite the fact that a Rule 9 petition was not filed, pursuant to T.R.A.P. 2 the rules for filing such a petition were suspended and permission for the interlocutory appeal was granted due to the subject matter involved. In re K.M., 382 S.W.3d 354, 2012 Tenn. App. LEXIS 242 (Tenn. Ct. App. Apr. 17, 2012).

Interlocutory appeal was improvidently granted because the State, by presenting nothing from which it could be concluded that the suppression out-of-court identifications would cause irreparable injury, had not met its burden; the State had not shown irreparable injury because there was nothing in the record demonstrating the importance of the suppressed evidence to the State's case, and the trial court did not exclude any potential in-court identifications. State v. Simic, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 687 (Tenn. Crim. App. Oct. 24, 2019).

Interlocutory appeal was improvidently granted because the State, by presenting nothing from which it could be concluded that the suppression out-of-court identifications would cause irreparable injury, had not met its burden; the legal standard was the necessity to "develop" not to "maintain" a uniform body of law, but the State did not show that review was appropriate because the trial court's misapplication of the correct legal standards did not demonstrate the lack of a uniform body of law. State v. Simic, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 687 (Tenn. Crim. App. Oct. 24, 2019).

3. Permission Denied.

A criminal defendant may not appeal an order denying a pretrial discovery motion on an interlocutory basis. State v. Gawlas, 614 S.W.2d 74, 1980 Tenn. Crim. App. LEXIS 353 (Tenn. Crim. App. 1980).

Defendant who was charged as an accessory after the fact was not entitled to seek interlocutory review of the trial court's order rejecting her alleged Sixth Amendment speedy trial violation because speedy trial claims in Tennessee ordinarily are raised and reviewed on direct appeal following conviction. Determining whether delay had impaired a defendant's ability to mount an adequate defense is crucial to the prejudice inquiry, and it is precisely this aspect which interlocutory review cannot well illuminate. State v. Hawk, 170 S.W.3d 547, 2005 Tenn. LEXIS 656 (Tenn. 2005).

In a breach of contract case, a trial court did not abuse its discretion by denying a motion to recuse under Tenn. Sup. Ct. R. 10, Canon 3(E)(1), on the eve of trial because the mere fact that the trial judge had ruled against one party in an unrelated case was not a sufficient basis for recusal; moreover, an interlocutory appeal from the denial of this motion was properly denied given the timing of the motion to recuse and the fact that the decision on appeal would have been the same. Bailey v. Champion Window Co. Tri-Cities, LLC, 236 S.W.3d 168, 2007 Tenn. App. LEXIS 249 (Tenn. Ct. App. Apr. 24, 2007), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 859 (Tenn. Sept. 17, 2007).

Trial court had no jurisdiction over interlocutory ruling of board of professional responsibility hearing panel because no provision of Tenn. R. Sup. Ct. 9 authorized interlocutory appeals of matters pending before a hearing panel and neither T.R.A.P. 9, governing interlocutory appeals from trial court, nor T.R.A.P. 10, governing extraordinary appeals on original application in appellate court, applied to trial court proceedings. In re Caldwell, 256 S.W.3d 656, 2008 Tenn. LEXIS 414 (Tenn. June 19, 2008).

4. Applicability of Certiorari Cases.

Case law developed under former certiorari procedure is relevant to motions brought under T.R.A.P. 9. State v. Gawlas, 614 S.W.2d 74, 1980 Tenn. Crim. App. LEXIS 353 (Tenn. Crim. App. 1980).

5. Appeal from Diversion Decision.

An appeal by either side questioning diversion decisions, either granted or denied, must be brought under T.R.A.P. 9 or 10 and cannot come by right under T.R.A.P. 3. State v. Montgomery, 623 S.W.2d 116, 1981 Tenn. Crim. App. LEXIS 374 (Tenn. Crim. App. 1981), but see, State v. Harris, — S.W.3d —, 1999 Tenn. Crim. App. LEXIS 557 (Tenn. Crim. App. June 4, 1999), aff'd, 33 S.W.3d 767, 2000 Tenn. LEXIS 690 (Tenn. 2000); State v. McDuff, 691 S.W.2d 569, 1984 Tenn. Crim. App. LEXIS 2687 (Tenn. Crim. App. 1984); State v. Wilson, 713 S.W.2d 85, 1986 Tenn. Crim. App. LEXIS 2221 (Tenn. Crim. App. 1986).

Appeal from denial of pretrial diversion is not automatic but is discretionary and the court must be given facts sufficient to determine whether an appeal would likely prevent needless, expensive and protracted litigation or develop a uniform body of law. State v. Nabb, 713 S.W.2d 685, 1986 Tenn. Crim. App. LEXIS 2266 (Tenn. Crim. App. 1986).

A second application for permission to appeal a denial of pretrial diversion was denied as

T.R.A.P. 9 does not authorize the continuous filing of additional applications upon the entry of amended statements. State v. Nabb, 713 S.W.2d 685, 1986 Tenn. Crim. App. LEXIS 2266 (Tenn. Crim. App. 1986).

Failure to appeal the grant or denial of diversion under the interlocutory appeals provisions set forth in T.R.A.P. 9 and 10 constitutes a waiver. State v. Mecord, 815 S.W.2d 218, 1991 Tenn. Crim. App. LEXIS 510 (Tenn. Crim. App. 1991).

The question of granting or denying pretrial diversion becomes moot after the defendant has been tried and convicted. State v. Mecord, 815 S.W.2d 218, 1991 Tenn. Crim. App. LEXIS 510 (Tenn. Crim. App. 1991).

When his petition to allow an interlocutory appeal was denied, defendant chose to go to trial and was found guilty. He, therefore, waived his right to pursue pretrial diversion. Rather than proceeding to trial, the defendant should have filed an application for an extraordinary appeal by permission under T.R.A.P. 10. In failing to do so, he waived this issue. State v. Mecord, 815 S.W.2d 218, 1991 Tenn. Crim. App. LEXIS 510 (Tenn. Crim. App. 1991).

Tennessee court of criminal appeals should not deny a T.R.A.P. 9 or T.R.A.P. 10 application from a denial of pretrial diversion under T.C.A. § 40-15-105(a)(1) simply on the basis that defendant may pursue a direct appeal upon conviction pursuant to Tenn. R. Crim. P. 38, as nothing in the amended text of Tenn. R. Crim. P. 38 or in the text of the advisory commission comments thereto indicates that the amendment to Tenn. R. Crim. P. 38 was adopted in order to limit or discourage interlocutory appeals from pretrial diversion decisions; as amended, Tenn. R. Crim. P. 38 simply gives an unsuccessful defendant another avenue to pursue after trial if, for whatever reason, he or she chooses to forego the interlocutory route. State v. McKim, 215 S.W.3d 781, 2007 Tenn. LEXIS 27 (Tenn. 2007).

When defendant who was indicted for criminally negligent homicide after leaving his infant daughter in a car on a hot day was denied pretrial diversion under T.C.A. § 40-15-105(a)(1), a trial court and the criminal appellate court erred in denying defendant's applications for interlocutory appeals pursuant to T.R.A.P. 9 or T.R.A.P.10 because: (1) An assistant district attorney general disregarded the guidelines concerning the proper factors to consider in evaluating applications for pretrial diversion; (2) Pretrial diversion would avoid the necessity of a trial; (3) An interlocutory appeal would not have created piecemeal litigation; and (4) The court of criminal appeals should not have denied defendant's application from the denial of pretrial diversion simply on the basis that defendant could pursue a direct appeal upon conviction pursuant to Tenn. R. Crim. P. 38. State v. McKim, 215 S.W.3d 781, 2007 Tenn. LEXIS 27 (Tenn. 2007).

Defendant waived her right to appeal the denial of her request for pretrial diversion under T.C.A. § 40-15-105 by failing to seek review of the trial court's decision pursuant to T.R.A.P. 9 or 10 prior to pleading guilty to some of the charges. An appeal pursuant to Tenn. R. Crim. P. 38(b) was required to be made under T.R.A.P. 3(b), which had no provision for appeal of the denial of pretrial diversion following a guilty plea. State v. Robinson, 328 S.W.3d 513, 2010 Tenn. Crim. App. LEXIS 268 (Tenn. Crim. App. Mar. 30, 2010).

6. Summary Judgment Orders.

Under repealed T.C.A. § 27-3-105, summary judgment orders were final decisions on the merits from which an appeal was available immediately as a matter of right, and the language in the summary judgment orders that reserved the right to appeal until final disposition of the case against all defendants had no legal effect. Disney v. Celotex Corp., 588 F. Supp. 1317, 1984 U.S. Dist. LEXIS 14837 (D. Tenn. 1984).

In an interlocutory appeal from a trial court's order denying a trustee's motion for summary judgment, the issues raised by the trustee in this breach of trust action were subsets of the issue certified by the trial court and the appellate court. Since these issues did not broaden the certified issue, the appellate court considered them. Meyers v. First Tenn. Bank, N.A., 503 S.W.3d 365, 2016 Tenn. App. LEXIS 371 (Tenn. Ct. App. May 27, 2016), appeal denied, — S.W.3d —, 2016 Tenn. LEXIS 694 (Tenn. Sept. 22, 2016).

7. Nondispositive Search Questions.

Nondispositive search questions cannot be brought to the court of criminal appeals by an interlocutory appeal. State v. Wilkes, 684 S.W.2d 663, 1984 Tenn. Crim. App. LEXIS 2677 (Tenn. Crim. App. 1984).

8. General Sessions Courts.

An appeal under T.C.A. § 27-5-108 could not be had for the review of an interlocutory order. State v. Osborne, 712 S.W.2d 488, 1986 Tenn. Crim. App. LEXIS 2604 (Tenn. Crim. App. 1986).

9. Judgment Granting New Trial.

The determination of whether to grant an interlocutory appeal pursuant to T.R.A.P. 9 and 10, is discretionary with the appellate court when the state desires an interlocutory appeal from a judgment granting a defendant a new trial. State v. Perry, 740 S.W.2d 723, 1987 Tenn. Crim. App. LEXIS 2308 (Tenn. Crim. App. 1987).

10. Pleas of Guilty or Nolo Contendere.

A Tenn. R. Crim. P. 37(b)(2) appeal cannot be pursued as an appeal under T.R.A.P. 9. State v.

Preston, 759 S.W.2d 647, 1988 Tenn. LEXIS 171 (Tenn. 1988).

11. Appeal from Order Not Dismissive of Case.

Had the state wished to appeal the order of the trial court mandating the disclosure of the identity of the confidential informant, it should have filed an interlocutory appeal pursuant to either T.R.A.P. 9 or T.R.A.P. 10; these are the only procedures available for the state to seek review of an interlocutory trial court order which does not have the substantial effect of dismissing the charges. State v. Collins, 35 S.W.3d 582, 2000 Tenn. Crim. App. LEXIS 247 (Tenn. Crim. App. 2000).

In a murder trial, T.R.A.P. 9 did not permit an interlocutory appeal of the court's ruling on the admissibility of evidence of the prior acts of physical abuse committed by the defendant against the victim under Tenn. R. Evid. 404(b); the criteria for review under T.R.A.P. 9 were not met, and because the trial had yet to begin, the interlocutory appeal was largely advisory in nature. State v. Gilley, 173 S.W.3d 1, 2005 Tenn. LEXIS 789 (Tenn. 2005).

12. Final Judgment.

Appellate court lacked jurisdiction to consider petitioner's appeal because all of petitioner's claims had not been adjudicated, and permission to file an interlocutory appeal had not been granted pursuant to T.R.A.P. 9 or T.R.A.P. 10, or the order appealed had not been made final pursuant to Tenn. R. Civ. P. 54.02; trial court did not address the request for a hearing on the conduct of the estate's attorney, and did not address the request for attorney fees and costs requested in the same motion. Boykin v. Casher (In re Estate of Boykin), 295 S.W.3d 632, 2008 Tenn. App. LEXIS 769 (Tenn. Ct. App. Dec. 30, 2008).

Rule 9. [Proposed rule. See Current rule and compiler's notes.] Interlocutory Appeal by Permission from the Trial Court. — (a) Application for Permission to Appeal; Grounds. — Except as provided in Rule 10, an appeal by permission may be taken from an interlocutory order of a trial court from which an appeal lies to the Supreme Court, Court of Appeals or Court of Criminal Appeals only upon application and in the discretion of the trial and appellate court. In determining whether to grant permission to appeal, the following, while neither controlling nor fully measuring the courts' discretion, indicate the character of the reasons that will be considered: (1) the need to prevent irreparable injury, giving consideration to the severity of the potential injury, the probability of its occurrence, and the probability that review upon entry of final judgment will be ineffective; (2) the need to prevent needless, expensive, and protracted litigation, giving consideration to whether the challenged order would be a basis for reversal upon entry of a final judgment, the probability of reversal, and whether an interlocutory appeal will result in a net reduction in the duration and expense of the litigation if the challenged order is reversed; and (3) the need to develop a uniform body of law, giving consideration to the existence of inconsistent orders of other courts and whether the question presented by the challenged order will not otherwise be reviewable upon entry of final judgment. Failure to seek or obtain interlocutory review shall not limit the scope of review upon an appeal as of right from entry of the final judgment.

(b) Procedure in the Trial Court. — The party seeking an appeal must file and serve a motion requesting such relief within 30 days after the date of entry of the order appealed from. When the trial court is of the opinion that an order, not appealable as of right, is nonetheless appealable, the trial court shall state in writing the specific issue or issues the court is certifying for appeal and the reasons for its opinion. The trial court's statement of reasons shall specify: (1) the legal criteria making the order appealable, as provided in subdivision (a) of this rule; (2) the factors leading the trial court to the opinion those criteria are satisfied; and (3) any other factors leading the trial court to exercise its discretion in favor of permitting an appeal. The appellate court may in its

discretion allow an appeal from the order.

(c) How Sought in Appellate Court; Clerk's Fees. — The appeal is sought by filing an application for permission to appeal with the clerk of the appellate court within 10 days after the date of entry of the order in the trial court or the making of the prescribed statement by the trial court, whichever is later. A sufficient number of copies shall be filed to provide the clerk and each judge of the appellate court with one copy. The application shall be served on all other parties in the manner provided in Rule 20 for the service of papers.

Applicable fees, taxes, or documentation required by Rule 6 shall be submitted with the application. An appeal from the denial of an application for interlocutory appeal by an intermediate appellate court is sought by filing an application in the Supreme Court as provided for in Rule 11, with the exception that the application shall be filed within 30 days of the filing date of the intermediate appellate court's order; the application shall be entitled "Application for Permission to Appeal from Denial of Rule 9 Application."

(d) Content of Application; Answer. — The application shall contain: (1) a statement of the questions presented for review; (2) a statement of the facts necessary to an understanding of why an appeal by permission lies, with appropriate references to the documents contained in the appendix to the application; and (3) a statement of the reasons supporting an immediate appeal. A statement of reasons is sufficient if it simply incorporates by reference the trial court's reasons for its opinion that an appeal lies. The application shall be accompanied by an appendix containing copies of: (1) the order appealed from, (2) the trial court's statement of reasons, and (3) the other parts of the record necessary for determination of the application for permission to appeal. Within 10 days after filing of the application, any other party may file an answer in opposition, with copies in the number required for the application, together with an appendix containing any additional parts of the record such party desires to have considered by the appellate court; any statement of facts in the answer shall contain appropriate references to the documents contained in the appendix to the application or the appendix to the answer. The answer shall be served on all other parties in the manner provided in Rule 20 for the service of papers. If available, the color of the cover of the application shall be blue, and the cover of the answer shall be red. The color of the cover of an answer filed by an amicus curiae shall be green. The application and answer shall be submitted without oral argument unless otherwise ordered.

(e) Subsequent Procedure. — After the answer is filed, or if no answer is filed within the time permitted, the appellate court shall either grant or deny the application. If the application is granted, the trial court clerk must file the record on appeal within 30 days from the date of entry of the order granting permission to appeal. The filing of briefs following the granting of an application under this rule is governed by rules 27 - 30, unless otherwise ordered by the appellate court.

(f) Effect on Trial Court Proceedings. — The application for permission to appeal or the grant thereof shall not stay proceedings in the trial court unless the trial court or the appellate court or a judge thereof shall so order.

(g) Appeal in Criminal Actions. — Permission to appeal under this rule may

be sought by the state and defendant in criminal actions. [As amended by order entered January 24, 1992, effective July 1, 1992; by order entered January 26, 1999, effective July 1, 1999; by order filed January 31, 2002, effective July 1, 2002; by order entered December 10, 2003, effective July 1, 2004; by order entered January 6, 2005, effective July 1, 2005; by order entered December 16, 2013, as amended, March 14, 2014, effective July 1, 2014; by order filed January 2, 2015, effective July 1, 2015; by order filed December 21, 2016, effective July 1, 2017; and by order filed December 3, 2020, effective July 1, 2021.]

Advisory Commission Comments [2002]. Refer to Rule 24 for details about the content and preparation of the record on appeal.

Advisory Commission Comments [2003]. T.R.A.P. 2 was amended to clarify that the thirty-day filing deadline to the Supreme Court under T.R.A.P. 9(c) is jurisdictional.

Advisory Commission Comments [2004]. The amendment deleted the second sentence in Rule 9(e) (relating to the docketing of an interlocutory appeal) because that sentence was rendered obsolete by an amendment to Rule 5(c), effective July 1, 2002.

Advisory Commission Comments [2005]. Rule 9(d) is amended to add a statement of the questions presented for review to the list of items that must be included in the application.

Advisory Commission Comments [2007]. When the intermediate court *grants* an interlocutory appeal under Rule 9, an appeal of the final decision of the intermediate court to the Supreme Court is governed by Rule 11. Accordingly, a party has 60 days from the date of the intermediate court's judgment in the interlocutory appeal to file an application for permission to appeal under Rule 11. Note, however, that when the intermediate court *denies* an interlocutory appeal, Rule 9(c) provides that an application for permission to appeal to the Supreme Court must be filed within 30 days of the intermediate court's order denying the interlocutory appeal.

Advisory Commission Comments [2012]. Effective July 1, 2012, the Supreme Court adopted Tenn. Sup. Ct. R. 10B, governing motions seeking disqualification or recusal of a judge. Section 2 of Rule 10B provides the procedural framework for appealing the denial of a disqualification or recusal motion by a judge of a court of record. Section 2.01 of the rule provides that such appeals may be effected either by filing an interlocutory appeal as of right authorized by the rule or by raising the disqualification or recusal issue in an appeal as of right at the conclusion of the case. Under Section 2.01, those two methods of appeal are "the exclusive methods for seeking appellate review of any issue concerning the trial court's ruling on a motion filed pursuant to this Rule." (Emphasis added.) As a result, "neither Tenn. R. App. P. 9 nor Tenn. R. App. P. 10 may be used to seek an interlocutory or extraordinary appeal by permission concerning the judge's ruling on such a motion." Tenn. Sup. Ct. R. 10B, Explanatory Comment to Section 2. Attorneys or self-represented litigants therefore should consult Tenn. Sup. Ct. R. 10B concerning the procedure for appealing from the denial of a disqualification or recusal motion.

Advisory Commission Comments [2014]. Subdivision (d) was amended to specify the color of the covers of applications and answers filed pursuant to Rule 9.

Advisory Commission Comments [2015]. Subdivision (e) was amended by: (1) changing the subtitle of the subdivision from "Filing the Record" to "Subsequent Procedure"; (2) adding the first sentence concerning the court's action on the application; and (3) adding the third sentence concerning the filing of briefs in cases in which the application is granted.

If the intermediate appellate court denies an application for an interlocutory appeal under Tenn. R. App. P. 9 and the Supreme Court subsequently grants permission to appeal, Tenn. R. App. P. 11(f), as amended in 2015, provides that the appellant's brief must be filed within thirty days of the filing of the record in the Supreme Court.

Advisory Commission Comments [2017]. In 2017, the Appellate Court Clerk's office will implement electronic filing and begin charging fees at the initiation of an appeal. To accommodate these initiatives, Rule 6 is amended to reflect that fees and taxes are to be paid at the initiation of a case, except under limited circumstances. Subdivision (c) of this rule is amended to reflect that fees are to be submitted with the application, rather than secured under the former procedure of filing a cost bond.

Rule 9(d) is amended to require that the statement of the facts in the application contain appropriate references to the documents contained in the appendix to the application. Subdivision (d) also is amended to require that any statement of facts in an answer to the application contain appropriate references to the documents contained in the appendix to the application or the appendix to the answer. These requirements are intended to facilitate the appellate court's efficient review of the application

for an interlocutory appeal by permission from the trial court.

Advisory Commission Comments [2021]. Rule 9(b) is amended to add a requirement that a trial court's order certifying as appealable an interlocutory order of the court shall state the specific issue or issues for consideration by the appellate court. The word "thereupon" is deleted from the last sentence of the Rule as surplusage.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated December 10, 2003, was ratified and approved by 2004 House Resolution 234 and Senate Resolution 117. The order promulgating the amendment of this rule provided that it take effect July 1, 2004.

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 6, 2005, was ratified and approved by 2005 House Resolution 14 and Senate Resolution 10. The order promulgating the amendment of this rule provided that it take effect July 1, 2005.

The amendment of the Advisory Commission Comments, which added the 2007 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated January 2, 2007, was ratified and approved by House Resolution 19 and Senate Resolution 12. The order promulgating the amendment of the Advisory Commission Comments provided that it take effect July 1, 2007.

The addition of the 2012 Advisory Commission Comments for this rule, as promulgated and adopted by the Supreme Court in its order dated January 13, 2012, was ratified and approved by 2012 House Resolution 194 and Senate Resolution 80. The order promulgating the amendment of the comments provided that the amendment take effect July 1, 2012.

The amendment of Rule 9, which amended subdivision (d) and added the 2014 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 16, 2013, as amended, March 14, 2014, was ratified and approved by 2014 House Resolution 156 and Senate Resolution 75. The order promulgating the 2014 amendment of subdivision (d) and the addition of the 2014 Advisory Commission Comments provided that it take effect on July 1, 2014.

The amendment of Rule 9, which amended subdivision (e) and added the 2015 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated January 2, 2015, was ratified and approved by 2015 House Resolution 3 and Senate Resolution 13. The order promulgating the amendment of this rule provided that it take effect on July 1, 2015.

The amendment of Rule 9, which amended subdivisions (c) and (d) and added the [2017] Advisory Comments, as promulgated and adopted by the Supreme Court in its order dated December 21, 2016, was ratified and approved by 2017 House Resolution 19 and Senate Resolution 16. The order promulgating the amendment of subdivisions (c) and (d) and the addition of the [2017] Advisory Comments, provided that it take effect July 1, 2017.

In its order filed December 3, 2020, the Supreme Court adopted the amendment to this rule, effective July 1, 2021, subject to approval by resolution of the General Assembly.

The amendment of Rule 9, which amended subdivision (b) and added the [2021] Advisory Comments, as promulgated and adopted by the Supreme Court in its order dated December 3, 2020, was ratified and approved by 2021 House Resolution 22 and Senate Resolution 20. The order promulgating the amendment of subdivision (b) and the addition of the [2021] Advisory Comments, provided that it take effect July 1, 2021.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 214, 235, 668.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 1-62.09-1, 2-9-1 — 2-9-3, 2-10-1, 2-12-2.

Tennessee Jurisprudence. 1 Tenn. Juris., Accounts and Accounting, § 13; 2 Tenn. Juris., Appeal and Error, §§ 16-51, 58, 72, 83, 131; 3 Tenn. Juris., Attachment and Garnishment, § 170; 4 Tenn. Juris., Bail and Recognizance, § 16; 15 Tenn. Juris., Injunctions, § 63; 16 Tenn. Juris., Judges, § 15.

Law Reviews. Seeking Justice on Appeal, 27 No. 4 Tenn. B.J. 28 (1991).

The Tennessee Pretrial Diversion Act: A Practitioner's Guide (Steven W. Feldman), 13 Mem. St. U.L. Rev. 285 (1983).

When Is Your Work Product "Work Product?" (Henry D. Finchere), 33 No. 1 Tenn. B.J. 22 (1997).

NOTES TO DECISIONS

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1. In General.
2. Permission Granted.
3. Permission Denied.
4. Applicability of Certiorari Cases.
5. Appeal from Diversion Decision.
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10. Pleas of Guilty or Nolo Contendere.
11. Appeal from Order Not Dismissive of Case.

12. Final Judgment.

1. In General.

For interlocutory appeals under T.R.A.P. 9, the only issues that can be raised are those certified in the trial court's order granting permission to seek an interlocutory appeal and in the appellate court's order granting the interlocutory appeal. Heatherly v. Merrimack Mut. Fire Ins. Co., 43 S.W.3d 911, 2000 Tenn. App. LEXIS 751 (Tenn. Ct. App. 2000).

Because the purpose of Tenn. R. Crim. P. 5.1(a) is to provide the defense with material that can be used to prepare for trial, a defendant should raise, and the trial court should attempt to resolve, this critical issue prior to trial. If the trial court denies defendant's motion to dismiss the indictment for failure to comply with Rule 5.1(a), defendant may request an interlocutory or extraordinary appeal and attempt to demonstrate that appellate review is appropriate under T.R.A.P. 9 and 10. State v. Graves, 126 S.W.3d 873, 2003 Tenn. LEXIS 487 (Tenn. 2003).

Interlocutory appeal pursuant to T.R.A.P. 9 is available to the state under T.C.A. § 39-13-203(f) when the trial court determines that a defendant is mentally retarded. State v. Strode, 232 S.W.3d 1, 2007 Tenn. LEXIS 666 (Tenn. Aug. 14, 2007).

Suppression order that eliminates any reasonable probability of a successful prosecution provides a basis for interlocutory appeal under T.R.A.P. 9(a)(1), (3) or extraordinary appeal under T.R.A.P. 10(a). State v. Meeks, 262 S.W.3d 710, 2008 Tenn. LEXIS 575 (Tenn. Sept. 2, 2008).

It is important for appellate courts to exercise restraint in granting extraordinary appeals; unless the trial court's alleged error qualifies for immediate review under the specific criteria indicated by the rule, the appellate court must respect the trial court's discretionary decision not to grant permission to appeal under the rule regarding interlocutory appeals and refrain from granting an extraordinary appeal, and those alleged errors not rising to the level required can be reviewed in the normal course of an appeal after a final judgment has been entered. Gilbert v. Wessels, 458 S.W.3d 895, 2014 Tenn. LEXIS 1031 (Tenn. Dec. 18, 2014).

Appellate court's decision to grant interlocutory review is a separate exercise of judicial discretion, and the appellate court must exercise its discretion under the statute regardless of any purported waiver of its consideration of the propriety of interlocutory appeal. State v. Simic, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 687 (Tenn. Crim. App. Oct. 24, 2019).

Plaintiffs claimed dismissal with prejudice for failure to comply with a court order that had been appealed pursuant to the rule was inappropriate; while plaintiffs did not file a motion to stay the proceeding pending the outcome of its motion for permission to appeal, much of plaintiffs' delay throughout the case was a result of counsel's longstanding failure to respond and her disregard of cour orders, and dismissal with prejudice would cause plaintiffs injustice. The trial court was to enter an order of dismissal without prejudice on remand. Diemoz v. Huneycutt, — S.W.3d —, 2020 Tenn. App. LEXIS 204 (Tenn. Ct. App. May 6, 2020).

2. Permission Granted.

In a case in which the complaint sought punitive damages, the court of appeals granted interlocutory appeal of chancellor's decree denying motion for a protective order relating to the discovery of defendant's financial condition. Breault v. Friedli, 610 S.W.2d 134, 1980 Tenn. App. LEXIS 391 (Tenn. Ct. App. 1980).

In suit for rents wrongfully retained and for the removal as a cloud upon plaintiffs' title to real property of a certain deed to the defendants, wherein defendants counterclaimed seeking a declaration that title was in them, and the chancellor found in favor of plaintiffs and referred to the master the matter of rent and damages, the defendants sought and were granted by the trial court and the court of appeals an appeal from the interlocutory order of the chancellor decreeing title of the property in question to be in plaintiffs. Aclin v. Speight, 611 S.W.2d 54, 1980 Tenn. App. LEXIS 401 (Tenn. Ct. App. 1980).

A decision by a juvenile court on a question of law in a paternity suit is appealable to the court of appeals. Tennessee Dep't of Human Services v. Lumley, 638 S.W.2d 381, 1982 Tenn. LEXIS 341 (Tenn. 1982).

Where defendants were charged with false pretense and conspiracy to commit false pretense, district attorney did not abuse discretion in denying pretrial diversion to defendant, who had no prior criminal record and was a reputable person, where the criminal activity was extensive, was not impulsive but required considerable effort and planning, was a serious problem in the circuit and was in need of deterrence. State v. Holland, 661 S.W.2d 91, 1983 Tenn. Crim. App. LEXIS 363 (Tenn. Crim. App. 1983).

Because the order granting the interlocutory appeal did not set out the issues to be addressed and because the plaintiffs had subsequently filed a brief addressing the issues, it was appropriate for the court to address all the issues. Heatherly v. Merrimack Mut. Fire Ins. Co., 43 S.W.3d 911, 2000 Tenn. App. LEXIS 751 (Tenn. Ct. App. 2000).

Where defendant was charged with DUI and obstructing a highway, the trial court granted defendant's motion to suppress evidence obtain from the traffic stop; while the state failed to file an application for appeal within thirty days as required by T.R.A.P. 9, the order of suppres-

sion was dispositive and waived timely filing in the interest of justice. State v. Williams, 185 S.W.3d 311, 2006 Tenn. LEXIS 181 (Tenn. 2006).

Grant of an interlocutory appeal was appropriate under T.R.A.P. 9 where the trial court had specifically found that a trial was unnecessary if the defendant's position was well taken and that there was a need to establish a uniform body of law in determining whether information used to obtain a search warrant has been provided by a citizen informant. State v. Williams, 193 S.W.3d 502, 2006 Tenn. LEXIS 436 (Tenn. 2006).

Interlocutory appeal of a trial court's order setting forth a procedure for determining competency to proceed at the post-conviction level and adopting the *Nix* standard for mental incompetence was proper to clarify the standard and procedure for determining competency to proceed in a post-conviction motion. Reid v. State, 197 S.W.3d 694, 2006 Tenn. LEXIS 555 (Tenn. 2006), rehearing denied, — S.W.3d —, 2006 Tenn. LEXIS 643, (Tenn. 2006).

Interlocutory appeal of the denial of defendant's motion to suppress was proper because: (1) The suppression issue was dispositive in one of four other cases pending against defendant and would further assist the trial court in determining whether evidence against him in the three other cases should be suppressed; and (2) The constitutionality of T.C.A. § 40-35-321 was a matter of first impression before the court. State v. Scarborough, 201 S.W.3d 607, 2006 Tenn. LEXIS 758 (Tenn. 2006).

Denying the state an interlocutory appeal when the trial court precluded the death penalty by finding that defendant was mentally retarded left no appellate recourse; thus, the conclusion that the matter in defendant's capital case was appropriate for interlocutory appeal under T.R.A.P. 9 was affirmed. State v. Strode, 232 S.W.3d 1, 2007 Tenn. LEXIS 666 (Tenn. Aug. 14, 2007).

In a case in which a plea agreement was entered into by which defendant would plead guilty to one count of violating T.C.A. § 39-17-417(i) for an eight-year sentence and to petition the trial court for placement in a community corrections program, and, pursuant to T.R.A.P. 9, the appellate court granted defendant's application for an interlocutory appeal of the trial court's rejection of the agreement based on defendant's ineligibility for probation and consequent ineligibility for placement in a community corrections program, the trial court erred in withholding its approval of the plea agreement upon a finding that defendant was ineligible for consideration of community corrections under T.C.A. § 40-36-106(a) because he was ineligible for probation. State v. Johnson, 342 S.W.3d 520, 2009 Tenn. Crim. App. LEXIS 877 (Tenn. Crim. App. Oct. 19, 2009).

Although an appeal was intended to be an interlocutory appeal pursuant to T.R.A.P. 9 from a disputed parentage order, despite the fact that a Rule 9 petition was not filed, pursuant to T.R.A.P. 2 the rules for filing such a petition were suspended and permission for the interlocutory appeal was granted due to the subject matter involved. In re K.M., 382 S.W.3d 354, 2012 Tenn. App. LEXIS 242 (Tenn. Ct. App. Apr. 17, 2012).

Interlocutory appeal was improvidently granted because the State, by presenting nothing from which it could be concluded that the suppression out-of-court identifications would cause irreparable injury, had not met its burden; the State had not shown irreparable injury because there was nothing in the record demonstrating the importance of the suppressed evidence to the State's case, and the trial court did not exclude any potential in-court identifications. State v. Simic, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 687 (Tenn. Crim. App. Oct. 24, 2019).

Interlocutory appeal was improvidently granted because the State, by presenting nothing from which it could be concluded that the suppression out-of-court identifications would cause irreparable injury, had not met its burden; the legal standard was the necessity to "develop" not to "maintain" a uniform body of law, but the State did not show that review was appropriate because the trial court's misapplication of the correct legal standards did not demonstrate the lack of a uniform body of law. State v. Simic, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 687 (Tenn. Crim. App. Oct. 24, 2019).

3. Permission Denied.

A criminal defendant may not appeal an order denying a pretrial discovery motion on an interlocutory basis. State v. Gawlas, 614 S.W.2d 74, 1980 Tenn. Crim. App. LEXIS 353 (Tenn. Crim. App. 1980).

Defendant who was charged as an accessory after the fact was not entitled to seek interlocutory review of the trial court's order rejecting her alleged Sixth Amendment speedy trial violation because speedy trial claims in Tennessee ordinarily are raised and reviewed on direct appeal following conviction. Determining whether delay had impaired a defendant's ability to mount an adequate defense is crucial to the prejudice inquiry, and it is precisely this aspect which interlocutory review cannot well illuminate. State v. Hawk, 170 S.W.3d 547, 2005 Tenn. LEXIS 656 (Tenn. 2005).

In a breach of contract case, a trial court did not abuse its discretion by denying a motion to recuse under Tenn. Sup. Ct. R. 10, Canon 3(E)(1), on the eve of trial because the mere fact that the trial judge had ruled against one party in an unrelated case was not a sufficient basis for recusal; moreover, an interlocutory appeal

from the denial of this motion was properly denied given the timing of the motion to recuse and the fact that the decision on appeal would have been the same. Bailey v. Champion Window Co. Tri-Cities, LLC, 236 S.W.3d 168, 2007 Tenn. App. LEXIS 249 (Tenn. Ct. App. Apr. 24, 2007), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 859 (Tenn. Sept. 17, 2007).

Trial court had no jurisdiction over interlocutory ruling of board of professional responsibility hearing panel because no provision of Tenn. R. Sup. Ct. 9 authorized interlocutory appeals of matters pending before a hearing panel and neither T.R.A.P. 9, governing interlocutory appeals from trial court, nor T.R.A.P. 10, governing extraordinary appeals on original application in appellate court, applied to trial court proceedings. In re Caldwell, 256 S.W.3d 656, 2008 Tenn. LEXIS 414 (Tenn. June 19, 2008).

4. Applicability of Certiorari Cases.

Case law developed under former certiorari procedure is relevant to motions brought under T.R.A.P. 9. State v. Gawlas, 614 S.W.2d 74, 1980 Tenn. Crim. App. LEXIS 353 (Tenn. Crim. App. 1980).

5. Appeal from Diversion Decision.

An appeal by either side questioning diversion decisions, either granted or denied, must be brought under T.R.A.P. 9 or 10 and cannot come by right under T.R.A.P. 3. State v. Montgomery, 623 S.W.2d 116, 1981 Tenn. Crim. App. LEXIS 374 (Tenn. Crim. App. 1981), but see, State v. Harris, — S.W.3d —, 1999 Tenn. Crim. App. LEXIS 557 (Tenn. Crim. App. June 4, 1999), aff'd, 33 S.W.3d 767, 2000 Tenn. LEXIS 690 (Tenn. 2000); State v. McDuff, 691 S.W.2d 569, 1984 Tenn. Crim. App. LEXIS 2687 (Tenn. Crim. App. 1984); State v. Wilson, 713 S.W.2d 85, 1986 Tenn. Crim. App. LEXIS 2221 (Tenn. Crim. App. 1986).

Appeal from denial of pretrial diversion is not automatic but is discretionary and the court must be given facts sufficient to determine whether an appeal would likely prevent needless, expensive and protracted litigation or develop a uniform body of law. State v. Nabb, 713 S.W.2d 685, 1986 Tenn. Crim. App. LEXIS 2266 (Tenn. Crim. App. 1986).

A second application for permission to appeal a denial of pretrial diversion was denied as T.R.A.P. 9 does not authorize the continuous filing of additional applications upon the entry of amended statements. State v. Nabb, 713 S.W.2d 685, 1986 Tenn. Crim. App. LEXIS 2266 (Tenn. Crim. App. 1986).

Failure to appeal the grant or denial of diversion under the interlocutory appeals provisions set forth in T.R.A.P. 9 and 10 constitutes a waiver. State v. Mecord, 815 S.W.2d 218, 1991 Tenn. Crim. App. LEXIS 510 (Tenn. Crim. App. 1991).

The question of granting or denying pretrial diversion becomes moot after the defendant has been tried and convicted. State v. Mecord, 815 S.W.2d 218, 1991 Tenn. Crim. App. LEXIS 510 (Tenn. Crim. App. 1991).

When his petition to allow an interlocutory appeal was denied, defendant chose to go to trial and was found guilty. He, therefore, waived his right to pursue pretrial diversion. Rather than proceeding to trial, the defendant should have filed an application for an extraordinary appeal by permission under T.R.A.P. 10. In failing to do so, he waived this issue. State v. Mecord, 815 S.W.2d 218, 1991 Tenn. Crim. App. LEXIS 510 (Tenn. Crim. App. 1991).

Tennessee court of criminal appeals should not deny a T.R.A.P. 9 or T.R.A.P. 10 application from a denial of pretrial diversion under T.C.A. § 40-15-105(a)(1) simply on the basis that defendant may pursue a direct appeal upon conviction pursuant to Tenn. R. Crim. P. 38, as nothing in the amended text of Tenn. R. Crim. P. 38 or in the text of the advisory commission comments thereto indicates that the amendment to Tenn. R. Crim. P. 38 was adopted in order to limit or discourage interlocutory appeals from pretrial diversion decisions; as amended, Tenn. R. Crim. P. 38 simply gives an unsuccessful defendant another avenue to pursue after trial if, for whatever reason, he or she chooses to forego the interlocutory route. State v. McKim, 215 S.W.3d 781, 2007 Tenn. LEXIS 27 (Tenn. 2007).

When defendant who was indicted for criminally negligent homicide after leaving his infant daughter in a car on a hot day was denied pretrial diversion under T.C.A. § 40-15-105(a)(1), a trial court and the criminal appellate court erred in denying defendant's applications for interlocutory appeals pursuant to T.R.A.P. 9 or T.R.A.P.10 because: (1) An assistant district attorney general disregarded the guidelines concerning the proper factors to consider in evaluating applications for pretrial diversion; (2) Pretrial diversion would avoid the necessity of a trial; (3) An interlocutory appeal would not have created piecemeal litigation; and (4) The court of criminal appeals should not have denied defendant's application from the denial of pretrial diversion simply on the basis that defendant could pursue a direct appeal upon conviction pursuant to Tenn. R. Crim. P. 38. State v. McKim, 215 S.W.3d 781, 2007 Tenn. LEXIS 27 (Tenn. 2007).

Defendant waived her right to appeal the denial of her request for pretrial diversion under T.C.A. § 40-15-105 by failing to seek review of the trial court's decision pursuant to T.R.A.P. 9 or 10 prior to pleading guilty to some of the charges. An appeal pursuant to Tenn. R. Crim. P. 38(b) was required to be made under T.R.A.P. 3(b), which had no provision for appeal of the denial of pretrial diversion following a guilty plea. State v. Robinson, 328 S.W.3d 513, 2010 Tenn. Crim. App. LEXIS 268 (Tenn. Crim. App. Mar. 30, 2010).

6. Summary Judgment Orders.

Under repealed T.C.A. § 27-3-105, summary judgment orders were final decisions on the merits from which an appeal was available immediately as a matter of right, and the language in the summary judgment orders that reserved the right to appeal until final disposition of the case against all defendants had no legal effect. Disney v. Celotex Corp., 588 F. Supp. 1317, 1984 U.S. Dist. LEXIS 14837 (D. Tenn. 1984).

In an interlocutory appeal from a trial court's order denying a trustee's motion for summary judgment, the issues raised by the trustee in this breach of trust action were subsets of the issue certified by the trial court and the appellate court. Since these issues did not broaden the certified issue, the appellate court considered them. Meyers v. First Tenn. Bank, N.A., 503 S.W.3d 365, 2016 Tenn. App. LEXIS 371 (Tenn. Ct. App. May 27, 2016), appeal denied, — S.W.3d —, 2016 Tenn. LEXIS 694 (Tenn. Sept. 22, 2016).

7. Nondispositive Search Questions.

Nondispositive search questions cannot be brought to the court of criminal appeals by an interlocutory appeal. State v. Wilkes, 684 S.W.2d 663, 1984 Tenn. Crim. App. LEXIS 2677 (Tenn. Crim. App. 1984).

8. General Sessions Courts.

An appeal under T.C.A. § 27-5-108 could not be had for the review of an interlocutory order. State v. Osborne, 712 S.W.2d 488, 1986 Tenn. Crim. App. LEXIS 2604 (Tenn. Crim. App. 1986).

9. Judgment Granting New Trial.

The determination of whether to grant an interlocutory appeal pursuant to T.R.A.P. 9 and 10, is discretionary with the appellate court when the state desires an interlocutory appeal from a judgment granting a defendant a new trial. State v. Perry, 740 S.W.2d 723, 1987 Tenn. Crim. App. LEXIS 2308 (Tenn. Crim. App. 1987).

10. Pleas of Guilty or Nolo Contendere.

A Tenn. R. Crim. P. 37(b)(2) appeal cannot be pursued as an appeal under T.R.A.P. 9. State v. Preston, 759 S.W.2d 647, 1988 Tenn. LEXIS 171 (Tenn. 1988).

11. Appeal from Order Not Dismissive of Case.

Had the state wished to appeal the order of the trial court mandating the disclosure of the identity of the confidential informant, it should have filed an interlocutory appeal pursuant to either T.R.A.P. 9 or T.R.A.P. 10; these are the only procedures available for the state to seek review of an interlocutory trial court order which does not have the substantial effect of dismissing the charges. State v. Collins, 35 S.W.3d 582, 2000 Tenn. Crim. App. LEXIS 247 (Tenn. Crim. App. 2000).

In a murder trial, T.R.A.P. 9 did not permit an interlocutory appeal of the court's ruling on the admissibility of evidence of the prior acts of physical abuse committed by the defendant against the victim under Tenn. R. Evid. 404(b); the criteria for review under T.R.A.P. 9 were not met, and because the trial had yet to begin, the interlocutory appeal was largely advisory in nature. State v. Gilley, 173 S.W.3d 1, 2005 Tenn. LEXIS 789 (Tenn. 2005).

12. Final Judgment.

Appellate court lacked jurisdiction to consider petitioner's appeal because all of petitioner's claims had not been adjudicated, and permission to file an interlocutory appeal had not been granted pursuant to T.R.A.P. 9 or T.R.A.P. 10, or the order appealed had not been made final pursuant to Tenn. R. Civ. P. 54.02; trial court did not address the request for a hearing on the conduct of the estate's attorney, and did not address the request for attorney fees and costs requested in the same motion. Boykin v. Casher (In re Estate of Boykin), 295 S.W.3d 632, 2008 Tenn. App. LEXIS 769 (Tenn. Ct. App. Dec. 30, 2008).

Rule 10. Extraordinary Appeal by Permission on Original Application in the Appellate Court. — (a) Original Application for Extraordinary Appeal; Grounds. — An extraordinary appeal may be sought on application and in the discretion of the appellate court alone of interlocutory orders of a lower court from which an appeal lies to the Supreme Court, Court of Appeals or Court of Criminal Appeals: (1) if the lower court has so far departed from the accepted and usual course of judicial proceedings as to require immediate review, or (2) if necessary for complete determination of the action on appeal as otherwise provided in these rules. The appellate court may issue whatever order is necessary to implement review under this rule.

(b) How Sought; Clerk's Fees. — An extraordinary appeal is sought by filing an application for an extraordinary appeal with the clerk of the appellate court. A sufficient number of copies shall be filed to provide the clerk and each

judge of the appellate court with one copy. Unless necessity requires otherwise, the application shall be served on all other parties in the manner provided in Rule 20 for the service of papers. The appeal shall be docketed in accordance with Rule 5(c) upon the filing of the application with the clerk of the appellate court. An appeal from the denial of an application for extraordinary appeal by an intermediate appellate court is sought by filing an application in the Supreme Court as provided for in this rule within 30 days of the filing date of the intermediate appellate court's order. Applicable fees, taxes, or documentation required by Rule 6 shall be submitted with the application.

(c) Content of Application. — The application shall contain: (1) a statement of the questions presented for review; (2) a statement of the facts necessary to an understanding of why an extraordinary appeal lies, with appropriate references to the documents contained in the appendix to the application; (3) a statement of the reasons supporting an extraordinary appeal, and (4) the relief sought. The application shall be accompanied by an appendix containing copies of any order or opinion relevant to the questions presented in the application and any other parts of the record necessary for determination of the application. The application may also be supported by affidavits or other relevant documents, which also shall be contained in the appendix. The application to the Supreme Court shall include the application filed in the intermediate appellate court and a copy of the intermediate appellate court's order.

(d) Subsequent Procedure. — If the appellate court is of the opinion that an extraordinary appeal should not be granted, it shall deny the application. Otherwise, the appellate court shall order that an answer to the application be filed by the other parties within the time fixed by the order. The order shall be served on all other parties and if the application has not previously been served shall have attached thereto a copy of the application. Such answers shall be accompanied by an appendix containing any additional parts of the record the answering party desires to have considered by the appellate court; any statement of facts in the answer shall contain appropriate references to the documents contained in the appendix to the application or the appendix to the answer. After the answer is filed, the appellate court shall either grant or deny the application. If the application is granted, the trial court clerk must file the record on appeal within 30 days from the date of entry of the order granting permission to appeal or within such other period as the appellate court may direct. The appellate court shall advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument, if oral argument is granted.

(e) Appeal in Criminal Actions. — Permission to appeal under this rule may be sought by the state and defendant in criminal actions.

(f) Color of Covers. — If available, the color of the cover of the application shall be blue. If the appellate court orders that an answer be filed, the cover of the answer shall be red, except that the cover of an answer filed by an amicus curiae shall be green. [As amended by order entered January 26, 1999, effective July 1, 1999; by order entered January 6, 2005, effective July 1, 2005; by order entered December 16, 2013, as amended, March 14, 2014, effective July 1, 2014; by order filed January 2, 2015, effective July 1, 2015; and by order filed December 21, 2016, effective July 1, 2017.]

Advisory Commission Comments. Interlocutory review under this rule differs from interlocutory review under Rule 9 in that this rule requires the permission of only the appellate court. The circumstances in which review is available under this rule, however, are very narrowly circumscribed to those situations in which the trial court or the intermediate appellate court has acted in an arbitrary fashion, or as may be necessary to permit complete appellate review on a later appeal.

The procedure for applying for extraordinary review under this rule is substantially the same as that set forth in Rule 9. However, an answer to an application need not be filed unless the appellate court so directs based upon its opinion that an extraordinary appeal may lie. If an extraordinary appeal is granted, subsequent proceedings are had as determined appropriate by the appellate court.

Subdivision (a) expressly empowers the appellate court to issue whatever order is necessary to implement review, and Rule 36 permits the court to grant whatever relief is appropriate.

This rule, like Rule 9, is available to both the defendant and the state in criminal actions.

Advisory Commission Comments [1994]. If the intermediate appellate court refuses to hear a Rule 10 extraordinary appeal, the Supreme Court will hear the case only under the criteria of Rule 10.

Advisory Commission Comments [2003]. T.R.A.P. 2 was amended to clarify that the thirty day filing deadline to the Supreme Court under T.R.A.P. 10(b) is jurisdictional.

Advisory Commission Comments [2005]. Rule 10(c) is amended to add a statement of the questions presented for review to the list of items that must be included in the application.

Advisory Commission Comments [2012]. *Generally.* Effective July 1, 2012, the Supreme Court adopted Tenn. Sup. Ct. R. 10B, governing motions seeking disqualification or recusal of a judge. Section 2 of Rule 10B provides the procedural framework for appealing the denial of a disqualification or recusal motion by a judge of a court of record. Section 2.01 of the rule provides that such appeals may be effected either by filing an interlocutory appeal as of right authorized by the rule or by raising the disqualification or recusal issue in an appeal as of right at the conclusion of the case. Under Section 2.01, those two methods of appeal are "the exclusive methods for seeking appellate review of any issue concerning the trial court's ruling on a motion filed pursuant to this Rule." (Emphasis added.) As a result, "neither Tenn. R. App. P. 9 nor Tenn. R. App. P. 10 may be used to seek an interlocutory or extraordinary appeal by permission concerning the judge's ruling on such a motion." Tenn. Sup. Ct. R. 10B, Explanatory Comment to Section 2. Attorneys or self-represented litigants therefore should consult Tenn. Sup. Ct. R. 10B concerning the procedure for appealing from the denial of a disqualification or recusal motion.

Subdivision (b). When the intermediate court grants an extraordinary appeal under Rule 10, an appeal of the final decision of the intermediate court to the Supreme Court is governed by Rule 11. Accordingly, a party has 60 days from the date of the intermediate court's judgment in the extraordinary appeal to file an application for permission to appeal under Rule 11. Note, however, that when the intermediate court denies an extraordinary appeal, Rule 10(b) provides that an application for extraordinary appeal must be filed in the Supreme Court within 30 days of the intermediate court's order denying the extraordinary appeal.

Advisory Commission Comments [2014]. Subdivision (f) was added to the rule to specify the color of the covers of applications and answers (if any) filed pursuant to Rule 10.

Advisory Commission Comments [2015]. Subdivision (d) was amended to clarify the procedure to be followed when the appellate court orders the filing of an answer to the application for extraordinary appeal by permission. As amended, the subdivision provides that the appellate court shall either grant or deny the application after the answer is filed, which conforms the text of the rule to the actual practice followed by the appellate courts. The subdivision also was amended to provide that the record on appeal must be filed by the trial court clerk within 30 days of the order granting permission to appeal or within such other period as the appellate court may direct.

Advisory Commission Comments [2017]. In 2017, the Appellate Court Clerk's office will implement electronic filing and begin charging fees at the initiation of an appeal. To accommodate these initiatives, Rule 6 is amended to reflect that fees and taxes are to be paid at the initiation of a case, except under limited circumstances. Subdivision (b) of this rule is amended to reflect that fees are to be submitted with the application, rather than secured under the former procedure of filing a cost bond.

Rule 10(c) is amended to require that the statement of the facts in the application contain appropriate references to the documents contained in the appendix to the application. Rule 10(d) is amended to require that, in the event the appellate court orders the filing of an answer to the application, the answer be accompanied by an appendix containing any additional parts of the record the answering party desires to have considered by the appellate court; subdivision (d) also is amended to require that any statement of facts in the answer contain appropriate references to the documents contained in the appendix to the application or the appendix to the answer. These requirements are intended to facilitate the appellate court's efficient review of the application

for an extraordinary appeal on original application in the appellate court.

Compiler's Notes. T.R.A.P. 10 may affect Tenn. Code Ann. §§ 27-8-101, 27-8-102.

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 6, 2005, was ratified and approved by 2005 House Resolution 14 and Senate Resolution 10. The order promulgating the amendment of this rule provided that it take effect July 1, 2005.

The addition of the 2012 Advisory Commission Comments for this rule, as promulgated and adopted by the Supreme Court in its order dated January 13, 2012, was ratified and approved by 2012 House Resolution 194 and Senate Resolution 80. The order promulgating the amendment of the comments provided that the amendment take effect July 1, 2012.

The amendment of Rule 10, which added subdivision (f) and added the 2014 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 16, 2013, as amended, March 14, 2014, was ratified and approved by 2014 House Resolution 156 and Senate Resolution 75. The order promulgating the 2014 addition of subdivision (f) and the addition of the 2014 Advisory Commission Comments provided that it take effect on July 1, 2014.

The amendment of rule 10, which amended subdivision (d) and added the 2015 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated January 2, 2015, was ratified and approved by 2015 House Resolution 3 and Senate Resolution 13. The order promulgating the amendment of this rule provided that it take effect on July 1, 2015.

The amendment of Rule 10, which amended subdivisions (b), (c) and (d) and added the [2017] Advisory Comments, as promulgated and adopted by the Supreme Court in its order dated December 21, 2016, was ratified and approved by 2017 House Resolution 19 and Senate Resolution 16. The order promulgating the amendment of subdivisions (b), (c) and (d) and the addition of the [2017] Advisory Comments, provided that it take effect July 1, 2017.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 214, 235.

Tennessee Forms (Robinson, Ramsey and Harwell), No. 2-10-1.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 16-51, 58, 72, 83, 131; 3 Tenn. Juris., Attachment and Garnishment, § 170; 4 Tenn. Juris., Bail and Recognizance, § 16; 5 Tenn. Juris., Certiorari, § 18; 15 Tenn. Juris., Injunctions, § 63; 16 Tenn. Juris., Judges, § 15.

Law Reviews. Seeking Justice on Appeal, 27 No. 4 Tenn. B.J. 28 (1991).

The Tennessee Pretrial Diversion Act: A Practitioner's Guide (Steven W. Feldman), 13 Mem. St. U.L. Rev. 285 (1983).

NOTES TO DECISIONS

Analysis

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14. Permission Granted.
15. Permission Denied.
16. Permission Improvidently Granted.
17. Motion to Suppress.

1. Jurisdiction.

Until the accused has been sentenced to death, the court of criminal appeals has appellate jurisdiction in capital cases. State v. Vilvarajah, 735 S.W.2d 837, 1987 Tenn. Crim. App. LEXIS 2563 (Tenn. Crim. App. 1987).

The issues that may be brought up pursuant to T.R.A.P. 10 are limited to those specified in an order by the Tennessee court of appeals granting the extraordinary appeal. Heatherly v. Merrimack Mut. Fire Ins. Co., 43 S.W.3d 911, 2000 Tenn. App. LEXIS 751 (Tenn. Ct. App. 2000).

Tennessee Court of Appeals erred in remanding case for discovery concerning allegations of misconduct by chancellor and in ordering that discovery materials be transmitted to it as a supplemental record, where the clear effect of the order was that the court of appeals, not the trial court, would determine the merits of allegations, requiring the court of appeals to make factual findings based upon the "supplemental record," which determination was an unauthorized exercise of original jurisdiction; proper remedy was for plaintiff to file motion asking court of appeals to remand the case to the trial court for the filing and adjudication of a motion pursuant to Tenn. R. Civ. P. 60. Peck v. Tanner, 181 S.W.3d 262, 2005 Tenn. LEXIS 579 (Tenn. 2005).

Appellate court lacked jurisdiction to consider petitioner's appeal because all of petitioner's claims had not been adjudicated, and permission to file an interlocutory appeal had not

been granted pursuant to T.R.A.P. 9 or T.R.A.P. 10, or the order appealed had not been made final pursuant to Tenn. R. Civ. P. 54.02; trial court did not address the request for a hearing on the conduct of the estate's attorney, and did not address the request for attorney fees and costs requested in the same motion. Boykin v. Casher (In re Estate of Boykin), 295 S.W.3d 632, 2008 Tenn. App. LEXIS 769 (Tenn. Ct. App. Dec. 30, 2008).

Although the state of Tennessee could not appeal its claim that the trial court erred by applying the amended version of a sentencing statute, appellate jurisdiction existed over the claim because, once defendant filed a notice of appeal, the court acquired jurisdiction of the entire case and any properly-preserved, cognizable claims. Because the determination of the appropriate version of the statute to be applied qualified as a question of law, it was permitted to be raised by either party, regardless of which party initiated the appeal. State v. Keese, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 193 (Tenn. Crim. App. Mar. 15, 2018), overruled in part, State v. Jones, 589 S.W.3d 747, 2019 Tenn. LEXIS 505 (Tenn. Nov. 13, 2019).

Although no right of direct appeal lied for the state of Tennessee, because a trial court's application of an amended sentencing statute to defendant's case and the resulting modification of defendant's sentence exceeded the court's authority, the appellate court elected to treat the state of Tennessee's improperly-filed appeal as of right as a petition for the common law writ of certiorari and reviewed the matter. State v. Tolle, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 203 (Tenn. Crim. App. Mar. 19, 2018), aff'd, 591 S.W.3d 539, 2019 Tenn. LEXIS 514 (Tenn. Nov. 27, 2019).

2. Construction with Other Rules.

An improperly filed T.R.A.P. 3 appeal may be treated as a T.R.A.P. 10 extraordinary appeal pursuant to T.R.A.P. 10(a). State v. Norris, 47 S.W.3d 457, 2000 Tenn. Crim. App. LEXIS 437 (Tenn. Crim. App. 2000).

Because the purpose of Tenn. R. Crim. P. 5.1(a) is to provide the defense with material that can be used to prepare for trial, a defendant should raise, and the trial court should attempt to resolve, this critical issue prior to trial. If the trial court denies defendant's motion to dismiss the indictment for failure to comply with Rule 5.1(a), defendant may request an interlocutory or extraordinary appeal and attempt to demonstrate that appellate review is appropriate under T.R.A.P. 9 and 10. State v. Graves, 126 S.W.3d 873, 2003 Tenn. LEXIS 487 (Tenn. 2003).

It is important for appellate courts to exercise restraint in granting extraordinary appeals; unless the trial court's alleged error qualifies for immediate review under the specific criteria indicated by the rule, the appellate court must respect the trial court's discretionary decision not to grant permission to appeal under the rule regarding interlocutory appeals and refrain from granting an extraordinary appeal, and those alleged errors not rising to the level required can be reviewed in the normal course of an appeal after a final judgment has been entered. Gilbert v. Wessels, 458 S.W.3d 895, 2014 Tenn. LEXIS 1031 (Tenn. Dec. 18, 2014).

3. Time for Application.

An application for an extraordinary appeal is appropriate where the ruling of the court below represents a fundamental illegality; where the ruling constitutes a failure to proceed according to the essential requirements of the law; where the ruling is tantamount to the denial to either party of a day in court; where the action of the trial judge was without legal authority; where the action of the trial judge constituted a plain and palpable abuse of discretion; or, where either party has lost a right or interest that may never be recaptured. State v. Willoughby, 594 S.W.2d 388, 1980 Tenn. LEXIS 405 (Tenn. 1980).

Action of the court of criminal appeals in amending T.R.A.P. 10 to require that an application be filed within ten days from the entry of the order appealed from was without authority and overruled. State v. Best, 614 S.W.2d 791, 1981 Tenn. LEXIS 437 (Tenn. 1981).

Applications pursuant to T.R.A.P. 10 may be denied if not pursued within a reasonable time, in the particular circumstances of the case, but no rigid time limitation on such applications is imposed. State v. Best, 614 S.W.2d 791, 1981 Tenn. LEXIS 437 (Tenn. 1981).

Most actions that give rise to applications pursuant to T.R.A.P. 10 are of such character that the application is filed and pursued immediately, lest the issue be rendered moot except for its possible viability on appeal from final judgment. State v. Best, 614 S.W.2d 791, 1981 Tenn. LEXIS 437 (Tenn. 1981).

4. Appeal from Diversion Decision.

An appeal by either side questioning diversion decisions, either granted or denied, must be brought under T.R.A.P. 9 and 10 and cannot come by right under T.R.A.P. 3. State v. Montgomery, 623 S.W.2d 116, 1981 Tenn. Crim. App. LEXIS 374 (Tenn. Crim. App. 1981), but see, State v. Harris, — S.W.3d —, 1999 Tenn. Crim. App. LEXIS 557 (Tenn. Crim. App. June 4, 1999), aff'd, 33 S.W.3d 767, 2000 Tenn. LEXIS 690 (Tenn. 2000); State v. McDuff, 691 S.W.2d 569, 1984 Tenn. Crim. App. LEXIS 2687 (Tenn. Crim. App. 1984); State v. Wilson, 713 S.W.2d 85, 1986 Tenn. Crim. App. LEXIS 2221 (Tenn. Crim. App. 1986).

Failure to appeal the grant or denial of diversion under the interlocutory appeals provisions set forth in T.R.A.P. 9 and 10 constitutes a waiver. State v. Mecord, 815 S.W.2d 218, 1991

Tenn. Crim. App. LEXIS 510 (Tenn. Crim. App. 1991).

The question of granting or denying pretrial diversion becomes moot after the defendant has been tried and convicted. State v. Mecord, 815 S.W.2d 218, 1991 Tenn. Crim. App. LEXIS 510 (Tenn. Crim. App. 1991).

When his petition to allow an interlocutory appeal was denied, defendant chose to go to trial and was found guilty. He, therefore, waived his right to pursue pretrial diversion. Rather than proceeding to trial, the defendant should have filed an application for an extraordinary appeal by permission under T.R.A.P. 10. In failing to do so, he waived the issue. State v. Mecord, 815 S.W.2d 218, 1991 Tenn. Crim. App. LEXIS 510 (Tenn. Crim. App. 1991).

When defendant who was indicted for criminally negligent homicide after leaving his infant daughter in a car on a hot day was denied pretrial diversion under T.C.A. § 40-15-105(a)(1), a trial court and the criminal appellate court erred in denying defendant's applications for interlocutory appeals pursuant to T.R.A.P. 9 or T.R.A.P. 10 because: (1) An assistant district attorney general disregarded the guidelines concerning the proper factors to consider in evaluating applications for pretrial diversion; (2) Pretrial diversion would avoid the necessity of a trial; (3) An interlocutory appeal would not have created piecemeal litigation; and (4) The court of criminal appeals should not have denied defendant's application from the denial of pretrial diversion simply on the basis that defendant could pursue a direct appeal upon conviction pursuant to Tenn. R. Crim. P. 38. State v. McKim, 215 S.W.3d 781, 2007 Tenn. LEXIS 27 (Tenn. 2007).

Tennessee court of criminal appeals should not deny a T.R.A.P. 9 or T.R.A.P. 10 application from a denial of pretrial diversion under T.C.A. § 40-15-105(a)(1) simply on the basis that defendant may pursue a direct appeal upon conviction pursuant to Tenn. R. Crim. P. 38, as nothing in the amended text of Tenn. R. Crim. P. 38 or in the text of the Advisory Commission Comments thereto indicates that the amendment to Tenn. R. Crim. P. 38 was adopted in order to limit or discourage interlocutory appeals from pretrial diversion decisions; as amended, Tenn. R. Crim. P. 38 simply gives an unsuccessful defendant another avenue to pursue after trial if, for whatever reason, he or she chooses to forego the interlocutory route. State v. McKim, 215 S.W.3d 781, 2007 Tenn. LEXIS 27 (Tenn. 2007).

Defendant waived her right to appeal the denial of her request for pretrial diversion under T.C.A. § 40-15-105 by failing to seek review of the trial court's decision pursuant to T.R.A.P. 9 or 10 prior to pleading guilty to some of the charges. An appeal pursuant to Tenn. R. Crim. P. 38(b) was required to be made under T.R.A.P. 3(b), which had no provision for appeal of the denial of pretrial diversion following a guilty plea. State v. Robinson, 328 S.W.3d 513, 2010 Tenn. Crim. App. LEXIS 268 (Tenn. Crim. App. Mar. 30, 2010).

5. Strict Compliance.

Failure to follow the requirements of T.R.A.P. 10(b) resulted in denial of appellant's application for extraordinary appeal. State v. Fiveash, 626 S.W.2d 477, 1981 Tenn. Crim. App. LEXIS 395 (Tenn. Crim. App. 1981).

Tennessee court's determination that most of state prisoner's postconviction claims were procedurally defaulted under T.R.A.P. 10(b) and that his completely new claims were barred by the one-year statute of limitations set forth in T.C.A. § 40-30-202 [now 40-30-102] was supported by independent and adequate state grounds, thereby precluding federal habeas corpus review, because those rules were consistently applied by Tennessee courts and were used to promote the timely presentation of claims. Hodges v. Bell, 548 F. Supp. 2d 485, 2008 U.S. Dist. LEXIS 25780 (M.D. Tenn. Mar. 27, 2008), aff'd, Hodges v. Colson, 711 F.3d 589, 2013 FED App. 75P, 2013 U.S. App. LEXIS 6050 (6th Cir. Mar. 26, 2013).

6. Nondispositive Search Questions.

Nondispositive search questions cannot be brought to the court of criminal appeals by an interlocutory appeal. State v. Wilkes, 684 S.W.2d 663, 1984 Tenn. Crim. App. LEXIS 2677 (Tenn. Crim. App. 1984).

7. Departure from Accepted and Usual Course of Proceedings.

The trial judge's order that the vote reinstate its prior plea bargain offer, after ordering a new trial based on ineffective assistance of counsel, was a total departure from the accepted and usual course of judicial proceedings under T.R.A.P. 10(a)(1). State v. Turner, 713 S.W.2d 327, 1986 Tenn. Crim. App. LEXIS 2572 (Tenn. Crim. App. 1986), cert. denied, Turner v. Tennessee, 479 U.S. 933, 107 S. Ct. 407, 93 L. Ed. 2d 360, 1986 U.S. LEXIS 4535 (1986).

8. Loss of Right That Could Never be Recaptured.

The action of the trial judge in granting defendant's pretrial motion to strike from the indictment the allegation of a prior driving under the influence conviction resulted in the state losing a right that could never be recaptured, and appeal is under T.R.A.P. 10 rather than T.R.A.P. 3. State v. Gallaher, 730 S.W.2d 622, 1987 Tenn. LEXIS 1007 (Tenn. 1987).

9. Waiver.

On two issues where appellant contended that trial court erred in giving a jury instruction on flight and that the evidence was insufficient to support the verdict of guilt for sale of a controlled substance and the appellant had failed to make appropriate references to the

record, cite authority in support of the issues and arguments advanced, or make appropriate argument, both issues were waived. State v. Hill, 875 S.W.2d 278, 1993 Tenn. Crim. App. LEXIS 672 (Tenn. Crim. App. 1993).

Where defendant failed to support his claim that he was misled at trial due to the variance between the indictment and the evidence presented at trial with any argument or citation to authorities, the claim was waived. State v. McCary, 119 S.W.3d 226, 2003 Tenn. Crim. App. LEXIS 17 (Tenn. Crim. App. 2003), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 674 (Tenn. July 7, 2003).

Although defendant weaved various issues throughout the argument section of defendant's appellate brief, these issues were waived for failure to raise them below and/or support them with argument or citation to the record. State v. Boykin, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 124 (Tenn. Crim. App. Feb. 21, 2019).

10. Judgment Granting New Trial.

The determination of whether to grant an interlocutory appeal pursuant to T.R.A.P. 9 and 10 is discretionary with the appellate court when the state desires an interlocutory appeal from a judgment granting a defendant a new trial. State v. Perry, 740 S.W.2d 723, 1987 Tenn. Crim. App. LEXIS 2308 (Tenn. Crim. App. 1987).

11. Denial of Transcript.

When the trial judge rules that the defendant is not entitled to a transcript of all or a portion of the proceedings designated by defense counsel, the defendant may seek relief in the appellate court pursuant to T.R.A.P. 10. State v. Draper, 800 S.W.2d 489, 1990 Tenn. Crim. App. LEXIS 469 (Tenn. Crim. App. 1990).

12. Refusal to Dissolve Prior Restraint.

If a person or entity has been permitted to intervene and the trial court refuses to dissolve a prior restraint, the intervenor may seek appellate review pursuant to T.R.A.P. 10. State v. Montgomery, 929 S.W.2d 409, 1996 Tenn. Crim. App. LEXIS 329 (Tenn. Crim. App. 1996), modified, State v. Carruthers, 35 S.W.3d 516, 2000 Tenn. LEXIS 683 (Tenn. 2000).

13. Appeal from Order Not Dismissive of Case.

Had the state wished to appeal the order of the trial court mandating the disclosure of the identity of the confidential informant, it should have filed an interlocutory appeal pursuant to either T.R.A.P. 9 or T.R.A.P. 10; these are the only procedures available for the state to seek review of an interlocutory trial court order which does not have the substantial effect of dismissing the charges. State v. Collins, 35 S.W.3d 582, 2000 Tenn. Crim. App. LEXIS 247 (Tenn. Crim. App. 2000).

Tennessee Rules of Appellate Procedure did not permit an interlocutory appeal of the trial court's ruling on the admissibility of evidence of defendant's prior acts of physical abuse against the victim in a murder trial under Tenn. R. Evid. 404(b); the criteria for appellate review was not met, and because the trial had yet to begin, the interlocutory appeal was largely advisory in nature. State v. Gilley, 173 S.W.3d 1, 2005 Tenn. LEXIS 789 (Tenn. 2005).

14. Permission Granted.

Because the order granting the extraordinary appeal did not specifically delineate the issues that would be addressed on appeal and because the plaintiffs had subsequently filed a brief addressing the issues, it was appropriate for the court to address the issues. Heatherly v. Merrimack Mut. Fire Ins. Co., 43 S.W.3d 911, 2000 Tenn. App. LEXIS 751 (Tenn. Ct. App. 2000).

15. Permission Denied.

Trial court had no jurisdiction over interlocutory ruling of board of professional responsibility hearing panel because no provision of Tenn. R. Sup. Ct. 9 authorized interlocutory appeals of matters pending before a hearing panel and neither T.R.A.P. 9, governing interlocutory appeals from trial court, nor T.R.A.P. 10, governing extraordinary appeals on original application in appellate court, applied to trial court proceedings. In re Caldwell, 256 S.W.3d 656, 2008 Tenn. LEXIS 414 (Tenn. June 19, 2008).

Defendant did not present compelling grounds for relief under this rule, as defendant did not allege that the trial court acted without authority. Defendant did not challenged the court's authority to place defendant on the sexual offender registry but, rather, that the court should not have placed the defendant on the registry based upon the facts and circumstances in the case, and defendant failed to show that court's decision to place defendant on the registry constituted a fundamental illegality or a plain and palpable abuse of discretion. State v. Holcomb, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 89 (Tenn. Crim. App. Mar. 12, 2021).

If co-defendant successfully completes his probationary period, no judgments of conviction would be entered, and if his probation was revoked and his convictions subsequently reinstated, he would be entitled to a Tenn. R. App. P. 3 appeal at that time; court declined to convert the appeal into a Tenn. R. App. P. 10 appeal by permission and ordered that his appeal be dismissed. State v. Sullivan, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 101 (Tenn. Crim. App. Mar. 22, 2021).

16. Permission Improvidently Granted.

There was no extraordinary departure from the accepted and usual course of judicial proceedings, as trial courts had discretionary authority to determine whether the contiguous state limitation for expert testimony purposes

was to be waived, plus discretionary evidentiary rulings, regardless of their merit, rarely constitute the types of extraordinary departures from the usual and accepted course of judicial proceedings that the rule contemplates; extraordinary review was not necessary for a complete determination of the action on appeal, and an extraordinary appeal was improvidently granted. Gilbert v. Wessels, 458 S.W.3d 895, 2014 Tenn. LEXIS 1031 (Tenn. Dec. 18, 2014).

17. Motion to Suppress.

The T.R.A.P. 10 requirements for a discretionary appeal are not typically met when a trial court overrules a defendant's motion to suppress evidence. State v. Norris, 47 S.W.3d 457, 2000 Tenn. Crim. App. LEXIS 437 (Tenn. Crim. App. 2000).

Suppression order that eliminates any reasonable probability of a successful prosecution provides a basis for interlocutory appeal under T.R.A.P. 9(a)(1), (3) or extraordinary appeal under T.R.A.P. 10(a). State v. Meeks, 262 S.W.3d 710, 2008 Tenn. LEXIS 575 (Tenn. Sept. 2, 2008).

Rule 11. Appeal by Permission from Appellate Court to Supreme Court. — (a) Application for Permission to Appeal; Grounds. — An appeal by permission may be taken from a final decision of the Court of Appeals or Court of Criminal Appeals to the Supreme Court only on application and in the discretion of the Supreme Court. In determining whether to grant permission to appeal, the following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons that will be considered: (1) the need to secure uniformity of decision, (2) the need to secure settlement of important questions of law, (3) the need to secure settlement of questions of public interest, and (4) the need for the exercise of the Supreme Court's supervisory authority.

(b) Time; Content. — The application for permission to appeal shall be filed with the clerk of the Supreme Court within 60 days after the entry of the judgment of the Court of Appeals or Court of Criminal Appeals if no timely petition for rehearing is filed, or, if a timely petition for rehearing is filed, within 60 days after the denial of the petition or entry of the judgment on rehearing. Except for an application seeking to appeal the Court of Criminal Appeals' disposition of an appeal pursuant to Rule 9 or Rule 10, the time period for filing an application for permission to appeal is not jurisdictional in a case arising from the Court of Criminal Appeals and may be waived by the Supreme Court in the interest of justice. The application shall contain a statement of: (1) the date on which the judgment was entered and whether a petition for rehearing was filed, and if so, the date of the denial of the petition or the date of entry of the judgment on rehearing; (2) the questions presented for review and, for each question presented, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues); (3) the facts relevant to the questions presented, with appropriate references to the record, but facts correctly stated in the opinion of the intermediate appellate court need not be restated in the application; and (4) the reasons, including appropriate authorities, supporting review by the Supreme Court. Except by order of the Supreme Court, the argument in an application for permission to appeal shall not exceed 50 pages. The brief of the appellant referred to in subdivision (f) of this rule may be served and filed with the application for permission to appeal. A copy of the opinion of the appellate court shall be appended to the application.

(c) Number of Copies; Service; Color of Covers. — The original and five copies of the application shall be filed. The application shall be served on all other parties in the manner provided in Rule 20 for the service of papers. If available, the color of the cover of the application shall be blue; the cover of an answer shall be red, except that the cover of an answer filed by an amicus curiae shall be green.

(d) Answer; Reply. — Within 15 days after filing of the application, any other party may file an answer in opposition, with copies in the number required for the application. An answer shall set forth the reasons why the application should not be granted and any other matters considered necessary for correction of the application. Additional facts stated in the answer shall contain appropriate references to the record. Except by order of the Supreme Court, the argument in an answer in opposition shall not exceed 25 pages. The answer shall be served on all other parties in the manner provided in Rule 20 for the filing of papers. No reply to the answer shall be filed.

(e) Action on Application. — The application shall be granted if two members of the Supreme Court are satisfied that the application should be granted. The appeal shall be docketed in accordance with Rule 5(c) upon entry of the order granting permission to appeal.

(f) Briefs. — Except as provided in the next paragraph, if permission to appeal is granted, the appellant shall serve and file his or her brief within 30 days after the date on which permission to appeal was granted. If the appellant files a brief with the application for permission to appeal as provided in subdivision (b) of this rule, he or she may also file a supplemental brief, which shall likewise be served and filed within 30 days after the date on which permission to appeal was granted. Except by order of the Supreme Court, the argument in a supplemental brief shall not exceed 25 pages. If available, the color of the cover of a supplemental brief shall be blue. An appellant who elects not to file a supplemental brief shall, within 30 days after the date on which permission to appeal was granted, file with the clerk of the appellate court and serve on the appellee notice of the appellant's election not to file a supplemental brief; if the appellant fails to file a notice within 30 days, the appellee's time runs from the 30th day after permission to appeal was granted.

If the Supreme Court grants an application for permission to appeal from the denial of a Tenn. R. App. P. 9 application, the appellant shall serve and file his or her brief within 30 days after the date on which the record on appeal is filed pursuant to Tenn. R. App. P. 9(e). The briefs filed in such cases shall otherwise be governed by this subdivision (f).

The appellee shall serve and file a brief within 30 days after filing of the brief or supplemental brief of the appellant or appellant's notice of election not to file a supplemental brief.

Reply briefs shall be served and filed within 14 days after filing of the preceding brief.

The briefs shall conform with the requirements of Rule 27.

(g) Appeal in Criminal Actions. — Permission to appeal under this rule may be sought by the state and defendant in criminal actions.

(h) [Reserved.] [As amended by orders entered January 31, 1984, effective August 15, 1984, January 29, 1987, effective August 1, 1987, January 24, 1992,

effective July 1, 1992, and December 20, 1993, effective July 1, 1994; by order filed February 1, 1995, effective July 1, 1995; by order entered January 26, 1999, effective July 1, 1999; by order entered December 14, 2009, effective July 1, 2010; by order filed January 13, 2012, effective July 1, 2012; by order filed December 18, 2012, effective July 1, 2013; by order entered December 16, 2013, as amended, March 14, 2014, effective July 1, 2014; by order filed January 2, 2015, effective July 1, 2015; and by order filed December 21, 2016, effective July 1, 2017.]

Advisory Commission Comments. This rule covers discretionary review by the Supreme Court of final decisions of the intermediate appellate courts. It does not speak to those cases in which an appeal lies directly from the trial court to the Supreme Court, since all direct appeals are either appeals as of right or appeals by permission covered by other rules. Similarly, this rule does not speak to plenary review of cases pending in the intermediate appellate courts, since discretionary review by the Supreme Court is limited to final decisions of the intermediate appellate courts. The essential purpose of the rule, therefore, is to identify those cases of such extraordinary importance as to justify the burdens of time, expense and effort associated with double appeals.

The situations described in subdivision (a) are not exclusive. Instead, subdivision (a) simply sets forth those reasons that typically will be considered sufficient to secure review by the Supreme Court. However, even cases falling within the articulated reasons are subject to review only in the discretion of the Supreme Court

The application for permission to appeal filed in the Supreme Court serves the purpose of demonstrating to that court that the case is an appropriate one for the exercise of the court's discretion in favor of permitting an appeal. One should be aware, however, that discretionary review by the Supreme Court is rarely granted solely for error-correction purposes. *See State v. West*, 844 S.W.2d 144, 146 (Tenn. 1992), (stating, "[w]ith the passage of the Appellate Courts Improvements Act of 1992, the jurisdiction of this Court has become almost completely discretionary. This means that as to non-capital criminal cases, we function primarily as a law development court, rather than as an error-correction court."). [An exception to the foregoing statement is that the Court does act as an error-correcting court in worker's compensation cases; worker's compensation cases, by statute, are appealed directly to the Supreme Court, and the provisions of Rule 11 therefore do not apply to such appeals. *See* Tenn. Code Ann. § 50-6-225(e).]

Subdivision (b). The 60-day period for filing an application for permission to appeal is jurisdictional and may not be extended. *See* Rules 2 and 21(b); and *State v. Sims*, 626 S.W.2d 3 (Tenn. 1981). By cross-reference to T.R.A.P. 21(a) the reader will observe that, should the sixtieth day fall on a weekend or holiday, the application for permission to appeal could be filed on the next business day.

Advisory Commission Comments [1984]. *Subdivision (f).* The Supreme Court is receptive to a full brief on all issues accompanying the application or permission to appeal, but an application without a brief will meet the requirement of the Rule.

Advisory Commission Comments [1999]. Concerning the scope of an answer under Rule 11(d), consult Rule 13(a), which permits the appellee to raise issues allegedly decided erroneously by the intermediate appellate court.

Advisory Commission Comments [2002]. Pursuant to Rule 39, Rules of the Tennessee Supreme Court, an appellant in a criminal case will be deemed to have exhausted all available state remedies respecting a claim of error following an adverse decision by the Court of Criminal Appeals without the necessity of filing a petition to rehear or an application for permission to appeal under Tenn. R. App. P. 11(a). The Tennessee Supreme Court adopted Rule 39 in response to *O'Sullivan v. Boerckel*, 526 U.S. 838 (1999), in which the U.S. Supreme Court held that in order to satisfy the exhaustion requirement of collateral federal review under 28 U.S.C. § 2254, a state prisoner must present his or her claims to the state supreme court for discretionary review absent a state court rule or decision to the contrary. This Advisory Commission Comment is to alert attorneys to Rule 39, Rules of the Tennessee Supreme Court, which works no change to Tenn. R. App. P. 11 itself.

Advisory Commission Comments [2010]. Rule 11 is amended to require that the application for permission to appeal include, for each question presented, a statement of the applicable standard of review. Although Tenn. R. App. P. 11(a) lists various criteria considered by the Court in deciding whether or not to grant an application for permission to appeal, the "applicable standard of review" means the standard of review which would be applied by the Court in deciding the case on the merits, if the Court were to grant the application for permission to appeal.

Advisory Commission Comments [2012]. Paragraph (b) is amended to provide that the time period for filing an application for permission to appeal pursuant to Rule 11 is not jurisdictional in cases arising from the Court of Criminal Appeals (subject to two exceptions discussed below) and may be waived by the Supreme Court in the interest of justice. The amendment is based upon a similar provision governing notices of appeal in criminal cases. See Tenn. R. App. P. 4(a).

The discretionary waiver authority granted to the Supreme Court in the amended rule is limited to cases arising from the Court of Criminal Appeals. Thus, the amendment does not apply to cases arising from the Court of Appeals. Additionally, the amended rule provides that the waiver authority granted to the Supreme Court does not extend to cases arising from the Court of Criminal Appeals' disposition of an interlocutory appeal filed pursuant to Rule 9 or an extraordinary appeal filed pursuant to Rule 10. Consequently, in cases arising from the Court of Appeals and in cases arising from interlocutory or extraordinary appeals filed in the Court of Criminal Appeals, the applicable time periods for filing an application for permission to appeal to the Supreme Court are jurisdictional and cannot be waived.

Advisory Commission Comments [2013]. Paragraphs (b) and (d) were amended to provide that the argument section of an application for permission to appeal cannot exceed 50 pages and that the argument section of an answer in opposition cannot exceed 25 pages, unless otherwise ordered by the Supreme Court. The third sentence of paragraph (f) was amended to replace "appellate court or a judge thereof" with "Supreme Court," thereby making that sentence consistent with the amended language in paragraphs (b) and (d).

Advisory Commission Comments [2015]. Subdivision (f) is amended to clarify the briefing schedule in those cases in which the intermediate appellate court denies an application for an interlocutory appeal under Tenn. R. App. P. 9 and in which the Supreme Court subsequently grants permission to appeal. The amendment provides that the appellant in such cases shall file his or her brief within thirty days of the filing of the record pursuant to Tenn. R. App. P. 9(e).

Advisory Commission Comments [2017]. Rule 11(b) and (d) are amended to require that the statement of facts in the application, and any additional facts stated in an answer to the application, contain appropriate references to the record. These requirements are intended to facilitate the appellate court's efficient review of the application for an appeal by permission from the appellate court to the Supreme Court.

In 2017, the Appellate Court Clerk's office will implement electronic filing and begin charging fees at the initiation of an appeal. To accommodate these initiatives, Rule 6 is amended to reflect that fees and taxes are to be paid at the initiation of a case, except under limited circumstances, rather than secured under the former procedure of filing a cost bond. Subdivision (h) of this rule, which addressed the posting of bonds under certain circumstances, is deleted as unnecessary in light of the amendment to Rule 6.

Compiler's Notes. The amendment of Rule 11, as promulgated and adopted by the Supreme Court in its order dated December 14, 2009, was ratified and approved by 2010 Senate Resolution 178 and 2010 House Resolution 238. The order promulgating the amendment of Rule 11 provided that it take effect July 1, 2010.

The amendment of Rule 11, as promulgated and adopted by the Supreme Court in its order dated January 13, 2012, was ratified and approved by 2012 Senate Resolution 80 and House Resolution 194. The order promulgating the amendment of Rule 11 provided that it take effect July 1, 2012.

T.R.A.P. 11 may affect Tenn. Code Ann. §§ 20-10-103 and 69-6-126.

The amendment of Rule 11, which amended subsections (b), (d) and (f) and added the 2013 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 18, 2012, was ratified and approved by House Resolution 35 and Senate Resolution 13. The order promulgating the amendment of Rule 11(b), (d) and (f) and the addition of the 2013 Advisory Commission Comments provided that it take effect July 1, 2013.

The amendment of Rule 11, which amended subdivision (c) and added the 2014 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 16, 2013, as amended, March 14, 2014, was ratified and approved by 2014 House Resolution 156 and Senate Resolution 75. The order promulgating the 2014 amendment of subdivision (c) and the addition of the 2014 Advisory Commission Comments provided that it take effect on July 1, 2014.

The reference in the third paragraph of the Advisory Commission Comments to § 50-6-225(e) applies to claims arising out of injuries occurring prior to July 1, 2014. For injuries occurring on or after July 1, 2014, see now § 50-6-225(a).

The amendment of rule 11, which amended subdivision (f) and added the 2015 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated January 2, 2015, was ratified and approved by 2015 House Resolution 3 and Senate Resolution 13. The order promulgating the amendment of this rule provided that it take effect on July 1, 2015.

The amendment of Rule 11, which amended subdivisions (b), (d) and (h) and added the

[2017] Advisory Comments, as promulgated and adopted by the Supreme Court in its order dated December 21, 2016, was ratified and approved by 2017 House Resolution 19 and Senate Resolution 16. The order promulgating the amendment of subdivisions (b), (d) and (h) and the addition of the [2017] Advisory Comments, provided that it take effect July 1, 2017.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), § 702.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 2-2-1, 2-11-1.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 26, 30, 51, 217; 5 Tenn. Juris., Certiorari, §§ 2, 18, 32.

Law Reviews. Seeking Justice on Appeal, 27 No. 4 Tenn. B.J. 28 (1991).

The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 1.

The Tennessee Pretrial Diversion Act: A Practitioner's Guide (Steven W. Feldman), 13 Mem. St. U.L. Rev. 285 (1983).

The Theoretical Foundations of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 45 Tenn. L. Rev. 161.

What's Happening with E-filing in Tennessee? (Judge William C. Koch Jr.), 37 No. 3 Tenn. B.J. 26 (2001).

NOTES TO DECISIONS

Analysis

1. Time for Application.
2. Extension of Time.
3. Delayed Appeal.
4. Insufficient Grounds for Appeal.
5. Waiver of Appeal.
6. Permission Granted.
7. Issues Raised In Appeal.

1. Time for Application.

The supreme court is without jurisdiction to determine an appeal after the expiration of the 60-day limitation for filing an application for permission to appeal prescribed by T.R.A.P. 11. State v. Sims, 626 S.W.2d 3, 1981 Tenn. LEXIS 512 (Tenn. 1981).

The burden is upon appellant and his counsel to calculate the proper number of days within which to file an application for permission to appeal, and to insure that the application is timely filed. State v. Sims, 626 S.W.2d 3, 1981 Tenn. LEXIS 512 (Tenn. 1981).

Tennessee Supreme Court's holding that a petitioner is not entitled to presumptive prejudice and must establish prejudice pursuant to Strickland when counsel fails to file a timely motion for a new trial does not apply to the untimely filing of an application for permission to appeal to the Supreme Court because the appellate court may not properly speculate about the Supreme Court's discretionary decision-making processes; case was remanded for entry of order granting petitioner delayed appeal to file an application for permission to appeal. Ruby-Ruiz v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 766 (Tenn. Crim. App. Nov. 30, 2020).

2. Extension of Time.

Neither the supreme court nor any member thereof has authority to grant an extension of the time in which an application for permission to appeal must be filed pursuant to T.R.A.P. 11 beyond 60 days from the entry of judgment of the court of appeals. State v. Sims, 626 S.W.2d 3, 1981 Tenn. LEXIS 512 (Tenn. 1981).

3. Delayed Appeal.

A defendant could not be deprived of second tier review through no fault of his own, and unilateral termination of a direct appeal following first-tier review entitled a prospective appellant to relief in the form of a delayed appeal. Pinkston v. State, 668 S.W.2d 676, 1984 Tenn. Crim. App. LEXIS 2881 (Tenn. Crim. App. 1984), superseded by statute as stated in, State v. Evans, 108 S.W.3d 231, 2003 Tenn. LEXIS 570 (Tenn. 2003), overruled, State v. Smith, 151 S.W.3d 533, 2004 Tenn. Crim. App. LEXIS 1170 (Tenn. Crim. App. 2004).

Tenn. Sup. Ct. R. 28, § (9)(D) has superseded the procedural framework of Pinkston v. State, 668 S.W.2d 676, 1984 Tenn. Crim. App. LEXIS 2881 (Tenn. Crim. App. 1984), superseded by statute as stated in, State v. Evans, 108 S.W.3d 231, 2003 Tenn. LEXIS 570 (Tenn. 2003), overruled, State v. Smith, 151 S.W.3d 533, 2004 Tenn. Crim. App. LEXIS 1170 (Tenn. Crim. App. 2004). State v. Evans, 108 S.W.3d 231, 2003 Tenn. LEXIS 570 (Tenn. 2003).

While the trial court erred by including language in its order purporting to vacate and reinstate the appellate court's judgment, this inappropriate language did not invalidate the portion of the judgment granting the defendant a delayed appeal under Tenn. Sup. Ct. R. 28, § (9)(D); thus, the defendant's application under T.R.A.P. 11 for permission to appeal was properly filed with the court. State v. Evans, 108 S.W.3d 231, 2003 Tenn. LEXIS 570 (Tenn. 2003).

Because appellate counsel for defendant failed to file a timely application for permission to appeal to the Supreme Court of Tennessee, so that defendant was denied the opportunity for substantive review by the Supreme Court, defendant was entitled to a delayed appeal for the purpose of seeking Supreme Court review of defendant's conviction proceedings. As a result defendant's ineffective assistance of counsel allegations were held in abeyance pending the resolution of the delayed appeal. Ruby-Ruiz v.

State, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 616 (Tenn. Crim. App. Oct. 2, 2019).

4. Insufficient Grounds for Appeal.

Convictions entered in trial courts prior to Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274, 1969 U.S. LEXIS 1434 (1969), superseded by statute as stated in, Aguirre-Mata v. State, 125 S.W.3d 473, 2003 Tex. Crim. App. LEXIS 87 (2003), superseded by statute as stated in, Wood v. Dretke, — U.S. —, — S. Ct. —, — L. Ed. 2d —, 2004 U.S. Dist. LEXIS 11087 (2004), which requires that guilty pleas be made knowingly and voluntarily, are not subject to post-conviction attack for *Boykin* violations. State v. Frazier, 784 S.W.2d 927, 1990 Tenn. LEXIS 54 (Tenn. 1990).

Violations of the holdings in State v. Mackey, 553 S.W.2d 337, 1977 Tenn. LEXIS 579 (Tenn. 1977), superseded by statute as stated in, State v. Chastain, 871 S.W.2d 661, 1994 Tenn. LEXIS 26 (Tenn. 1994), superseded by statute as stated in, State v. Wilson, 31 S.W.3d 189, 2000 Tenn. LEXIS 519 (Tenn. 2000), requiring trial judges to advise defendants of the consequences of guilty pleas, that exceed the requirements of Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274, 1969 U.S. LEXIS 1434 (1969), superseded by statute as stated in, Aguirre-Mata v. State, 125 S.W.3d 473, 2003 Tex. Crim. App. LEXIS 87 (2003), superseded by statute as stated in, Wood v. Dretke, — U.S. —, — S. Ct. —, — L. Ed. 2d —, 2004 U.S. Dist. LEXIS 11087 (2004), which requires guilty pleas to be made knowingly and voluntarily, are not constitutional violations and are not available except on direct appeal. State v. Frazier, 784 S.W.2d 927, 1990 Tenn. LEXIS 54 (Tenn. 1990).

5. Waiver of Appeal.

The issue of waiver for failure to raise violations of the holdings in Boykin v. Alabama, 395 U.S. 238, 89 S. Ct. 1709, 23 L. Ed. 2d 274, 1969 U.S. LEXIS 1434 (1969), superseded by statute as stated in, Aguirre-Mata v. State, 125 S.W.3d 473, 2003 Tex. Crim. App. LEXIS 87 (2003), superseded by statute as stated in, Wood v. Dretke, — U.S. —, — S. Ct. —, — L. Ed. 2d —, 2004 U.S. Dist. LEXIS 11087 (2004), which requires guilty pleas to be made knowingly and voluntarily, is not available to the state. State v. Frazier, 784 S.W.2d 927, 1990 Tenn. LEXIS 54 (Tenn. 1990).

Defendant waived the opportunity to take issue with the alleged delay in providing defendant a probable cause to arrest hearing by failing to raise it and preserve it in the proper manner. State v. Bishop, 431 S.W.3d 22, 2014 Tenn. LEXIS 189 (Tenn. Mar. 6, 2014), cert. denied, Bishop v. Tennessee, 190 L. Ed. 2d 92, 135 S. Ct. 120, — U.S. —, 2014 U.S. LEXIS 6666 (U.S. 2014).

Bank waived the issue of an out-of-state rating agency's consent to personal jurisdiction through compliance with Tennessee's business registration statute because the bank failed to properly raise and present the issue below and in its application to the appellate court. First Cmty. Bank, N.A. v. First Tenn. Bank, 489 S.W.3d 369, 2015 Tenn. LEXIS 1005 (Tenn. Dec. 14, 2015), cert. denied, Fitch Ratings, 136 S. Ct. 2511, 195 L. Ed. 2d 841, 2016 U.S. LEXIS 4094 (U.S. 2016).

Because a city did not raise an issue in its application for permision to appeal, the supreme court declined to address the issue and contention. Chuck's Package Store v. City of Morristown, 545 S.W.3d 398, 2018 Tenn. LEXIS 59 (Tenn. Feb. 6, 2018).

6. Permission Granted.

Pursuant to T.R.A.P. 11, a county employer was granted permission to appeal after the Tennessee Court of Appeals reversed the summary judgment that had been entered in its favor because the legal issue raised was one of first impression for the court. The court held that the county, which had not opted into the workers' compensation statutes, could not avoid liability under the Governmental Tort Liability Act, T.C.A. § 29-20-101 et seq., by adopting a civil service policy that purported to provide the exclusive remedy to county employees who suffered work-related injuries. Crawley v. Hamilton County, 193 S.W.3d 453, 2006 Tenn. LEXIS 432 (Tenn. 2006).

After allowing an insurance company's T.R.A.P. 11 application for permission to appeal, the Tennessee supreme court determined whether court of appeals correctly permitted negligent infliction of emotional distress claims to proceed. Eskin v. Bartee, 262 S.W.3d 727, 2008 Tenn. LEXIS 535 (Tenn. Aug. 14, 2008).

7. Issues Raised In Appeal.

Because a fireworks retailer failed to include an issue in its application for permission to appeal to the supreme court as required by T.R.A.P. 11(b), it failed to properly preserve the issue for review, even though the retailer briefly alludes to the issue in its supplemental brief. SNPCO, Inc. v. City of Jefferson City, 363 S.W.3d 467, 2012 Tenn. LEXIS 212 (Tenn. Mar. 26, 2012).

D. DIRECT APPELLATE REVIEW OF ADMINISTRATIVE PROCEEDINGS

Rule 12. Direct Review of Administrative Proceedings by the Court of Appeals.

I.

For those agencies which are subject to the Tennessee Uniform Administrative Procedures Act and from which appeals are taken directly to the Court of Appeals, the procedure upon review shall be as follows:

(a) Any person who is aggrieved by a final decision in a contested case may seek judicial review by filing a petition for review with the clerk of the Court of Appeals within 60 days after entry of the administrative order appealed from. The agency shall be named respondent.

(b) The petition shall specify the party seeking review, designate the order to be reviewed, and briefly describe the issues which the petitioner intends to raise. If two or more persons are entitled to petition for review of the same order and their interests are such as to make joinder practicable, they may file a joint petition and proceed as a single petitioner.

(c) The petition shall be accompanied by any applicable fees, taxes, or documentation required by Rule 6.

(d) The petitioner shall serve a copy of the petition on the agency, the Attorney General, and on all parties of record to the proceeding before the agency in the manner provided in Rule 5(a).

(e) Any person who was a party of record to the proceeding before the agency may become a party of record to the appeal by filing a written notice of appearance within 30 days after the filing of the petition for review. The notice of appearance shall describe briefly the position the intervenor intends to take and shall be served on the agency and on all parties in the proceeding before the agency.

(f) The record of proceedings before the agency, as described by Tenn. Code Ann. § 4-5-319, shall be filed by the agency with the clerk of the Court of Appeals, as provided in Tenn. Code Ann. § 4-5-322(d), within 45 days after filing of the petition for review.

(g) Insofar as applicable, briefs shall be filed in accordance with the time limits and stylistic requirements of Rules 27, 28, 29, and 30. The time for filing briefs begins to run from the day the record is filed. Any party disagreeing, in whole or in part, with the order of the agency shall file a brief within the time allowed for the petitioner. Other parties shall file briefs within 30 days from the last day allowed for filing petitioner's brief. The agency may file a responsive brief but is not required to do so.

(h) Insofar as applicable, proceedings before the Court of Appeals shall be conducted in accordance with these rules except that, where there is conflict between these rules and the provisions of the Tennessee Uniform Administrative Procedures Act, the provisions of the Act are controlling as provided in Tenn. Code Ann. § 4-5-322(f).

II.

For all other agencies from which appeals are taken directly to the Court of Appeals, the procedure upon review shall be as follows:

(a) Petition for Review. — Review is instituted by filing a petition for review with the clerk of the Court of Appeals within thirty days after the date of entry of the administrative order appealed from. The petition for review shall specify the party or parties seeking review and shall designate the respondent and the order to be reviewed. The agency and all other parties of record shall be named as respondents. The petition for review filed with the clerk of the Court of Appeals shall be accompanied by petitioner's or petitioner's counsel's address, a list of the names and addresses of the parties or counsel upon whom service is required, and any applicable fees, taxes, or documentation required by Rule 6. The clerk of the Court of Appeals shall docket the proceeding and serve notice of the docketing as provided in Rule 5(c).

(b) Service of the Petition. — The petitioner shall serve the petition for review on the agency and all other parties of record to the proceeding before the agency in the manner for serving and proving service of a notice of appeal in civil actions prescribed in Rule 5(a).

(c) Other Parties. — If any respondent other than the agency wishes to participate in the proceeding in the Court of Appeals, such respondent shall file a written appearance, and those who do shall be parties in the Court of Appeals.

(d) Composition of the Record. — The entire record before the administrative agency shall be the record on review unless the agency and petitioner stipulate to omit portions. A party unreasonably refusing to stipulate to limit the record may be taxed for the additional cost. Omitted portions of the record shall be transmitted to the Court of Appeals at any time on the request of the agency, the petitioner or any other party, which request shall be served on all parties, or on order of the Court of Appeals. If anything is misstated in the record, the parties may at any time correct the misstatement by stipulation, or the Court of Appeals may at any time order that the misstatement be corrected and, if necessary, that a supplemental record be prepared and filed.

(e) Agency to File Record; Time for Filing; Notice of Filing. — The agency shall file the record within 45 days after filing of the petition for review. Extensions of time for filing the record may be granted by the Court of Appeals or a judge thereof on motion made within the time originally prescribed, or within an extension previously granted, or on motion made within 30 days thereafter supported by a showing of reasonable excuse for failing to file the motion earlier. The clerk of the Court of Appeals shall give notice to all parties of the date on which the record is filed.

(f) Time for Filing Briefs. — The time for filing briefs begins to run from the day the record is filed.

(g) (Reserved).

(h) Application of Other Rules. — Insofar as appropriate, the provisions of these rules (except Rules 24 through 26) are applicable to proceedings under this rule. As used in any applicable rule, the term "appellant" includes a petitioner and the term "appellee" includes a respondent in proceedings to review agency orders. [As amended by order entered January 21, 1988, effective August 1, 1988; by order entered January 28, 1993, effective July 1,

1993; by order entered January 26, 1999, effective July 1, 1999; and by order filed December 21, 2016, effective July 1, 2017.]

Advisory Commission Comments. Initial review of most administrative proceedings takes place in the trial court. Some appeals, however, are taken directly from an administrative proceeding to the Court of Appeals. For example, appeals from the Tennessee Regulatory Authority go to the Middle Section of the Court of Appeals, Tenn. Code Ann. § 4-5-322(b)(1). Rule 12 simply sets forth the procedure to be followed in such circumstances. This rule does not itself create a right of review.

The procedure set forth in Rule 12 is substantially the same as the procedure established in other rules dealing with appeals of right from the trial court. At the same time, this rule has been formulated so as not to conflict with the provisions or the terminology of the Tennessee Uniform Administrative Procedures Act, Tenn. Code Ann. § 4-5-101 et seq.

Advisory Commission Comments [1993]. New Rule 12 I. conforms the rules of appellate procedure to the judicial review provisions of the Tennessee Uniform Administrative Procedures Act. Rule 12 II. is the existing rule applicable to agencies not subject to the Uniform Act.

Advisory Commission Comments [1999]. Appeals from Claims Commission decisions entered after May 7, 1997, are not governed by Rule 12.

Advisory Commission Comments [2017]. In 2017, the Appellate Court Clerk's office will implement electronic filing and begin charging fees at the initiation of an appeal. To accommodate these initiatives, Rule 6 is amended to reflect that fees and taxes are to be paid at the initiation of a case except under limited circumstances. Subdivision (c) of section I of Rule 12 and subdivision (a) of section II of Rule 12 are amended to reflect that any applicable fees and taxes are to be submitted with the petition, rather than the former procedure of filing a cost bond.

Compiler's Notes. The amendment of Rule 12, which amended subdivision (c) in Section I and subdivision (a) in Section II and added the [2017] Advisory Comments, as promulgated and adopted by the Supreme Court in its order dated December 21, 2016, was ratified and approved by 2017 House Resolution 19 and Senate Resolution 16. The order promulgating the amendment of subdivision (c) in Part I and subdivision (a) in Part II and the addition of the [2017] Advisory Comments, provided that it take effect July 1, 2017.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 2-2-1, 2-12-1, 2-12-3.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 52, 137.

Law Reviews. The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 1.

E. PRACTICE ON APPEAL

Rule 13. Scope of Review. — (a) Questions of Law that May Be Urged on Appeal. — Except as otherwise provided in Rule 3(e), any question of law may be brought up for review and relief by any party. Cross-appeals, separate appeals, and separate applications for permission to appeal are not required. Dismissal of the original appeal shall not preclude issues raised by another party from being considered by an appellate court.

(b) Consideration of Issues Not Presented for Review. — Review generally will extend only to those issues presented for review. The appellate court shall also consider whether the trial and appellate court have jurisdiction over the subject matter, whether or not presented for review, and may in its discretion consider other issues in order, among other reasons: (1) to prevent needless litigation, (2) to prevent injury to the interests of the public, and (3) to prevent prejudice to the judicial process.

(c) Facts that May Be Considered on Appeal. — The Supreme Court, Court of Appeals, and Court of Criminal Appeals may consider those facts established by the evidence in the trial court and set forth in the record and any additional facts that may be judicially noticed or are considered pursuant to Rule 14.

(d) Findings of Fact in Civil Actions. — Unless otherwise required by statute, review of findings of fact by the trial court in civil actions shall be de

novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. Findings of fact by a jury in civil actions shall be set aside only if there is no material evidence to support the verdict.

(e) Findings of Guilt in Criminal Actions. — Findings of guilt in criminal actions whether by the trial court or jury shall be set aside if the evidence is insufficient to support the findings by the trier of fact of guilt beyond a reasonable doubt.

(f) Default Judgments. — A defaulted defendant cannot raise on appeal the defense of failure to state a claim upon which relief can be granted or the defense of failure to join a party under Rule 19 of the Tennessee Rules of Civil Procedure. [As amended effective July 1, 1980; by order entered January 23, 2001, effective July 1, 2001; and by order filed January 31, 2002, effective July 1, 2002.]

Advisory Commission Comments. *Subdivision (a).* This subdivision treats that aspect of scope of review that involves the questions of law that may be urged on appeal. There are three features of this subdivision that are particularly noteworthy.

First, this subdivision provides only that any question of law may be brought up for review and relief [except as otherwise provided in Rule 3(e)], not that the appellate court must decide every question or that it must grant the requested relief. The propriety of granting relief is governed by Rule 36, which provides that relief need not be granted to a party who was responsible for an error or failed to take whatever action was reasonably available to prevent or nullify the harmful effect of error.

Second, this subdivision rejects use of the notice of appeal as a review limiting device. In federal practice the notice of appeal has limited review in two principal ways. Some courts have limited the questions an appellant may urge on review to those affecting the portion of the judgment specified in the notice of appeal. However, since the principal utility of the notice of appeal is simply to indicate a party's intention to take an appeal, this limitation seems undesirable. The federal courts have also limited the issues an appellee may raise on appeal in the absence of the appellee's own notice of appeal. Here again, since neither the issues presented for review nor the arguments in support of those issues are set forth in the notice of appeal, there seems to be no good reason for so limiting the questions an appellee may urge on review. The result of eliminating any requirement that an appellee file the appellee's own notice of appeal is that once any party files a notice of appeal the appellate court may consider the case as a whole.

Finally, this subdivision applies not only to appeals from final judgments of the trial court, but also to interlocutory appeals and final decisions of the intermediate appellate courts that are reviewed by the Supreme Court. A separate application for permission to appeal is not necessary to bring up a question of law upon an interlocutory appeal or upon Supreme Court review of the final decision of an intermediate appellate court. As previously noted, the fact that a question of law may be brought up for review does not mean the appellate court must decide the question or grant the requested relief. Ordinarily, therefore, the Supreme Court will refuse to consider an issue not presented to the intermediate appellate court because, as stated in Rule 36, the party raising the issue has failed to take action reasonably available to nullify the error presented by the issue. However, if the issue were presented but not dealt with by the intermediate appellate court, the Supreme Court may decide the issue and grant appropriate relief. Thus the scope of review is as plenary in cases in which the Supreme Court reviews the final decision of an intermediate appellate court as it is when the Supreme Court reviews directly the final decision of a trial court. Full access to the issues and record is also available upon an interlocutory appeal.

Subdivision (b). This subdivision deals with the very difficult question of when an appellate court should consider an issue not raised by the parties. Generally speaking, control over the issues should reside in the parties, not in the court. Accordingly, this subdivision provides that review will typically extend only to the issues set forth in the briefs. Only the absence of subject matter jurisdiction, whether at the trial or appellate level, must be considered by the appellate court regardless of whether it is presented for review. Cases appealed to the wrong appellate court must be transferred pursuant to Rule 17 of these rules. In all the other situations described in this subdivision, the appellate court has discretion to decide whether it will consider a matter not raised by the parties. It is intended that this discretion be sparingly exercised.

Subdivision (c). This subdivision specifies the facts that may be considered on appeal. Only

rarely is it proper for an appellate court to consider facts in addition to those established by the evidence in the trial court. In actions tried before a jury, appellate consideration of facts beyond those established at the trial and relevant to the merits would deprive the parties of their right to trial by jury. In criminal actions consideration of additional facts raises serious problems under the confrontation clause. These factors in conjunction with the power of the trial court in appropriate circumstances to reopen a judgment to hear new evidence combine to foreclose appellate consideration of additional facts except as provided in Rule 14 of these rules.

Subdivision (d). This subdivision deals with appellate review of findings of fact in civil actions. Concurrent findings, see Tenn. Code Ann. § 27-1-113, findings in worker's compensation cases, see Tenn. Code Ann. § 50-6-225, and findings in administrative adjudication, see Tenn. Code Ann. § 4-5-323, are exempted from this subdivision.

Subdivision (e). This subdivision, dealing with appellate review of findings of guilt in criminal actions, is in accord with the latest decisions of the United States Supreme Court concerning the double jeopardy clause. *See Burks v. United States*, 46 U.S.L.W. 4632 (U.S. June 14, 1978); *Greene v. Massey*, 46 U.S.L.W. 4636 (U.S. June 14, 1978). In *Burks* the Court held that an accused may not be subjected to a second trial when his or her conviction is reversed by an appellate court solely for lack of sufficient evidence to sustain the jury's verdict. This holding was applied to a state court conviction in *Greene*. Although the Court did not expressly address the standard governing appellate reversal on the ground of insufficient evidence, the standard set forth in this subdivision is consistent with if not compelled by the holdings in *Burks* and *Greene*.

Advisory Commission Comments [1980]. *Subdivision (a).* This amendment adds the introductory proviso "[e]xcept as otherwise provided in Rule 3(e)" to the phrase "any question of law may be brought up for review and relief by any party." It does not change the substance of either Rule 3 or Rule 13, and is simply designed to remind the appellant of the need to move for a new trial in jury actions.

Advisory Commission Comments [2001]. New Rule 13(f) overrules decisions such as *Nickas v. Capadalis*, 954 S.W.2d 735 (Tenn. App. 1997). That opinion relied on the pre Rules precedent of *Edington v. Michigan Mut. Life Ins. Co.*, 134 Tenn. 188, 183 S.W. 728 (1915). When the Rules of Civil Procedure took effect on January 1, 1971, however, *Edington* was no longer controlling because the holding conflicted with Rule 12.08 of the Civil Rules concerning waiver of defenses not raised by motion to dismiss or answer. *See* Tenn. Code Ann. § 16-3-406: "After such rules have become effective, all laws in conflict therewith shall be of no further force or effect."

Advisory Commission Comments [2002]. As pointed out in amended Rule 15(a), a party wishing to preserve appellate issues after dismissal of the original appeal should so indicate in response to the motion to dismiss.

Advisory Commission Comments [2009]. See amended Rule 36(b), Tenn. R. App. P., on the plain error doctrine.

Compiler's Notes. The amendment of the Advisory Commission Comments to Rule 13, which added the 2009 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated January 8, 2009, was ratified and approved by 2009 House Resolution 19 and Senate Resolution 15. The order promulgating the amendment of the Advisory Commission Comments provided that it take effect July 1, 2009.

Cross-References. Additur, remittitur decisions, review on appeal, T.C.A. §§ 20-10-101, 20-10-102.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 214, 662, 682.

Tennessee Forms (Robinson, Ramsey and Harwell), No. 2-3-2.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 20, 25, 27-30, 44-51, 67, 86-138, 209-215, 217, 220, 225-233, 236, 238; 5 Tenn. Juris., Certiorari, § 2; 9 Tenn. Juris., Damages, § 50; 9 Tenn. Juris., Dismissal, Discontinuance and Nonsuit, § 15; 10 Tenn. Juris., Elections, § 23; 11 Tenn. Juris., Evidence, §§ 52, 213, 222; 12 Tenn. Juris., Exceptions, Bill of, §§ 4, 13; 13 Tenn. Juris., Forcible Entry and Detainer, § 17; 16 Tenn. Juris., Intoxicating Liquors, §§ 7, 19; 18 Tenn. Juris., Mandamus, § 29; 20 Tenn. Juris., Pleading, § 10; 21 Tenn. Juris., Public Service Commissions, § 3; 21 Tenn. Juris., Reference and Commissioners, § 18; 22 Tenn. Juris., Robbery, § 5; 24 Tenn. Juris., Verdict, § 36; 25 Tenn. Juris., Weapons, § 7.

Law Reviews. Attorneys' Fees — Appellate Review of Trial Courts' Determination of Reasonable Attorneys' Fees — Federal Lodestar Method Rejected, 17 Mem. St. U.L. Rev. 163 (1986).

Best Interest on the Move: Standards for Custodial Removal of Children from Tennessee (A. Darby Dickerson, W. David Stalnaker), 18 Mem. St. U.L. Rev. 399 (1988).

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Tenn. L. Rev. 557 (2001).

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1. Practice on Appeal Generally.

Although appellee did not formally perfect an appeal, it could seek affirmative relief involving mixed questions of law and fact in its brief. Eller Bros., Inc. v. Home Federal Sav. & Loan Asso., 623 S.W.2d 624, 1981 Tenn. App. LEXIS 551 (Tenn. Ct. App. 1981), overruled, Guiliano v. Cleo, Inc., 995 S.W.2d 88, 1999 Tenn. LEXIS 339 (Tenn. 1999).

The supreme court is not obligated under T.R.A.P. 13(b) to respond in the opinion to the issues defendant elected to brief. State v. Warner, 649 S.W.2d 580, 1983 Tenn. LEXIS 641 (Tenn. 1983).

Where the trial court made no findings of fact, there was nothing in the record upon which the presumption of correctness contained in T.R.A.P. 13(d) could attach. Kelly v. Kelly, 679 S.W.2d 458, 1984 Tenn. App. LEXIS 3109 (Tenn. Ct. App. 1984).

Although T.R.A.P. 13(c) provides that the appellate court "may consider those facts established by the evidence in the trial court and set forth in the record," where the record is abridged pursuant to the rules of the court of appeals, and the record does not contain much of the evidence and exhibits to which the party refers in his brief, in the absence of this portion of the record, the appellate court must "conclusively presume" that the findings of the trial court are supported by evidence heard in the trial court. Threadgill v. Threadgill, 740 S.W.2d 419, 1987 Tenn. App. LEXIS 2804 (Tenn. Ct. App. 1987).

In determining the sufficiency of the evidence, an appellate court will not reweigh or reevaluate the evidence; nor may it substitute inferences for those drawn by the trier of fact from circumstantial evidence. To the contrary, the court is required to afford the state the strongest legitimate view of the evidence contained in the record as well as all reasonable and legitimate inferences which may be drawn from the evidence. State v. Thomas, 755 S.W.2d 838, 1988 Tenn. Crim. App. LEXIS 297 (Tenn. Crim. App. 1988).

In reviewing trial court's decision, court of appeals has the responsibility to apply the controlling law, whether or not cited or relied upon by either party. McClain v. Kimbrough Constr. Co., 806 S.W.2d 194, 1990 Tenn. App. LEXIS 886 (Tenn. Ct. App. 1990); In re Ellis, 822 S.W.2d 602, 1991 Tenn. App. LEXIS 490 (Tenn. Ct. App. 1991), rehearing denied, In re Conservatorship for Ellis, — S.W.2d —, 1991 Tenn. App. LEXIS 517 (Tenn. Ct. App. June 28, 1991).

Where chancellor adopted verbatim proposed findings submitted by the defendant as the court's opinion, and stated that such findings best represented the opinion of the court without stating which factual findings actually represented the court's opinion, chancellor did not commit reversible error, nor was there justification for disregarding the customary presumption of correctness in favor of de novo review. Airline Constr., Inc. v. Barr, 807 S.W.2d 247, 1990 Tenn. App. LEXIS 847 (Tenn. Ct. App. 1990).

Court of appeals on appeal is required to take the strongest legitimate view of the evidence favoring the prevailing party, discard all contrary evidence, allow all reasonable inferences to uphold the jury's verdict and set aside the jury verdict only when there is no material to support it. Witter v. Nesbit, 878 S.W.2d 116, 1993 Tenn. App. LEXIS 767 (Tenn. Ct. App. 1993), cert. denied, 513 U.S. 873, 115 S. Ct. 199, 130 L. Ed. 2d 130, 1994 U.S. LEXIS 6351 (1994).

On appeal, the state is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. State v. Raspberry, 875

S.W.2d 678, 1993 Tenn. Crim. App. LEXIS 670 (Tenn. Crim. App. 1993).

Where defendant did not include a speedy trial issue in his post-conviction petition, court of criminal appeals was unable to address it. Taylor v. State, 875 S.W.2d 684, 1993 Tenn. Crim. App. LEXIS 810 (Tenn. Crim. App. 1993).

In a conservatorship proceeding where the brother-in-law sought to be appointed conservator over the elderly widow, the brother-in-law and the brother-in-law's wife had fair notice in the trial court that the validity of the purported gifts was at issue and introduced evidence designed to support their claim that the gifts were valid and they were the ones who took issue with the trial court's disposition of those gifts on appeal; thus, the appellate court could address the issues regarding the trial court's decision to set those gifts aside. In re Conservatorship Groves, 109 S.W.3d 317, 2003 Tenn. App. LEXIS 112 (Tenn. Ct. App. 2003).

Determination of the value of a marital asset is a question of fact, and a trial court's decision with regard to the value of a marital asset will be given great weight on appeal; the trial court properly relied on the wife's expert and on other evidence, such as financial statements prepared by the husband, in finding the value of the husband's businesses, and the division of marital property was affirmed. Powell v. Powell, 124 S.W.3d 100, 2003 Tenn. App. LEXIS 281 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 1075 (Tenn. 2003).

Where a shareholders' agreement required an attorney to share fifty percent of the contingency fees the attorney earned on files the attorney took from the firm if the attorney maintained a practice in the firm's county or surrounding counties after withdrawing from the firm, the provision was unenforceable and the trial court's decision was reversed because the economic disincentives in the resignation provision constituted an impermissible restraint on the practice of law. Arena v. Schulman, LeRoy & Bennett, P.C., 233 S.W.3d 809, 2006 Tenn. App. LEXIS 696 (Tenn. Ct. App. Oct. 27, 2006), rehearing denied, Arena v. Schulman, LeRoy & Bennett, — S.W.3d —, 2006 Tenn. App. LEXIS 773 (Tenn. Ct. App. Nov. 17, 2006).

2. —Criminal Cases.

Neither the United States Constitution nor the Constitution of the state of Tennessee, according a defendant the right of self-representation at conviction trial proceedings, confer a similar privilege at appellate proceedings, including post-conviction review. State v. Reeves, 610 S.W.2d 730, 1980 Tenn. Crim. App. LEXIS 337 (Tenn. Crim. App. 1980).

On appeal of a conviction in the trial court, the state is entitled to the strongest legitimate view of the trial evidence and all reasonable or legitimate inferences which may be drawn therefrom. State v. Roe, 612 S.W.2d 192, 1980 Tenn. Crim. App. LEXIS 342 (Tenn. Crim. App. 1980); State v. Rhoden, 739 S.W.2d 6, 1987 Tenn. Crim. App. LEXIS 2562 (Tenn. Crim. App. 1987); State v. Payton, 782 S.W.2d 490, 1989 Tenn. Crim. App. LEXIS 627 (Tenn. Crim. App. 1989); State v. Oody, 823 S.W.2d 554, 1991 Tenn. Crim. App. LEXIS 405 (Tenn. Crim. App. 1991); State v. Kinnaird, 823 S.W.2d 571, 1991 Tenn. Crim. App. LEXIS 589 (Tenn. Crim. App. 1991); State v. Gregory, 862 S.W.2d 574, 1993 Tenn. Crim. App. LEXIS 295 (Tenn. Crim. App. 1993).

Once a defendant has been found guilty at trial, upon judicial review, all of the evidence is to be considered in the light most favorable to the prosecution. State v. Smith, 626 S.W.2d 283, 1981 Tenn. Crim. App. LEXIS 387 (Tenn. Crim. App. 1981); State v. Kinnaird, 823 S.W.2d 571, 1991 Tenn. Crim. App. LEXIS 589 (Tenn. Crim. App. 1991).

This rule requires that findings of guilt in criminal actions shall be set aside only if the evidence is insufficient to support the findings of guilt by the trier of fact beyond a reasonable doubt. State v. Smith, 626 S.W.2d 283, 1981 Tenn. Crim. App. LEXIS 387 (Tenn. Crim. App. 1981).

Verdicts as between two or more defendants tried together in a criminal case need not demonstrate rational consistency. State v. Hamrick, 688 S.W.2d 477, 1985 Tenn. Crim. App. LEXIS 3001 (Tenn. Crim. App. 1985).

The thirteenth juror rule should not be reinstated as a part of Tennessee criminal procedure. State v. Johnson, 692 S.W.2d 412, 1985 Tenn. LEXIS 602 (Tenn. 1985), superseded by statute as stated in, State v. Loftin, — S.W.2d —, 1991 Tenn. Crim. App. LEXIS 594 (Tenn. Crim. App. July 30, 1991), superseded by statute as stated in, State v. Harris, — S.W.2d —, 1994 Tenn. Crim. App. LEXIS 225 (Tenn. Crim. App. Apr. 13, 1994), superseded by statute as stated in, State v. Dankworth, 919 S.W.2d 52, 1995 Tenn. Crim. App. LEXIS 632 (Tenn. Crim. App. 1995), superseded by statute as stated in, Ray v. Holland, — F.3d —, 2000 U.S. App. LEXIS 22725 (6th Cir. Tenn. Sept. 5, 2000), but see State v. Dankworth, 919 S.W.2d 52, 1995 Tenn. Crim. App. LEXIS 632 (Tenn. Crim. App. 1995), Ray v. Holland, — F.3d —, 2000 U.S. App. LEXIS 22725 (6th Cir. Tenn. Sept. 5, 2000).

Upon motion for new trial based on newly discovered evidence, defendant is entitled to a new trial as a matter of right when he establishes: (1) Reasonable diligence in seeking the newly discovered evidence; (2) Materiality of the evidence; and (3) The evidence will likely change the result of the trial. State v. Burns, 777 S.W.2d 355, 1989 Tenn. Crim. App. LEXIS 287 (Tenn. Crim. App. 1989).

Pursuant to T.R.A.P. 13(e), the evidence presented by the state was not sufficient for the

jury to have rationally concluded that the defendant was sane when he committed the offenses in question. State v. Dodson, 780 S.W.2d 778, 1989 Tenn. Crim. App. LEXIS 630 (Tenn. Crim. App. 1989).

The 13th juror rule, whereby a trial judge could set aside a jury verdict upon grounds of preponderance alone and direct a retrial of the action, without entering judgment of acquittal, has not been reinstated in State v. Adkins, 786 S.W.2d 642, 1990 Tenn. LEXIS 119 (Tenn. 1990), superseded by statute as stated in, State v. Loftin, — S.W.2d —, 1991 Tenn. Crim. App. LEXIS 594 (Tenn. Crim. App. July 30, 1991), superseded by statute as stated in, State v. Harris, — S.W.2d —, 1994 Tenn. Crim. App. LEXIS 225 (Tenn. Crim. App. Apr. 13, 1994), superseded by statute as stated in, State v. Dankworth, 919 S.W.2d 52, 1995 Tenn. Crim. App. LEXIS 632 (Tenn. Crim. App. 1995), superseded by statute as stated in, Ray v. Holland, — F.3d —, 2000 U.S. App. LEXIS 22725 (6th Cir. Tenn. Sept. 5, 2000), but see State v. Dankworth, 919 S.W.2d 52, 1995 Tenn. Crim. App. LEXIS 632 (Tenn. Crim. App. 1995), Ray v. Holland, — F.3d —, 2000 U.S. App. LEXIS 22725 (6th Cir. Tenn. Sept. 5, 2000).

State did not waive its right to a review of the legality of sentencing by failing to file a separate appeal. State v. Russell, 800 S.W.2d 169, 1990 Tenn. LEXIS 429 (Tenn. 1990).

Court of criminal appeals views the evidence in the light most favorable to the state to determine whether any reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt, setting aside a conviction only if the evidence is insufficient to support such a finding. State v. Jones, 802 S.W.2d 221, 1990 Tenn. Crim. App. LEXIS 646 (Tenn. Crim. App. 1990); State v. Banes, 874 S.W.2d 73, 1993 Tenn. Crim. App. LEXIS 718 (Tenn. Crim. App. 1993), but see, State v. Upshaw, — S.W.3d —, 2001 Tenn. Crim. App. LEXIS 22 (Tenn. Crim. App. Jan. 11, 2001).

T.R.A.P. 13(d) applies only to findings of fact by the trial court. HMF Trust v. Bankers Trust Co., 827 S.W.2d 296, 1991 Tenn. App. LEXIS 568 (Tenn. Ct. App. 1991).

The credibility of the witnesses, the weight to be given their testimony, and the reconciliation of conflicts in the testimony, are matters entrusted exclusively to the jury as the triers of fact. In a jury trial, a guilty verdict, approved by the trial judge, accredits the testimony of the state's witnesses and resolves all conflicts in testimony in favor of the theory of the state. State v. Oody, 823 S.W.2d 554, 1991 Tenn. Crim. App. LEXIS 405 (Tenn. Crim. App. 1991).

When an accused challenges the sufficiency of the convicting evidence, the reviewing court must review the record to determine if the evidence adduced at trial is sufficient to support the findings of guilt by the trier of fact beyond a reasonable doubt. State v. Baker, 842 S.W.2d 261, 1992 Tenn. Crim. App. LEXIS 641 (Tenn. Crim. App. 1992).

Where sufficiency of the evidence is challenged, the relevant question of an appellate court is whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime or crimes beyond a reasonable doubt. State v. Little, 854 S.W.2d 643, 1992 Tenn. Crim. App. LEXIS 404 (Tenn. Crim. App. 1992); State v. Corder, 854 S.W.2d 653, 1992 Tenn. Crim. App. LEXIS 918 (Tenn. Crim. App. 1992).

The appellate court views the evidence to determine whether any reasonable trier of fact could have found the essential elements of the crime beyond a reasonable doubt, and set aside the conviction only if the evidence is not sufficient to support the trier's finding. State v. Holland, 860 S.W.2d 53, 1993 Tenn. Crim. App. LEXIS 288 (Tenn. Crim. App. 1993).

New trial may be granted on appeal in circumstances in which the trial court absolved itself of its responsibility to consider the evidence as a thirteenth juror. State v. Burlison, 868 S.W.2d 713, 1993 Tenn. Crim. App. LEXIS 282 (Tenn. Crim. App. 1993).

On appeal, where record reflected that trial court considered evidence in its role as thirteenth juror and denied request for new trial, and where defendant's sole contention was that weight of evidence was contrary to verdict of first degree murder, appellate court could not overturn decision of trial court. State v. Burlison, 868 S.W.2d 713, 1993 Tenn. Crim. App. LEXIS 282 (Tenn. Crim. App. 1993).

T.R.A.P. 13 is applicable to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of direct and circumstantial evidence. State v. Hill, 885 S.W.2d 357, 1994 Tenn. Crim. App. LEXIS 73 (Tenn. Crim. App. 1994).

State, as appellee, may raise a sentencing issue even though defendant was the only party to file a notice of appeal; however, the right to raise such issue without filing a notice of appeal does not end the state's obligation to delineate the issue as a separate issue for review, to submit supporting argument, and to identify the appropriate relief. State v. Hayes, 894 S.W.2d 298, 1994 Tenn. Crim. App. LEXIS 643 (Tenn. Crim. App. 1994).

The appellate court must consider the evidence in the light most favorable to the prosecution in determining whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. State v. Wilson, 924 S.W.2d 648, 1996 Tenn. LEXIS 361 (Tenn. 1996).

The standard espoused in T.R.A.P. 13(d) may be applicable to a trial court's findings of fact in a suppression hearing in a criminal case, especially where the jury has heard no testimony.

State v. Spradlin, 12 S.W.3d 432, 2000 Tenn. LEXIS 54 (Tenn. 2000).

T.R.A.P. 13(e) is applicable to findings of guilt based upon direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. State v. Land, 34 S.W.3d 516, 2000 Tenn. Crim. App. LEXIS 369 (Tenn. Crim. App. 2000).

Given that the appellate court reversed a trial court's decision on procedural grounds, the appellate court did not address the substantive issue presented by defendant's motion; on appeal, the court reversed the appellate court's decision, but instead of remanding the matter to the appellate court, the court exercised its discretion in the interest of judicial economy and pursuant to T.R.A.P. 13(b) to address the issue. State v. Goodman, 90 S.W.3d 557, 2002 Tenn. LEXIS 547 (Tenn. 2002).

Defendant's appeal from the trial court restitution order on his reckless endangerment conviction was dismissed for lack of jurisdiction as the restitution order was incomplete and interlocutory in nature where the trial court intended to further adjudicate the particulars of payment at a future date. State v. Comer, 278 S.W.3d 758, 2008 Tenn. Crim. App. LEXIS 296 (Tenn. Crim. App. Apr. 21, 2008).

Although the state of Tennessee could not appeal its claim that the trial court erred by applying the amended version of a sentencing statute, appellate jurisdiction existed over the claim because, once defendant filed a notice of appeal, the court acquired jurisdiction of the entire case and any properly-preserved, cognizable claims. Because the determination of the appropriate version of the statute to be applied qualified as a question of law, it was permitted to be raised by either party, regardless of which party initiated the appeal. State v. Keese, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 193 (Tenn. Crim. App. Mar. 15, 2018), overruled in part, State v. Jones, 589 S.W.3d 747, 2019 Tenn. LEXIS 505 (Tenn. Nov. 13, 2019).

3. —Civil Cases.

When reviewing findings of fact by a trial court sitting without a jury, the Court of Appeals proceeds de novo upon the record accompanied by a presumption of correctness unless the preponderance of the evidence is otherwise. Carrington v. W. A. Soefker & Son, Inc., 624 S.W.2d 894, 1981 Tenn. App. LEXIS 554 (Tenn. Ct. App. 1981); Kelly v. Kelly, 679 S.W.2d 458, 1984 Tenn. App. LEXIS 3109 (Tenn. Ct. App. 1984); Foster v. Bue, 749 S.W.2d 736, 1988 Tenn. LEXIS 101 (Tenn. 1988); Metropolitan Gov't v. McKinney, 852 S.W.2d 233, 1992 Tenn. App. LEXIS 780 (Tenn. Ct. App. 1992); Allstate Ins. Co. v. Wilson, 856 S.W.2d 706, 1992 Tenn. App. LEXIS 1012 (Tenn. Ct. App. 1992); McCarty v. McCarty, 863 S.W.2d 716, 1992 Tenn. App. LEXIS 816 (Tenn. Ct. App. 1992).

Presumption of T.R.A.P. 13(d) applies in child custody cases. Scarbrough v. Scarbrough, 752 S.W.2d 94, 1988 Tenn. App. LEXIS 75 (Tenn. Ct. App. 1988).

The review of findings of fact in child custody cases is de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise. Nichols v. Nichols, 792 S.W.2d 713, 1990 Tenn. LEXIS 254 (Tenn. 1990).

When one party to a suit perfects its appeal as provided in T.R.A.P. 3, then it is not necessary for the other party to file a notice of appeal, and such party is permitted to state his issues in his reply brief. State v. Russell, 800 S.W.2d 169, 1990 Tenn. LEXIS 429 (Tenn. 1990).

Reviewing negligence cases tried before a judge without a jury requires a two-step analysis. T.R.A.P. 13(d) establishes the presumption that the trial court's findings of fact are correct unless the evidence preponderates against them. However, the same presumption does not exist with regard to the trial court's legal determinations or when the trial court's conclusions are based on uncontroverted facts. Kelley v. Johnson, 796 S.W.2d 155, 1990 Tenn. App. LEXIS 406 (Tenn. Ct. App. 1990).

T.R.A.P. 13(d) applies only to findings of fact by the trial court. HMF Trust v. Bankers Trust Co., 827 S.W.2d 296, 1991 Tenn. App. LEXIS 568 (Tenn. Ct. App. 1991).

If after review the trial court has, pursuant to Tenn. R. Civ. P. 54.02 improperly determined that no just reason for delay exists, then the appeal must be dismissed. Huntington Nat'l Bank v. Hooker, 840 S.W.2d 916, 1991 Tenn. App. LEXIS 177 (Tenn. Ct. App. 1991).

The presumption of correctness under T.R.A.P. 13(d) applies only to findings of fact, not to conclusions of law. Tennessee Farmers Mut. Ins. Co. v. American Mut. Liability Ins. Co., 840 S.W.2d 933, 1992 Tenn. App. LEXIS 629 (Tenn. Ct. App. 1992).

Trial court's interpretation of a parking agreement was not entitled to a presumption of correctness under T.R.A.P. 13(d), since contract interpretation involves a legal rather than factual inquiry. Hillsboro Plaza Enters. v. Moon, 860 S.W.2d 45, 1993 Tenn. App. LEXIS 154 (Tenn. Ct. App. 1993).

Presumption of T.R.A.P. 13(d) applies in appellate review of a division of marital property. Dellinger v. Dellinger, 958 S.W.2d 778, 1997 Tenn. App. LEXIS 368 (Tenn. Ct. App. 1997).

When reviewing a trial court's findings of fact, an appellate court must apply the de novo standard of review contained in T.R.A.P. 13(d). To the extent that this subsection permits an appellate court to apply a clearly erroneous standard of review, the decision in Coln v. City of Savannah, 966 S.W.2d 34, 1998 Tenn. LEXIS 193 (Tenn. 1998), overruled in part, Cross v. City of Memphis, 20 S.W.3d 642, 2000 Tenn.

LEXIS 343 (Tenn. 2000), is clarified. Cross v. City of Memphis, 20 S.W.3d 642, 2000 Tenn. LEXIS 343 (Tenn. 2000).

Where findings of fact in civil action were supported by material evidence, the court of appeals erred in setting aside jury's findings. Alexander v. Armentrout, 24 S.W.3d 267, 2000 Tenn. LEXIS 305 (Tenn. 2000).

The appellate court does not review the trial court's oral statements, unless incorporated in a decree, but reviews the court's order and judgments for that is how a court speaks. Oral pronouncements of the trial judge are ineffective if they conflict with the judgment when it is entered of record. Goolsby v. Upper Cumberland Oil, 34 S.W.3d 309, 2000 Tenn. App. LEXIS 409 (Tenn. Ct. App. 2000).

In a conservatorship proceeding where the brother-in-law sought to be appointed conservator over the elderly widow, the brother-in-law and the brother-in-law's wife had fair notice in the trial court that the validity of the purported gifts was at issue and introduced evidence designed to support their claim that the gifts were valid and they were the ones who took issue with the trial court's disposition of those gifts on appeal; thus, the appellate court could address the issues regarding the trial court's decision to set those gifts aside. In re Conservatorship Groves, 109 S.W.3d 317, 2003 Tenn. App. LEXIS 112 (Tenn. Ct. App. 2003).

Appellate courts may award complete relief, provided all parties have fair notice and a reasonable opportunity to be heard on the disputed issues. In re Conservatorship Groves, 109 S.W.3d 317, 2003 Tenn. App. LEXIS 112 (Tenn. Ct. App. 2003).

Determination of the value of a marital asset is a question of fact, and a trial court's decision with regard to the value of a marital asset will be given great weight on appeal; the trial court properly relied on the wife's expert and on other evidence, such as financial statements prepared by the husband, in finding the value of the husband's businesses, and the division of marital property was affirmed. Powell v. Powell, 124 S.W.3d 100, 2003 Tenn. App. LEXIS 281 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 1075 (Tenn. 2003).

Although a trial court erred in ruling that a lease with an option had been entered into between a purported seller and a purported buyer, despite the fact that no meeting of the minds as to the essential terms had been reached, the trial court nonetheless properly came to the proper amount of damages by assessing the purported buyer an amount to compensate the purported seller in quantum meruit for the use of a fully operational restaurant and subtracting that amount from the total amount paid by the purported buyer to the purported seller. Strickland v. Cartwright, 117 S.W.3d 766, 2003 Tenn. App. LEXIS 278 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 967 (Tenn. Oct. 6, 2003).

Evidence was sufficient to support the court's conclusion that the owner of the dog invited the meter reader into the yard before the dog could be penned; the appellate court affirmed the award of compensatory damages for the dog bite the meter reader suffered, because a reasonable and prudent person in the owner's circumstances would not have invited the meter reader into the yard until after ensuring that the dog was put away. Mayes v. LeMonte, 122 S.W.3d 142, 2003 Tenn. App. LEXIS 424 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 1225 (Tenn. Dec. 15, 2003).

Plaintiff's parol evidence explaining the terms of the agreement was properly admitted as to the acknowledgment contained on the note. While the acknowledgment did not set forth the exact terms of the loan agreement, it did serve as corroboration of plaintiff's testimony regarding the oral terms of the loan agreement between the parties. When the acknowledgment was considered as evidence, the evidence preponderated against the trial court's findings that the parties' agreement ran afoul of the statute of frauds. Birdwell v. Psimer, 151 S.W.3d 916, 2004 Tenn. App. LEXIS 333 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 1057 (Tenn. Nov. 29, 2004).

Where plaintiff's brother and his wife constructed a log home on their parents' property that plaintiff later inherited, plaintiff was entitled to recover rents and take possession of the property; plaintiff's brother and his wife were entitled to recover the value of their improvements, which the chancellor determined to be $97,750, and the evidence did not preponderate against this value. Rogers v. Davis, 150 S.W.3d 158, 2004 Tenn. App. LEXIS 335 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 943 (Tenn. Nov. 8, 2004).

In an extraordinary appeal that arose from a dispute concerning the scope of discovery in a retaliatory discharge action, the former employee failed to make a compelling showing of relevance and failed to establish that the value of the discovery sought, which pertained to information contained in the personnel and medical records of current and former employees of the company, outweighed the privacy interests of those individuals who were not parties to the action; the trial court's legal determinations that had allowed for the discovery were incorrect, and its decision was reversed. Johnson v. Nissan N. Am., Inc., 146 S.W.3d 600, 2004 Tenn. App. LEXIS 338 (Tenn. Ct. App. 2004).

Patient's alleged error concerning whether the verdict rendered by the jury was contrary to the greater weight of the evidence presented no

issue on appeal based on T.R.A.P. 13(d). Godbee v. Dimick, 213 S.W.3d 865, 2006 Tenn. App. LEXIS 601 (Tenn. Ct. App. 2006), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 66 (Tenn. 2006).

Pursuant to T.R.A.P. 13(b) and 27(a)(7), in parties' employment dispute, as the trial court found that exemptions under 29 U.S.C. § 213(a)(1) of the Fair Labor Standards Act, 29 U.S.C. § 201 et seq., did not apply to an employee, and neither the employer nor the president raised any argument or cited to any authority on the issue in their appellate brief or at oral argument, the issue of whether the employee was exempt from the provisions of the Act was waived. Edmunds v. Delta Partners, L.L.C., 403 S.W.3d 812, 2012 Tenn. App. LEXIS 884 (Tenn. Ct. App. Dec. 18, 2012), rehearing denied, — S.W.3d —, 2013 Tenn. App. LEXIS 28 (Tenn. Ct. App. Jan. 9, 2013), appeal denied, Edmunds v. Delta Partners, LLC, — S.W.3d —, 2013 Tenn. LEXIS 457 (Tenn. May 9, 2013).

Pursuant to T.R.A.P. 13(b) and 27(a)(7), in parties' employment dispute, the trial court properly found that pursuant to the Fair Labor Standards Act, 29 U.S.C. § 201 et seq., an employee was within the statutory definition of employee, and that he was engaged in commerce under 29 U.S.C. § 203(b), (e)(1), and 206(a) for the weeks that he was not paid over a multi-year period. Edmunds v. Delta Partners, L.L.C., 403 S.W.3d 812, 2012 Tenn. App. LEXIS 884 (Tenn. Ct. App. Dec. 18, 2012), rehearing denied, — S.W.3d —, 2013 Tenn. App. LEXIS 28 (Tenn. Ct. App. Jan. 9, 2013), appeal denied, Edmunds v. Delta Partners, LLC, — S.W.3d —, 2013 Tenn. LEXIS 457 (Tenn. May 9, 2013).

4. —Record on Appeal.

Judgment declaring the candidate's opponent the winner of the election was affirmed in accordance with T.R.A.P. 24(c), because in the absence of a transcript or a statement of the evidence prepared in accordance with T.R.A.P. 24(c), the appellate court must presume that the evidence supported the trial court's findings and ultimate conclusion; the appellate court could not review the facts de novo without an appellate record containing the facts, and therefore must assume that the record, had it been preserved, would have contained sufficient evidence to support the trial court's factual findings. Reinhardt v. Neal, 241 S.W.3d 472, 2007 Tenn. App. LEXIS 368 (Tenn. Ct. App. June 11, 2007), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 919 (Tenn. Oct. 15, 2007), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 947 (Tenn. Oct. 22, 2007).

While attachments to appellate briefs were generally not considered part of the record, when the insurance policy in question was attached to the homeowners' brief in toto, the policy was clearly part of the record of the trial court and would have been in the record before the appellate court had the court required the record. Therefore, the court considered the policy as a whole for purposes of its analysis. Lammert v. Auto-Owners (Mut.) Ins. Co., 572 S.W.3d 170, 2019 Tenn. LEXIS 169 (Tenn. Apr. 15, 2019).

A declaration was not included in the appellate record, but was attached to appellant's brief on appeal. However, attaching a document to an appellate brief did not supplement the record on appeal. Wolf Org., Inc. v. TNG Contrs., LLC, — S.W.3d —, 2019 Tenn. App. LEXIS 338 (Tenn. Ct. App. July 3, 2019).

Appellate court could not consider the CD recordings, affidavits of transcript, and exhibits to the depositions of two witnesses because those items were not presented to or considered by the trial court when it granted the bank's motion for partial summary judgment. Tenn. State Bank v. Mashek, — S.W.3d —, 2020 Tenn. App. LEXIS 228 (Tenn. Ct. App. May 21, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 496 (Tenn. Oct. 7, 2020).

In the absence of a filing to consider facts occurring after a hearing in a trial court, an appellate court was not permitted to consider facts that were not presented to the trial court or contained in the appellate record. In re Winston, — S.W.3d —, 2020 Tenn. App. LEXIS 351 (Tenn. Ct. App. Aug. 6, 2020).

5. —Additur or Remittitur.

The standard of review pertaining to questions of additur or remittitur in the court of appeals is covered by T.R.A.P. 13(d). Thrailkill v. Patterson, 879 S.W.2d 836, 1994 Tenn. LEXIS 196 (Tenn. 1994).

Trial court did not err in ordering remittitur of jury's award to injured husband for back injuries and to wife for loss of consortium since evidence did not preponderate against the trial court's determination that the verdict rendered by the jury was excessive and that a remittitur was appropriate. Miller v. Choo Choo Ptnrs., L.P., 73 S.W.3d 897, 2001 Tenn. App. LEXIS 821 (Tenn. Ct. App. 2001).

6. Presumption of Correctness.

Trial court's finding that an employee was on a business trip was a finding of fact entitled to a presumption of correctness. Tennessee Farmers Mut. Ins. Co. v. American Mut. Liability Ins. Co., 840 S.W.2d 933, 1992 Tenn. App. LEXIS 629 (Tenn. Ct. App. 1992).

While T.R.A.P. 13(d) requires the presumption that the trial court's findings of fact are correct unless the evidence preponderates against the finding, this presumption does not exist with regard to the trial court's legal determinations or when the trial court's conclusions are based on uncontroverted facts. NCNB Nat'l Bank v. Thrailkill, 856 S.W.2d 150, 1993 Tenn. App. LEXIS 106 (Tenn. Ct. App. 1993).

Where a special master's report was a statement of legal conclusions and contained very few findings of fact, review of the trial court's determinations ordinarily would be de novo with a presumption that the trial court's findings of fact were correct; however, where the trial court did not make any findings, review would be de novo without a presumption of correctness. Archer v. Archer, 907 S.W.2d 412, 1995 Tenn. App. LEXIS 257 (Tenn. Ct. App. 1995).

In a non-jury divorce case, review is de novo; however, the record comes to the court of appeals with a presumption of correctness of the trial court's factually-driven determinations, which will be affirmed unless the evidence preponderates against them; no such presumption attaches to the trial court's conclusions of law. Jahn v. Jahn, 932 S.W.2d 939, 1996 Tenn. App. LEXIS 319 (Tenn. Ct. App. 1996), appeal denied, — S.W.2d —, 1996 Tenn. LEXIS 680 (Tenn. Oct. 21, 1996), appeal dismissed, — S.W.2d —, 1997 Tenn. App. LEXIS 918 (Tenn. Ct. App. Dec. 23, 1997).

Trial court's findings of facts will be reviewed de novo with presumption of correctness absent preponderance of evidence to the contrary, whereas findings of law will be reviewed de novo without such a presumption. Hawks v. City of Westmoreland, 960 S.W.2d 10, 1997 Tenn. LEXIS 641 (Tenn. 1997).

Jury's findings of fact will be set aside only if there is no material evidence to support verdict. Scott v. Jones Bros. Constr., 960 S.W.2d 589, 1997 Tenn. App. LEXIS 438 (Tenn. Ct. App. 1997).

Court's finding relating to dissolution of partnership agreement is not entitled to presumption of correctness since interpretation of contract is legal, not factual, inquiry. Gates, Duncan & Vancamp Co. v. Levatino, 962 S.W.2d 21, 1997 Tenn. App. LEXIS 421 (Tenn. Ct. App. 1997), rehearing denied, Gates v. Levatino, — S.W.2d —, 1997 Tenn. App. LEXIS 502 (Tenn. Ct. App. 1997).

In a car accident negligence case, an appellate court affirmed the jury's award of $1,250,000 in damages to the victim where he sustained extensive injuries that greatly affected his life; his medical bills alone totaled $200,000, and an open fracture of his left femur required two surgical procedures involving the insertion of 12 inch metal rods in his leg. Davidson v. Lindsey, 104 S.W.3d 483, 2003 Tenn. LEXIS 410 (Tenn. 2003).

In a car accident negligence case, an appellate court affirmed the jury's award of $500,000 where $101,000 was conceded, and the remainder of the award was supported by material evidence related to the decedent's pecuniary contributions to her family in the form of personal services, such as cooking and other housekeeping and the value of her consortium. Davidson v. Lindsey, 104 S.W.3d 483, 2003 Tenn. LEXIS 410 (Tenn. 2003).

In reviewing a trial court's factual findings in a case addressing modification of an award of rehabilitative alimony, pursuant to T.R.A.P. 13(d), an appeals court presumes the correctness of the trial court's factual findings as long as the evidence did not preponderate against those findings. Perry v. Perry, 114 S.W.3d 465, 2003 Tenn. LEXIS 725 (Tenn. 2003).

Judgment awarding a landlord possession of the property and for unpaid rent against a tenant was affirmed because neither a transcript of the proceedings nor a statement of the evidence was filed and the pleadings filed contained minimal information; without a complete record or sufficient statement of the evidence, the appellate court assumed the sufficiency of the evidence to support the judgment pursuant to T.R.A.P. 13(d). The Court of Appeals of Tennessee had appellate jurisdiction only, and its power to review was limited to those factual and legal issues for which an adequate legal record had been preserved. Reid v. Reid, 388 S.W.3d 292, 2012 Tenn. App. LEXIS 554 (Tenn. Ct. App. Aug. 9, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 846 (Tenn. Nov. 20, 2012).

Trial court's findings of fact were presumed to be correct because a mother filed no transcript or statement of the evidence from the trial court proceedings, and thus, the trial court's denial of the mother's motion to alter or amend on the issue of whether the mother's failure to pay child support and uncovered medical expenses was willful was affirmed; therefore, the trial court's underlying judgment finding the mother guilty of criminal contempt was also affirmed. Burris v. Burris, 512 S.W.3d 239, 2016 Tenn. App. LEXIS 698 (Tenn. Ct. App. Sept. 20, 2016).

7. Questions of Law.

Where there is no conflict in the evidence as to any material fact, the question on appeal is one of law, and the scope of review is de novo with no presumption of correctness accompanying a chancellor's conclusions of law. Union Carbide Corp. v. Huddleston, 854 S.W.2d 87, 1993 Tenn. LEXIS 160 (Tenn. 1993).

No presumption of correctness attaches to the trial court's conclusions of law under T.R.A.P. 13. Tennessee Farmers Mut. Ins. Co. v. Moore, 958 S.W.2d 759, 1997 Tenn. App. LEXIS 250 (Tenn. Ct. App. 1997).

In a drug case, although the judgment contained no reference to a certified question of law, the trial court dated and entered an order directing that the recitation of the certified question be attached to the judgment, the defendant filed his notice of appeal and the trial court entered an amended judgment that recited the certified question; the court of appeals treated the order as an amendment to the

judgment because it was entered while the trial court still had jurisdiction to amend the judgment, and it contained all of the *Preston* components. State v. Harris, 280 S.W.3d 832, 2008 Tenn. Crim. App. LEXIS 112 (Tenn. Crim. App. Feb. 6, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 629 (Tenn. Aug. 25, 2008).

8. Witness Credibility.

In a case tried without a jury, the question of credibility of the witnesses is exclusively for the trial judge trying the case and cannot be reviewed by the appellate court. Harwell v. Harwell, 612 S.W.2d 182, 1980 Tenn. App. LEXIS 371 (Tenn. Ct. App. 1980).

When the trial court has made a decision which hinges on witness credibility, then it will not be reversed unless, other than the oral testimony of the witnesses, there is found in the record clear, concrete and convincing evidence to the contrary. Airline Constr., Inc. v. Barr, 807 S.W.2d 247, 1990 Tenn. App. LEXIS 847 (Tenn. Ct. App. 1990).

Questions concerning the credibility of the witnesses and the weight and value of the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact. State v. Russell, 10 S.W.3d 270, 1999 Tenn. Crim. App. LEXIS 321 (Tenn. Crim. App. 1999), review or rehearing denied, — S.W.3d —, 1999 Tenn. LEXIS 480 (Tenn. Oct. 4, 1999).

Trial court properly held that a husband had not carried his burden of proving that a wife kept any items of silver to which she was not entitled because whether to believe the husband or the wife was within the trial court's discretion, and the record did not preponderate against the trial court's finding that the husband failed to prove the wife had taken and kept any of his silver. Trezevant v. Trezevant, 568 S.W.3d 595, 2018 Tenn. App. LEXIS 213 (Tenn. Ct. App. Apr. 25, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 622 (Tenn. Sept. 18, 2018).

With respect to appellant's claim that appellee allegedly caused a sewage smell and foul odor to invade her property due to the improper installation of a septic tank, the primary evidence on this issue was the conflicting testimony of the parties, and only appellee's testimony was corroborated by the sewage department reports. Accordingly, appellant did not meet her burden concerning nuisance based on the foul smell, and the trial court properly dismissed appellant's nuisance claim. Magness v. Couser, — S.W.3d —, 2020 Tenn. App. LEXIS 188 (Tenn. Ct. App. Apr. 27, 2020).

Sufficient evidence corroborated a co-defendant's testimony because defendant's DNA was found on a piece of duct tape along with the victim's DNA, and defendant was treated at a nearby emergency room later the day of the incident for a fractured clavicle; it was the province of the jury to assess a witness's credibility and by its verdict, the jury found the co-defendant credible. State v. Graham, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 275 (Tenn. Crim. App. Apr. 21, 2020).

9. Appellate Court Decree When Chancellor's Set Aside.

Where the evidence preponderates against the finding of the chancellor, it is the duty of the court of appeals to enter such decree as the law and evidence warrant. Thornburg v. Chase, 606 S.W.2d 672, 1980 Tenn. App. LEXIS 384 (Tenn. Ct. App. 1980).

10. Evidence of Guilt Beyond Reasonable Doubt.

Victims' identifying defendant as the robber constituted ample evidence to convince a rational trier of fact of his guilt beyond a reasonable doubt. State v. York, 605 S.W.2d 837, 1980 Tenn. Crim. App. LEXIS 303 (Tenn. Crim. App. 1980).

Evidence supported a finding of guilt beyond a reasonable doubt. State v. Richards, 615 S.W.2d 163, 1981 Tenn. Crim. App. LEXIS 334 (Tenn. Crim. App. 1981); State v. Gauldin, 737 S.W.2d 795, 1987 Tenn. Crim. App. LEXIS 2594 (Tenn. Crim. App. 1987); State v. Kyger, 787 S.W.2d 13, 1989 Tenn. Crim. App. LEXIS 690 (Tenn. Crim. App. 1989), rehearing denied, — S.W.2d —, 1989 Tenn. Crim. App. LEXIS 757 (Tenn. Crim. App. Oct. 24, 1989); State v. Black, 815 S.W.2d 166, 1991 Tenn. LEXIS 322 (Tenn. 1991) ; State v. Oody, 823 S.W.2d 554, 1991 Tenn. Crim. App. LEXIS 405 (Tenn. Crim. App. 1991); State v. Gilmore, 823 S.W.2d 566, 1991 Tenn. Crim. App. LEXIS 581 (Tenn. Crim. App. 1991); State v. Kinnaird, 823 S.W.2d 571, 1991 Tenn. Crim. App. LEXIS 589 (Tenn. Crim. App. 1991); State v. Young, 866 S.W.2d 194, 1992 Tenn. Crim. App. LEXIS 863 (Tenn. Crim. App. 1992), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 78 (Tenn. Mar. 1, 1993); State v. Nunnery, 875 S.W.2d 681, 1993 Tenn. Crim. App. LEXIS 745 (Tenn. Crim. App. 1993); State v. Darnell, 905 S.W.2d 953, 1995 Tenn. Crim. App. LEXIS 164 (Tenn. Crim. App. 1995).

When the defendant in a criminal action challenges the sufficiency of the convicting evidence, the court must review the record to determine if the evidence adduced at trial is sufficient "to support the findings by the trier of fact of guilt beyond a reasonable doubt." T.R.A.P. 13(e) is applicable to findings of guilt based upon direct as well as circumstantial evidence. State v. Bohanan, 745 S.W.2d 892, 1987 Tenn. Crim. App. LEXIS 2747 (Tenn. Crim. App. 1987); State v. Matthews, 805 S.W.2d 776, 1990 Tenn. Crim. App. LEXIS 597 (Tenn. Crim. App. 1990).

In reviewing a case based upon circumstantial evidence, the same rule is applied as is applied in weighing a case based upon direct evidence. That is, the court must determine if the evidence is such that any rational trier of

fact could find guilt beyond a reasonable doubt. State v. Cate, 746 S.W.2d 727, 1987 Tenn. Crim. App. LEXIS 2738 (Tenn. Crim. App. 1987).

In a circumstantial evidence case, the relevant question on appeal is whether, after reviewing the evidence in the light most favorable to the state, any rational trier of fact, could have found the essential elements of the charged offense beyond a reasonable doubt. If the circumstantial evidence sufficiently shows all the elements of the crime and the defendant's connection to the crime, then that evidence is enough to support the verdict. State v. McAlister, 751 S.W.2d 436, 1987 Tenn. Crim. App. LEXIS 2755 (Tenn. Crim. App. 1987).

T.R.A.P. 13(e) is applicable to findings of guilt based upon direct evidence, circumstantial evidence, or direct and circumstantial evidence. State v. Thomas, 755 S.W.2d 838, 1988 Tenn. Crim. App. LEXIS 297 (Tenn. Crim. App. 1988).

T.R.A.P. 13(e) embodies the rational trier of fact test. State v. Matthews, 805 S.W.2d 776, 1990 Tenn. Crim. App. LEXIS 597 (Tenn. Crim. App. 1990).

When sufficiency of evidence is challenged, relevant question is whether, after reviewing evidence in light most favorable to state, any rational trier of fact could find essential elements of crime beyond reasonable doubt. State v. Alvarado, 961 S.W.2d 136, 1996 Tenn. Crim. App. LEXIS 736 (Tenn. Crim. App. 1996).

11. Issues Not Presented for Review.

T.R.A.P. 13(b) allows the appellate court to consider the appropriateness of an award of incidental damages even though issue was not expressly raised by the parties. King v. Anderson, 618 S.W.2d 478, 1980 Tenn. App. LEXIS 425 (Tenn. Ct. App. 1980).

Untimely filing of a motion for new trial waives appellant's right to present those issues on appeal. The court, however, has the authority to review the record for apparent errors, assuming a timely notice of appeal has been filed. State v. Givhan, 616 S.W.2d 612, 1981 Tenn. Crim. App. LEXIS 335 (Tenn. Crim. App. 1981).

The appellate courts have authority to review the record for apparent errors to prevent needless litigation, injury to the interest of the public and prejudice to the judicial process under the provisions of T.R.A.P. 13(b); and in accordance with Tenn. R. Crim. P. 52 to notice at any time, within their discretion, an error which effects the substantial right of an accused, even though not raised in a motion for new trial or assigned as error on appeal, where it may be necessary to do substantial justice. State v. Maynard, 629 S.W.2d 911, 1981 Tenn. Crim. App. LEXIS 416 (Tenn. Crim. App. 1981).

Case where whether the plaintiff had a right to nonsuit without prejudice depended upon whether the trial court was correct in granting a new trial, yet neither party had asserted or briefed the issue of the correctness of the order granting a new trial, was a classic case for the application of T.R.A.P. 13(b) that expressly grants the appellate courts authority to consider issues not brought up for review by any party to prevent needless litigation and to prevent prejudice to the judicial process. Panzer v. King, 743 S.W.2d 612, 1988 Tenn. LEXIS 5 (Tenn. 1988).

Although not raised in the trial court, a question as to whether a statutory amendment retroactively barred the cause of action was reviewable because its answer would determine whether there was proper jurisdiction in the first place. Shell v. State, 893 S.W.2d 416, 1995 Tenn. LEXIS 14 (Tenn. 1995).

Recognition of error pursuant to T.R.A.P. 13(b), or Tenn. R. Crim. P. 52(b), does not automatically result in the reversal of the trial court's judgment, since the error may be harmless and not justify reversal. State v. Adkisson, 899 S.W.2d 626, 1994 Tenn. Crim. App. LEXIS 801 (Tenn. Crim. App. 1994).

It was inappropriate for the special workers' compensation appeals panel to address the validity of the local rules for workers' compensation cases for the twenty-fourth judicial district when the issue was not raised by either party before the panel. Williams v. Tecumseh Prods. Co., 978 S.W.2d 932, 1998 Tenn. LEXIS 664 (Tenn. 1998).

A party's failure to comply with T.R.A.P. 3(f), by not designating the judgment from which relief is sought, does not limit the issues which that party may raise on appeal. Dunlap v. Dunlap, 996 S.W.2d 803, 1998 Tenn. App. LEXIS 836 (Tenn. Ct. App. 1998).

Criminal appellate court erred in addressing the issue of whether petitioner was permitted to assert petitioner's right against self-incrimination during the post-conviction proceeding because the state opted not to appeal the trial court's ruling in that respect; however, the error did not affect the result. Nichols v. State, 90 S.W.3d 576, 2002 Tenn. LEXIS 419 (Tenn. 2002).

In a first degree murder case, the trial court properly dismissed defendant's motion to reopen his post-conviction petition as the state's alleged suppression of exculpatory evidence was not a proper ground to reopen; the appellate court erred in sua sponte treating defendant's motion to reopen as a petition for writ of error coram nobis as it could not independently examine the motion to determine whether defendant should have pursued a completely different avenue of relief in the trial court. Harris v. State, 102 S.W.3d 587, 2003 Tenn. LEXIS 313 (Tenn. 2003), overruled in part, Nunley v. State, 552 S.W.3d 800, 2018 Tenn. LEXIS 382 (Tenn. July 19, 2018).

In a custody proceeding, since much of the evidence that went to best interest also tended to spill over into the question of material

change of circumstances regarding primary residential parent, an appellate court decided to examine that issue as well as the one specifically raised by a mother. Massey-Holt v. Holt, 255 S.W.3d 603, 2007 Tenn. App. LEXIS 668 (Tenn. Ct. App. Oct. 31, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 309 (Tenn. Apr. 14, 2008).

Spouse in a divorce did not raise the alleged erroneous classification of real property in the statement of issues on appeal and addressed it along with the other properties in the spouse's argument regarding the valuation of the real estate, and, in the course of that argument the spouse argued briefly that it was incorrectly classified as marital property when it should have been classified as separate property. Accordingly, the appellate court deemed any argument relative to the classification of the property to be waived. Lucchesi v. Lucchesi, — S.W.3d —, 2019 Tenn. App. LEXIS 27 (Tenn. Ct. App. Jan. 23, 2019).

Party did not raise any issue relative to the findings or the award of alimony in the party's appeal. Consequently, the appellate court considered the matters which the party attempted to raise in the party's reply brief as waived. Lucchesi v. Lucchesi, — S.W.3d —, 2019 Tenn. App. LEXIS 27 (Tenn. Ct. App. Jan. 23, 2019).

Because a wife did not raise the issue of attorney's fees on appeal in her statement of the issues, the issue was waived. Pierce v. Pierce, — S.W.3d —, 2019 Tenn. App. LEXIS 306 (Tenn. Ct. App. June 21, 2019).

In a termination of parental rights proceeding, a mother's waiver of the presence of the guardian ad litem (GAL) did not prevent appellate review of whether the absence of the GAL was reversible error because the issue had to be considered in the interest of justice. In re Aliyah C., 604 S.W.3d 417, 2019 Tenn. App. LEXIS 319 (Tenn. Ct. App. June 26, 2019).

Father was not entitled to an award of attorney's fees and damages incurred as a result of a mother's allegedly frivolous appeal because the father's appellate brief's statement of issues did not properly raise the matter, waiving it. Blakney v. White, — S.W.3d —, 2019 Tenn. App. LEXIS 498 (Tenn. Ct. App. Oct. 8, 2019).

Although appellee asserted in the argument section of appellee's appellate brief that the appeal was frivolous and that appellee was entitled to an award of attorney's fees incurred on appeal, appellee failed to raise this as an issue in the statement of the issues in appellee's brief. Therefore, the appellate court deemed appellee's request for attorney's fees on appeal to have been waived. In re Estate of Baker, — S.W.3d —, 2019 Tenn. App. LEXIS 565 (Tenn. Ct. App. Nov. 22, 2019).

While not raised by either party, as a matter of plain error, the appellate court concluded that defendant's conviction for theft was to be modified from a Class D felony to a Class E felony because of an amendment to the relevant statute. Accordingly, the appellate court remanded the matter to the trial court for the entry of a new judgment and imposition of a sentence. State v. Cole-Pugh, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 176 (Tenn. Crim. App. Mar. 18, 2019), appeal denied, State v. Cole-Pugh, — S.W.3d —, 2019 Tenn. LEXIS 538 (Tenn. Dec. 10, 2019).

When defendant appealed the denial of defendant's motion for modification of sentence, the appellate court did not extend its review to defendant's issue concerning the trial court's revocation of defendant's probation without notice because defendant did not raise that issue in the notice of appeal. State v. Smith, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 258 (Tenn. Crim. App. Apr. 15, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 551 (Tenn. Sept. 16, 2020).

12. Issues Presented for Review.

Defendant did not waive the issue of double jeopardy because defendant's amended motion for new trial was sufficient to direct the trial court's and the state of Tennessee's attention to defendant's challenge to multiple convictions for employing a firearm during the commission of a dangerous felony when defendant fired a single weapon. Moreover, the intermediate appellate court construed defendant's argument as a challenge to defendant's firearm convictions based on double jeopardy grounds. State v. Harbison, 539 S.W.3d 149, 2018 Tenn. LEXIS 7 (Tenn. Jan. 9, 2018).

13. Record of Trial Court.

The appellate court cannot review the facts de novo without an appellate record containing the facts, and therefore, in the absence of a transcript of a statement of the evidence, the court must assume that the record, had it been preserved, would have contained sufficient evidence to support the trial court's factual findings. Sherrod v. Wix, 849 S.W.2d 780, 1992 Tenn. App. LEXIS 848 (Tenn. Ct. App. 1992); Bishop v. Bishop, 939 S.W.2d 109, 1996 Tenn. App. LEXIS 600 (Tenn. Ct. App. 1996).

Where the trial court made no findings of fact, there was nothing in this record upon which the presumption of correctness contained in T.R.A.P. 13(d) could attach, and thus the court reviewed the record de novo, without presumption. Goodman v. Memphis Park Comm'n, 851 S.W.2d 165, 1992 Tenn. App. LEXIS 914 (Tenn. Ct. App. 1992); Devorak v. Patterson, 907 S.W.2d 815, 1995 Tenn. App. LEXIS 307 (Tenn. Ct. App. 1995).

Where the trial court's order, the motion, and the accompanying affidavits in the underlying tort action were not part of the record, they could not be considered by the court on appeal. Tennessee Farmers Mut. Ins. Co. v. Moore, 958 S.W.2d 759, 1997 Tenn. App. LEXIS 250 (Tenn. Ct. App. 1997).

Where there is no material evidence in the record to support finding of damages for expenses, the court should enter remittitur. United Brake Sys. v. American Envtl. Protection, 963 S.W.2d 749, 1997 Tenn. App. LEXIS 289 (Tenn. Ct. App. 1997).

In an appeal from a parental rights termination proceeding, the attachment of a custody order to the parents' appellate brief did not make it part of the appellate record pursuant to T.R.A.P. 13(c), such that it was not properly before the appellate court for consideration. In re Dakota C.R., 404 S.W.3d 484, 2012 Tenn. App. LEXIS 844 (Tenn. Ct. App. Dec. 7, 2012), appeal denied, In re Dakota R., — S.W.3d —, 2013 Tenn. LEXIS 230 (Tenn. Mar. 6, 2013).

14. Cross Appeals.

Party filing notice of appeal cannot terminate all counter appeals by dismissing his notice of appeal. Edwards v. Hunt, 635 S.W.2d 696, 1982 Tenn. App. LEXIS 491 (Tenn. Ct. App. 1982).

It was the intention of T.R.A.P. 13 that only one notice of appeal be filed and that right of cross appeal shall exist without notice of cross appeal. Edwards v. Hunt, 635 S.W.2d 696, 1982 Tenn. App. LEXIS 491 (Tenn. Ct. App. 1982).

15. Joinder.

The court condemns the joinder of an appeal with an original action and the simultaneous consideration of both at the trial level. Goodwin v. Metropolitan Bd. of Health, 656 S.W.2d 383, 1983 Tenn. App. LEXIS 710 (Tenn. Ct. App. 1983).

16. Merger of Convictions.

Appellant who did not file notice of appeal could properly seek review of action of trial court judge in ordering merger of conviction for attempt to commit petit larceny into conviction of third-degree burglary. State v. Valentine, 659 S.W.2d 27, 1983 Tenn. Crim. App. LEXIS 360 (Tenn. Crim. App. 1983).

Although state did not appeal from an order merging defendant's convictions for burglary and attempted petit larceny, it could seek review and relief of the action of the trial court in effectively setting aside and dismissing the indictment charging the defendant with petit larceny and the jury verdict finding him guilty of attempting to commit petit larceny. State v. Valentine, 659 S.W.2d 27, 1983 Tenn. Crim. App. LEXIS 360 (Tenn. Crim. App. 1983).

17. Subject-matter Jurisdiction.

The question of whether the trial court had subject-matter jurisdiction may be noticed at any time during the pendency of the proceedings and is not waived by the failure to raise this defense prior to trial. State v. Seagraves, 837 S.W.2d 615, 1992 Tenn. Crim. App. LEXIS 146 (Tenn. Crim. App. 1992).

A no contest plea or plea of guilty does not waive a challenge to the court's jurisdiction. State v. Carter, 988 S.W.2d 145, 1999 Tenn. LEXIS 61 (Tenn. 1999).

Appellate court lacked jurisdiction to consider petitioner's appeal because all of petitioner's claims had not been adjudicated, and permission to file an interlocutory appeal had not been granted pursuant to T.R.A.P. 9 or T.R.A.P. 10, or the order appealed had not been made final pursuant to Tenn. R. Civ. P. 54.02; trial court did not address the request for a hearing on the conduct of the estate's attorney, and did not address the request for attorney fees and costs requested in the same motion. Boykin v. Casher (In re Estate of Boykin), 295 S.W.3d 632, 2008 Tenn. App. LEXIS 769 (Tenn. Ct. App. Dec. 30, 2008).

Courts, pursuant to T.R.A.P. 13(b), have the responsibility to address their own subject matter jurisdiction, even when the parties have not raised the issue. Morgan Keegan & Co. v. Smythe, 401 S.W.3d 595, 2013 Tenn. LEXIS 428 (Tenn. Apr. 25, 2013).

Trust's appeal was dismissed for lack of jurisdiction where the notice of appeal was signed the non-attorney trustee, and thus, under Tenn. R. Civ. P. 11.01, it was insufficient to initiate an appeal on behalf of the trust. Elm Children's Educ. Trust v. Wells Fargo Bank, N.A., 468 S.W.3d 529, 2014 Tenn. App. LEXIS 821 (Tenn. Ct. App. Dec. 17, 2014), appeal denied, — S.W.3d —, 2015 Tenn. LEXIS 427 (Tenn. May 14, 2015).

Although the trial court did not expressly rule on the issue of waiver and its effect on subject matter jurisdiction, an inmate properly raised the issue on appeal because prison officials posited throughout the pendency of the action that the trial court lacked subject matter jurisdiction; because the inmate's waiver of the action deprived the trial court of subject matter jurisdiction, the issue required the dismissal of his cause of action and, therefore, it was dispositive of the appeal. Sexton v. Hart, — S.W.3d —, 2019 Tenn. App. LEXIS 168 (Tenn. Ct. App. Apr. 4, 2019).

In an appeal arising from the trial court's entry of a default judgment against defendants and its denial of defendants' motion to set aside the judgment, the appellate court concluded the trial court's entry of default was not a final judgment because it did not address plaintiff's claim for damages. Accordingly, the appeal was subject to dismissal for lack of subject matter jurisdiction. Douglas v. Covington Crossing Inc., — S.W.3d —, 2019 Tenn. App. LEXIS 329 (Tenn. Ct. App. June 28, 2019).

Order setting aside the dismissal of an action was not a final judgment and was not certified as final for purposes of appeal; accordingly, the notice of appeal was prematurely filed, thereby depriving the court of appeals of subject matter jurisdiction. Hampton Reserve Homeowner's Ass'n v. Leipzig, — S.W.3d —, 2021 Tenn. App. LEXIS 70 (Tenn. Ct. App. Feb. 26, 2021).

18. Attorney's Fees.

The award of attorney's fees and legal expenses is largely in the discretion of the trial judge, and the trial court's determination will not be disturbed unless the evidence preponderates toward the contrary. Barnhill v. Barnhill, 826 S.W.2d 443, 1991 Tenn. App. LEXIS 561 (Tenn. Ct. App. 1991).

19. Sufficiency of Evidence.

To sustain a conviction of a lesser-included offense, the proof must be sufficient to support each and every element of the conviction offense. To the extent that State v. Mellons, 557 S.W.2d 497, 1977 Tenn. LEXIS 675 (Tenn. 1997) and its progeny hold to the contrary, they are overruled. State v. Parker, 350 S.W.3d 883, 2011 Tenn. LEXIS 881 (Tenn. Sept. 23, 2011).

Evidence was sufficient to show that four gang members who engaged in the kidnapping of two gang members were criminally responsible for the ensuing death of one of the gang members. Proof of premeditation was abundant; deadly weapons were used and witnesses testified that defendants were part of the crowd beating the unarmed victim with bats, jack irons, crowbars, and hammers. State v. Mickens, 123 S.W.3d 355, 2003 Tenn. Crim. App. LEXIS 107 (Tenn. Crim. App. 2003), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 805 (Tenn. Sept. 2, 2003).

In reviewing the factual sufficiency of defendant's aggravated sexual battery convictions pursuant to T.R.A.P. 13(e), the evidence was sufficient to convict defendant of aggravated sexual battery under the old sexual battery statute, T.C.A. § 39-2-606(a) (repealed), and the current sexual battery statute, T.C.A. § 39-13-504(a), because: (1) The father and the victim testified that the victim was under 13 years of age at the time of the sexual offense as required by T.C.A. §§ 39-2-603(a)(4) (repealed) and 39-13-502(a)(4); (2) The victim testified as to defendant's actions and the incident which met the definition of sexual contact with the victim's intimate parts as required by T.C.A. § 39-2-602(10) and (5) (repealed) and T.C.A. § 39-13-501(6) and (2); and (3) Defendant's sister testified regarding the incident. State v. Jordan, 116 S.W.3d 8, 2003 Tenn. Crim. App. LEXIS 301 (Tenn. Crim. App. 2003).

Defendant's attempt to purchase merchandise by passing a forged check was insufficient evidence to convict him of money laundering because there was no proof that defendant was attempting to conceal anything other than his own identity, and the Tennessee Legislature did not intend that conduct such as simple forgery and attempting to pass forged instruments would also constitute the crime of money laundering. State v. Jackson, 124 S.W.3d 139, 2003 Tenn. Crim. App. LEXIS 509 (Tenn. Crim. App. 2003).

In a defamation suit a jury's findings were not set aside where material evidence was introduced at trial that showed the defendant did not have a conditional privilege to make the allegedly defamatory statements in a letter because he either knew the allegations were false or, at the very least, acted with reckless disregard as to the truth or falsity of the allegations. McWhorter v. Barre, 132 S.W.3d 354, 2003 Tenn. App. LEXIS 672 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 228 (Tenn. Mar. 8, 2004).

Although circumstantial, the evidence in the case wove a "web of guilt" around defendant, as the testimony demonstrated that she had decided to move out of state with her lover, that she had repeatedly expressed concern that she would be unable to take her son because of the victim's objections, that the victim died from brain swelling brought about by a profound hypoglycemic episode, one of several such episodes, that the victim, who was not diabetic, had been injected with synthetic insulin, and that the defendant was both a nurse and a diabetic with a supply of insulin. State v. Wilson, 164 S.W.3d 355, 2003 Tenn. Crim. App. LEXIS 841 (Tenn. Crim. App. 2003), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 226 (Tenn. Mar. 8, 2004).

Appellant's aggravated child abuse conviction was supported by the evidence, where a rational jury could have concluded that appellant knowingly gave her child twice his dosage of Clonidine against the instructions of medical professionals and that the appellant knew her actions were abusive. State v. Prater, 137 S.W.3d 25, 2003 Tenn. Crim. App. LEXIS 886 (Tenn. Crim. App. 2003), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 169 (Tenn. Mar. 1, 2004).

Evidence was sufficient to support defendant's carjacking conviction because an officer testified that defendant inched up under the victim and that the victim appeared very surprised and was excited and upset; another officer testified that when defendant entered the victim's vehicle, the victim looked frantic and upset. State v. Wilson, 211 S.W.3d 714, 2007 Tenn. LEXIS 22 (Tenn. 2007).

Evidence was sufficient to support defendant's conviction of reckless endangerment because he temporarily pinned the officer between the victim's car and another car. State v. Wilson, 211 S.W.3d 714, 2007 Tenn. LEXIS 22 (Tenn. 2007).

Material evidence supported the jury's determination that the father's handwritten document was not a valid holographic will under T.C.A. § 32-1-104 because the circumstances surrounding the father's execution of the document did not indicate testamentary intent, as none of the witnesses present when he wrote and signed it testified that the father explicitly told them that he intended it to be his will; the barely legible solitary statement that the will proponent could do whatever he wanted with

everything after the father passed did not exhibit testamentary intent. Blackburn v. Blackburn, 253 S.W.3d 603, 2007 Tenn. App. LEXIS 692 (Tenn. Ct. App. Nov. 14, 2007), appeal denied, In re Estate of Blackburn, — S.W.3d —, 2008 Tenn. LEXIS 240 (Tenn. Apr. 7, 2008).

Material evidence supported the jury's verdict that the father's handwritten document was not a formal will under T.C.A. § 32-1-204 because: (1) A witness testified that neither he nor the other witness to the document were in the father's presence or each other when they signed the document as eyewitnesses; and (2) The witness testified that the father did not refer to the document as his last will and testament but rather only asked the witness to do him a favor in signing it. Blackburn v. Blackburn, 253 S.W.3d 603, 2007 Tenn. App. LEXIS 692 (Tenn. Ct. App. Nov. 14, 2007), appeal denied, In re Estate of Blackburn, — S.W.3d —, 2008 Tenn. LEXIS 240 (Tenn. Apr. 7, 2008).

Evidence was sufficient to support conviction of conspiracy to commit especially aggravated robbery because the metal flashlight as used was properly classified as a deadly weapon, and testifying co-defendant admitted that there was discussion that defendant would knock the victim out if the victim awoke. State v. Downey, 259 S.W.3d 723, 2008 Tenn. LEXIS 536 (Tenn. Aug. 15, 2008).

Substantial and material evidence that supported the jury's findings in the record that the deceased mother's two children had a confidential relationship with their mother given the degree of dominion and control both had over their mother, and the evidence submitted by the contestants established at least five suspicious circumstances beyond the existence of the confidential relationship. Therefore, because the record contained material evidence supporting the jury's findings that the two children had a confidential relationship with their mother, and that they did not overcome the presumption that the will was obtained through the undue influence of the two children, the deceased mother's will was invalid. In re Estate of Schisler, 316 S.W.3d 599, 2009 Tenn. App. LEXIS 699 (Tenn. Ct. App. Oct. 19, 2009), cert. denied, Stem v. Wix, 562 U.S. 894, 131 S. Ct. 299, 178 L. Ed. 2d 144, 2010 U.S. LEXIS 6054 (U.S. 2010).

On review pursuant to T.R.A.P. 13(e), evidence was sufficient to support defendant's conviction for robbery, a violation of T.C.A. § 39-13-401, because the victim identified defendant in a photo lineup two days after the robbery and then identified defendant again at trial, two witnesses likewise identified defendant in photo lineups that placed him at the strip mall shortly before the robbery took place, and a bystander observed and recorded the tag number of a vehicle registered to defendant leaving the strip mall shortly after the robbery took place. State v. Franklin, 308 S.W.3d 799, 2010 Tenn. LEXIS 415 (Tenn. Apr. 29, 2010), cert. denied, Franklin v. Tennessee, 179 L. Ed. 2d 503, 131 S. Ct. 1598, 562 U.S. 1272, 2011 U.S. LEXIS 1989 (U.S. 2011).

Sufficient evidence supported defendant's convictions for aggravated burglary, under T.C.A. § 39-14-403(b), and theft of $10,000 or more but less than $60,000, under T.C.A. § 39-14-105(4), because circumstantial evidence showed: (1) defendant, a smoker, lived near the burglarized house; (2) the victims gave defendant no permission to enter the home and were not smokers; (3) the victims were absent when the house was burglarized; (4) items stolen from the home were worth about $40,000, while a stolen car was worth $26,000; (5) a partly smoked cigarette containing defendant's DNA was found in the home when police discovered the burglary; (6) the chances that DNA belonged to someone else were less than one in six billion; (7) the cigarette was not crumpled or flattened as if tracked into the house, and investigating officers ensured the officers did not track debris into the crime scene; (8) when police went to defendant's home to arrest defendant on another charge and ask defendant about the burglary, defendant ran; and (9) this circumstantial evidence was equally as probative as direct evidence. State v. Sisk, 343 S.W.3d 60, 2011 Tenn. LEXIS 596 (Tenn. June 15, 2011).

In a wrongful death and survivor action arising from care and treatment of a nursing home resident, upon review under T.R.A.P. 13 and T.C.A. § 20-10-102(b), a trial court's suggested remittitur of the compensatory damages awarded to plaintiff was supported by its reasons for disagreeing with the jury's compensatory damage award; the evidence did not preponderate against the trial court's decision. McLemore v. Elizabethton Med. Investors, Ltd. P'ship, 389 S.W.3d 764, 2012 Tenn. App. LEXIS 415 (Tenn. Ct. App. June 22, 2012), appeal denied, McLemore v. Elizabethton Med. Investors LP, — S.W.3d —, 2012 Tenn. LEXIS 892 (Tenn. Nov. 27, 2012).

In a wrongful death and survivor action arising from care and treatment of a nursing home resident, upon review under T.R.A.P. 13(d), a trial court conducted a thorough Hodges review of a punitive damages award and concluded that there was clear and convincing evidence of conduct evidencing a reckless disregard for the safety and well-being of the resident. McLemore v. Elizabethton Med. Investors, Ltd. P'ship, 389 S.W.3d 764, 2012 Tenn. App. LEXIS 415 (Tenn. Ct. App. June 22, 2012), appeal denied, McLemore v. Elizabethton Med. Investors LP, — S.W.3d —, 2012 Tenn. LEXIS 892 (Tenn. Nov. 27, 2012).

Pursuant to T.R.A.P. 13(d), in parties' employment dispute, the evidence did not preponderate against the trial court's finding that a

valid employment contract existed, that the contract was not terminated until the employee's resignation, and that the contract was breached by the employer when it failed to pay the employee as promised. Edmunds v. Delta Partners, L.L.C., 403 S.W.3d 812, 2012 Tenn. App. LEXIS 884 (Tenn. Ct. App. Dec. 18, 2012), rehearing denied, — S.W.3d —, 2013 Tenn. App. LEXIS 28 (Tenn. Ct. App. Jan. 9, 2013), appeal denied, Edmunds v. Delta Partners, LLC, — S.W.3d —, 2013 Tenn. LEXIS 457 (Tenn. May 9, 2013).

Pursuant to T.R.A.P. 13(d), in parties' employment dispute, the evidence supported the trial court's finding that there was no modification of the employment contract with respect to the employee's rate of compensation; although the employee was not paid due to financial difficulties of the employer, the president repeatedly assured the employee that he owed him a debt and that he would catch up the back pay. Edmunds v. Delta Partners, L.L.C., 403 S.W.3d 812, 2012 Tenn. App. LEXIS 884 (Tenn. Ct. App. Dec. 18, 2012), rehearing denied, — S.W.3d —, 2013 Tenn. App. LEXIS 28 (Tenn. Ct. App. Jan. 9, 2013), appeal denied, Edmunds v. Delta Partners, LLC, — S.W.3d —, 2013 Tenn. LEXIS 457 (Tenn. May 9, 2013).

Pursuant to T.R.A.P. 13(d), in parties' employment dispute, the evidence did not support the trial court's piercing of the veil of the employer in order to hold the president personally liable for an employee's unpaid compensation under T.C.A. §§ 48-217-101(a)(1) and 48-249-114(a)(1)(B), as the *Allen* factors did not weigh in favor of such piercing; there was no evidence to show that the president's control of the employer-limited liability company was used to commit fraud or wrong, to perpetuate the violation of a statutory or other positive legal duty, or a dishonest or unjust act in contravention of third parties' rights. Edmunds v. Delta Partners, L.L.C., 403 S.W.3d 812, 2012 Tenn. App. LEXIS 884 (Tenn. Ct. App. Dec. 18, 2012), rehearing denied, — S.W.3d —, 2013 Tenn. App. LEXIS 28 (Tenn. Ct. App. Jan. 9, 2013), appeal denied, Edmunds v. Delta Partners, LLC, — S.W.3d —, 2013 Tenn. LEXIS 457 (Tenn. May 9, 2013).

Pursuant to T.R.A.P. 13(d), in parties' employment dispute, the evidence did not support the trial court's piercing of the veil of the employer in order to hold the president personally liable for an employee's unpaid compensation under T.C.A. §§ 48-217-101(a)(1) and 48-249-114(a)(1)(B), as the assurances of payment by the president were made on behalf of the employer-limited liability company rather than by him personally; his assurances were qualified that the employee would receive compensation when the employer had the money to pay it. Edmunds v. Delta Partners, L.L.C., 403 S.W.3d 812, 2012 Tenn. App. LEXIS 884 (Tenn. Ct. App. Dec. 18, 2012), rehearing denied, — S.W.3d —, 2013 Tenn. App. LEXIS 28 (Tenn. Ct. App. Jan. 9, 2013), appeal denied, Edmunds v. Delta Partners, LLC, — S.W.3d —, 2013 Tenn. LEXIS 457 (Tenn. May 9, 2013).

There was insufficient evidence to support defendant's conviction for tampering with evidence because when defendant tossed the murder weapon into a location adjacent to the crime scene, where it lay in plain view and was easily found, defendant did not conceal the weapon within the meaning of T.C.A. § 39-16-503(a)(1); the evidence was not altered or destroyed, its discovery was delayed minimally, if at all, and the murder weapon retained its full evidentiary value. State v. Hawkins, 406 S.W.3d 121, 2013 Tenn. LEXIS 497 (Tenn. June 20, 2013).

Evidence was insufficient to support defendant's second-degree murder conviction as the state failed to prove that the victim used methamphetamine and that her use of the drug was the proximate cause of her death. No witness testified regarding the cause in fact of the victim's death. State v. Pack, 421 S.W.3d 629, 2013 Tenn. Crim. App. LEXIS 848 (Tenn. Crim. App. Sept. 27, 2013).

Proof admitted at trial was clearly legally sufficient to sustain defendant's convictions for theft over $1,000 and forgery over $1,000 because the state presented evidence that defendant falsified loan documents and pocketed money supposedly loaned to individuals whose names were on the documents; State v. McCullough, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 268 (Tenn. Crim. App. Apr. 9, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 501 (Tenn. Aug. 9, 2018), overruled in part, State v. Jones, 589 S.W.3d 747, 2019 Tenn. LEXIS 505 (Tenn. Nov. 13, 2019).

Evidence was sufficient to support defendant's conviction for theft of property valued at $1,000 or more because witnesses' testimony established the total value of all the fitness trackers taken during the five thefts; both witnesses testified that they were charged with keeping track of the fitness trackers and that they maintained logs of the items, and both testified to the manufacturer's suggested retail price of the fitness trackers at the time they were taken. State v. Jones, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 479 (Tenn. Crim. App. June 28, 2018), aff'd, 589 S.W.3d 747, 2019 Tenn. LEXIS 505 (Tenn. Nov. 13, 2019).

Each of defendant's convictions of especially aggravated sexual exploitation of a minor was based on forty photographs depicting the victim engaged in digital-vaginal penetration, penile-vaginal penetration, oral sex/fellatio, and other sexually explicit photographs of the victim. Although the photographs did not show defendant's face, there were other identifiable characteristics of defendant including his wedding ring, fingers, distinctive moles on his penis, a watch, pajamas and a bedspread and mini-fridge from defendant's bedroom. State v.

Smith, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 645 (Tenn. Crim. App. Aug. 22, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 59 (Tenn. Jan. 17, 2019).

Evidence did not preponderate against the trial court's classification of certain jewelry as the wife's separate property. Although the husband claimed that he purchased the jewelry as an investment, during cross-examination he admitted that the wife wore the jewelry during the marriage. Williams v. Williams, — S.W.3d —, 2019 Tenn. App. LEXIS 148 (Tenn. Ct. App. Mar. 26, 2019).

Proof adduced at trial was sufficient to sustain appellant's convictions for first degree premeditated murder, felony murder, attempted especially aggravated robbery, aggravated robbery, and being a felon in possession of a weapon, where multiple witnesses identified appellant as the shooter and an autopsy revealed the victim died as a result of the gunshot wound. Regarding the felon in possession of a charge, appellant stipulated that at the time of the offenses, he had been convicted of five felonies involving the use or attempted use of violence and knew it was illegal for him to own, possess or handle a firearm. State v. Harper, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 80 (Tenn. Crim. App. Feb. 6, 2019).

Defendant was properly convicted of attempted voluntary manslaughter, aggravated assault, being a convicted felon in possession of a firearm, and employing a firearm during the commission of a dangerous felony because there was sufficient evidence of defendant's guilt where the victim, who had previously been in a romantic relationship with defendant for approximately one year, identified him as the person who shot at her vehicle based on his size and body shape, and defendant himself admitted to a police investigator that he shot at the victim's car to scare her. State v. Springfield, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 122 (Tenn. Crim. App. Feb. 22, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 279 (Tenn. June 21, 2019).

Evidence was sufficient to support defendant's conviction for possession of a firearm with the intent to go armed during the commission of a dangerous felony because a trooper recovered a firearm and a baggy containing marijuana and pills from defendant's person during a search of his vehicle. State v. Barnett, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 142 (Tenn. Crim. App. Mar. 6, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 352 (Tenn. July 18, 2019).

Evidence was sufficient to support defendant's conviction for possession with intent to sell alprazolam because a trooper observed a baggy containing pills in the floorboard of defendant's truck, and defendant had no prescription for the pills. State v. Barnett, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 142 (Tenn. Crim. App. Mar. 6, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 352 (Tenn. July 18, 2019).

Evidence was sufficient to sustain defendant's conviction for exhibiting obscene material to a minor because the proof fully supported the jury's finding that defendant knew the victim was a minor at the time he sent nude photographs; defendant never confirmed that the victim was at least eighteen years old before sending the pictures. State v. Foster, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 222 (Tenn. Crim. App. Apr. 9, 2019).

Proof was sufficient to sustain defendant's conviction for aggravated rape based on his own act of sexually penetrating the victim because the jury accredited the victim's testimony that defendant sexually penetrated her without her consent and that defendant caused the bodily injury to the victim; photographs admitted at trial corroborated a nurse's testimony regarding the victim's injury to her vagina. State v. Foster, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 222 (Tenn. Crim. App. Apr. 9, 2019).

Evidence was sufficient to sustain defendant's conviction for aggravated rape because a rational jury could have found, beyond a reasonable doubt, that the victim was physically helpless when defendant sexually penetrated her; the victim testified that she "blacked out" and that when she awoke defendant was sexually penetrating her, and the jury, by its verdict, accredited her testimony. State v. Foster, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 222 (Tenn. Crim. App. Apr. 9, 2019).

Evidence was sufficient to sustain defendant's conviction for rape because the proof presented at trial supported the jury's finding that the victim never consented to defendant's sexual penetration of her; a nurse testified that she had never seen someone with a vaginal laceration like the victim's that had been caused by consensual sex. State v. Foster, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 222 (Tenn. Crim. App. Apr. 9, 2019).

Evidence was sufficient for a rational trier of fact to find, beyond a reasonable doubt, that defendant was guilty of statutory rape because the overwhelming evidence presented at trial showed that defendant knew the victim was a minor when he sexually penetrated her, and the jury, by its verdict, chose not to accredit defendant's testimony that the victim had lied to him about her age, as was its prerogative. State v. Foster, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 222 (Tenn. Crim. App. Apr. 9, 2019).

Evidence was sufficient to support the verdicts convicting defendant of possession with intent to sell and deliver cocaine and marijuana and possession of drug paraphernalia because the testimony established that the amount of drugs that he possessed was more than law enforcement officers typically encountered

when the drugs were for personal use; an officer testified that the marijuana appeared to be packaged for sale rather than personal use because it was split up into smaller amounts. State v. Green, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 240 (Tenn. Crim. App. Apr. 15, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 388 (Tenn. Aug. 16, 2019).

Evidence regarding defendant's relationship with the motel room that housed controlled substances was sufficient to establish that he was in possession of marijuana, cocaine, and drug paraphernalia because the drugs were scattered over the bed and bedside table so that an occupant of the room could not have escaped knowledge of their presence; the drugs were discovered immediately after defendant emerged from the room, and the room was otherwise unoccupied. State v. Green, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 240 (Tenn. Crim. App. Apr. 15, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 388 (Tenn. Aug. 16, 2019).

Evidence was sufficient to support defendant's conviction for failure to appear because a rationale jury could find that defendant knowingly failed to appear at an official proceeding; defendant testified about his absence from court, and by its verdict, the jury concluded that his reason for not appearing was not reasonable. State v. Mathis, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 287 (Tenn. Crim. App. May 2, 2019).

Evidence was sufficient to support defendant's conviction for sexual battery because defendant forced the victim to make unlawful sexual contact when he touched her hand to his genital area, and he forced such action for the purpose of sexual gratification; the trial court acted within its prerogative when it found the victim to be a more credible witness, and each element of the offense of sexual battery was, therefore, satisfied by her testimony. State v. Rodriguez, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 379 (Tenn. Crim. App. July 1, 2019).

Evidence was sufficient for a rational juror to have determined that defendant entered a store and committed a theft because an asset protection associate of the store observed defendant select five pairs of scrubs, conceal them in his pants, and proceed to the exit. State v. Hefner, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 381 (Tenn. Crim. App. July 2, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 191 (Tenn. Mar. 26, 2020).

Evidence was sufficient to support defendant's conviction for burglary because the state was not required to establish beyond a reasonable doubt that a store was not open to the public; the evidence admitted at trial showed that defendant had received two notices from the store that he was prohibited from entering any store property. State v. Hefner, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 381 (Tenn. Crim. App. July 2, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 191 (Tenn. Mar. 26, 2020).

Evidence was sufficient to support defendant's convictions for facilitation of felony murder in the perpetration of aggravated child abuse and felony murder in the perpetration of aggravated child neglect because defendant and the victim's mother were alone with the victim when he died, and defendant admitted that he "whooped" the victim; a doctor's testimony and photographs established that his body was covered in bruises, abrasions, and scars that evinced ongoing abuse. State v. Harris, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 708 (Tenn. Crim. App. Nov. 5, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 236 (Tenn. Mar. 26, 2020).

Evidence was sufficient to support defendant's especially aggravated robbery conviction, where the victim saw an object in defendant's hand that looked to him like the handle of a gun, the victim suffered painful injuries to one side of his face, which he testified was "shattered," and the victim's injuries took two months to heal. State v. Clay, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 3 (Tenn. Crim. App. Jan. 6, 2020).

Evidence was sufficient to establish intoxication and, consequently, vehicular homicide. Defendant's main complaint on appeal went to the weight and credibility of the evidence, but these tasks were for the jury to determine. State v. Brewer, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 221 (Tenn. Crim. App. Apr. 6, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 421 (Tenn. Aug. 6, 2020), cert. denied, Brewer v. Tennessee, — L. Ed. 2d —, — S. Ct. —, — U.S. —, 2020 U.S. LEXIS 6062 (U.S. Dec. 14, 2020).

Duct tape found at the crime scene was sufficient evidence to establish defendant's identity as a perpetrator because defendant's DNA was on the duct tape, alongside the murder victim's DNA; defendant was treated at a nearby emergency room later the day of the incident for a fractured clavicle. State v. Graham, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 275 (Tenn. Crim. App. Apr. 21, 2020).

Evidence was sufficient to support defendant's convictions of aggravated assault and domestic assault, where the evidence showed that the victim and defendant were dating and had a sexual relationship, during a tussle defendant ended up on top of the victim with his hands around her neck, and after the incident a police officer saw scratches on the victim's neck and other parts of the body. State v. Cartwright, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 384 (Tenn. Crim. App. June 2, 2020).

In a case in which defendant was convicted of two counts of aggravated robbery, there was no evidence of any bodily injury to one of the victims. Therefore, the conviction on that count was subject to reversal in its entirely and

dismissal with prejudice due to insufficient evidence. State v. Banks, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 583 (Tenn. Crim. App. Aug. 25, 2020).

In a case in which defendant was convicted of two counts of aggravated robbery, the evidence was sufficient beyond a reasonable doubt to support defendant's conviction on one of the counts. The victim testified that she was in the kitchen when the assailants broke into the house and pointed a gun at her while ordering her to the floor, and defendant himself admitted that one of his accomplices took eighty dollars from her. State v. Banks, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 583 (Tenn. Crim. App. Aug. 25, 2020).

Evidence was sufficient to support defendant's conviction for aggravated assault because the jury clearly chose to credit the victim's version of events, rejecting defendant's testimony supporting self-defense; the victim testified specifically about the manner in which defendant and co-defendant began to follow him, about his attempts to get help through 911, about the shooting, about his fleeing the scene, and about his abandoning his own weapon to seek. State v. Manning, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 615 (Tenn. Crim. App. Sept. 17, 2020).

Evidence was sufficient to support defendant's conviction for evidence supported his conviction for tampering with the firearm he used during a shooting because the jury could have inferred that defendant was in possession of a firearm, that he concealed it somewhere to prevent police from discovering it, and that he subsequently denied his involvement with the shooting; the evidence established that defendant had a gun which he used to shoot at the victim. State v. Manning, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 615 (Tenn. Crim. App. Sept. 17, 2020).

Two victims provided similar accounts to a sexual assault nurse examiner, whose physical examinations revealed mild redness in the first victim's genital area and severe redness throughout the second victim's genital area. Inasmuch as this was sufficient evidence from which the jury could find beyond a reasonable doubt that defendant sexually penetrated each victim, the evidence, viewed in the light most favorable to the State, was sufficient to sustain defendant's child rape and incest convictions. State v. Henson, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 697 (Tenn. Crim. App. Oct. 28, 2020).

20. Jury Instructions.

There was no reversible error in the trial court's refusal to issue tortfeasor's requested additional instructions to the jury since the trial court adequately instructed the jury on the issues in the case. Miller v. Choo Choo Ptnrs., L.P., 73 S.W.3d 897, 2001 Tenn. App. LEXIS 821 (Tenn. Ct. App. 2001).

Trial court's failure to instruct the jury on the defense of duress under T.C.A. § 39-11-504 did not constitute plain error under Tenn. R. Crim. P. 52(b), and therefore his conviction of unlawful possession of a handgun by a convicted felon in violation of T.C.A. § 39-17-1307(b)(1)(A) was reinstated, even though the evidence, including defendant's testimony, may have been sufficient to warrant such an instruction, because duress was never discussed as a theory of the defense and defendant expressly declined a jury instruction on self-defense, a defense closely related to duress. State v. Bledsoe, 226 S.W.3d 349, 2007 Tenn. LEXIS 368 (Tenn. Apr. 26, 2007).

In a wrongful death and survivor action arising from care and treatment of a nursing home resident, where defendants did not object to the medical malpractice jury instruction under Tenn. R. Civ. P. 51.02, and review of the issue was not necessary to achieve fairness and justice in the circumstances under T.R.A.P. 13(b) and 36(a), review thereof was declined. McLemore v. Elizabethton Med. Investors, Ltd. P'ship, 389 S.W.3d 764, 2012 Tenn. App. LEXIS 415 (Tenn. Ct. App. June 22, 2012), appeal denied, McLemore v. Elizabethton Med. Investors LP, — S.W.3d —, 2012 Tenn. LEXIS 892 (Tenn. Nov. 27, 2012).

21. De Novo Review.

In suit brought by relatives of the seller of property alleging fraud and misrepresentation arising out of the seller's mental incompetence to enter into the sale of the property, the appellate court applied a de novo review standard as the matter was tried to the court without a jury. Owen v. Summers, 97 S.W.3d 114, 2001 Tenn. App. LEXIS 953 (Tenn. Ct. App. 2001).

Partner's previous probate court claim did not destroy the trial court's jurisdiction over partition of the partnership and partnership accounting claims filed by the executrix of the deceased, the other partner in the partnership; however, pursuant to the defendant's answer and counter complaint, Tenn. R. Civ. P. 8, the trial court had jurisdiction over all the businesses in the partnership, not just the two businesses it ruled on and, therefore, it was error for the trial court to refuse the partner's claims to do a complete partnership accounting. Utter v. Sherrod, 132 S.W.3d 344, 2003 Tenn. App. LEXIS 458 (Tenn. Ct. App. 2003), rehearing denied, 132 S.W.3d 344, 2003 Tenn. App. LEXIS 974 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 231 (Tenn. Mar. 8, 2004).

Enrollment of the Mississippi judgment that the lien held by the bank had priority over the business's possessory lien in the vehicle was affirmed pursuant to de novo review because the appellate court disagreed with the business's assertion that Tennessee law concerning

priority should apply and its Tennessee common law possessory lien should retain superiority against the bank's Mississippi judgment, when Tennessee law concerning the priority of possessory liens did not constitute an "age old rule" that had seldom been questioned, but rather, Tennessee case law showed that this area of the law had undergone many changes over the course of the last several decades and had, at times, granted prior lien holders priority over holders of liens of possession. Trustmark Nat'l Bank v. Miller, 209 S.W.3d 54, 2006 Tenn. App. LEXIS 223 (Tenn. Ct. App. 2006), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 981 (Tenn. Oct. 9, 2006).

Appellate court reviewed a trial court's findings that the members of a compensation self-insured group trust in liquidation were in contempt under a de novo standard of review. State ex rel. Flowers v. Tenn. Trucking Ass'n Self Ins. Group Trust, 209 S.W.3d 602, 2006 Tenn. App. LEXIS 251 (Tenn. Ct. App. 2006), appeal denied, State ex rel. Flowers v. Tenn. Trucking Ass'n Self Ins. Group Trust & Trucking Servs., — S.W.3d —, 2006 Tenn. LEXIS 1010 (Tenn. 2006).

Appellate court could consider a father's argument on appeal that a default judgment was entered against him to terminate his parental rights without sufficient evidence even if it was not directly raised in his brief as the father had a fundamental, constitutional right to the care, custody, and control of his children, and that right must be recognized and protected by the courts. In re B.G.J., 215 S.W.3d 396, 2006 Tenn. App. LEXIS 669 (Tenn. Ct. App. 2006), appeal denied, Dep't of Children's Servs. v. S.R.J. (In re B.F.J.), — S.W.3d —, 2007 Tenn. LEXIS 187 (Tenn. Feb. 26, 2007).

Supreme Court of Tennessee held that the standard of review under T.R.A.P. 13(d) is identical to the standard of review provided for workers' compensation cases, which is set forth in T.C.A. § 50-6-225(e)(2) [under version as applicable to injuries occurring prior to July 1, 2014. See now § 50-6-225(a)(2)]. Bldg. Materials Corp. v. Britt, 211 S.W.3d 706, 2007 Tenn. LEXIS 21 (Tenn. 2007).

Trial court's resolution of which tax allocation statute controlled was not entitled to T.R.A.P. 13's presumption of correctness on appeal and the appellate court could review the issues de novo because no genuine material factual disputes were presented, and the issues presented hinged on the proper interpretation of Tennessee statutes and their application to the facts of the case. Town of Huntsville v. Scott County, 269 S.W.3d 57, 2008 Tenn. App. LEXIS 114 (Tenn. Ct. App. Feb. 28, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 665 (Tenn. Aug. 25, 2008).

Pursuant to de novo review, insurer was obligated for the entire judgment rendered in favor of the insureds, because the inability to collect from an insolvent insurance carrier constituted an original definition of uninsured motor vehicle under the uninsured motor vehicle statutes, when the definition of motor vehicle adopted in the 1982 statutory amendment, which was substantively identical to the current definition, combined the two categories of insolvency and underinsured, making collectibility from the defendant the primary consideration. Clark v. Shoaf, 302 S.W.3d 849, 2008 Tenn. App. LEXIS 798 (Tenn. Ct. App. Dec. 15, 2008), rehearing denied, — S.W.3d —, 2009 Tenn. App. LEXIS 902 (Tenn. Ct. App. Jan. 14, 2009).

Court of appeals reviewed the chancery court's findings of fact and conclusions of law as they pertained to each ground and also considered the ultimate determination that the board of education was justified in terminating a teacher's employment; in doing so, the court of appeals would ascertain whether the chancery court complied with the de novo standard of review applicable to the case. Elmi v. Cheatham Cty. Bd. of Educ., 546 S.W.3d 630, 2017 Tenn. App. LEXIS 568 (Tenn. Ct. App. Aug. 18, 2017).

22. Compensatory Damages.

In a defamation suit a jury's compensatory damage award was not set aside where material evidence was introduced at trial that showed the plaintiff's reputation and standing in the community of pilots had been impaired by defendant's defamatory letter and that plaintiff had suffered personal humiliation as a result of having to disclose the fact that he had been grounded. McWhorter v. Barre, 132 S.W.3d 354, 2003 Tenn. App. LEXIS 672 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 228 (Tenn. Mar. 8, 2004).

23. Frivolous Appeals.

Delinquent taxpayer was not permitted to escape a federal tax lien imposed on his property by deeding the property to a trust. The taxpayer's action to quiet title to the property was dismissed to prevent needless litigation, and to prevent prejudice to the judicial process. Stigall v. Lyle, 119 S.W.3d 701, 2003 Tenn. App. LEXIS 89 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 773 (Tenn. Sept. 2, 2003).

24. Findings of Fact.

In a child support proceeding, T.R.A.P. 13(b) permitted the appellate court to sua sponte review the trial court's order sentencing the father to jail for civil contempt of the child support order. The trial court's order lacked an express finding that the father was able to make the child support payments; therefore, the appellate court vacated the civil contempt sentence. Beard v. Beard, 206 S.W.3d 463, 2006 Tenn. App. LEXIS 293 (Tenn. Ct. App. 2006), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 875 (Tenn. 2006).

Court found, pursuant to its deferential review of findings of fact under T.R.A.P. 13(d), that a trial court properly ordered a tenant and his live-in aide to vacate a landlord's premises under the provisions of the federal Housing Act of 1959 because: (1) The fact that a forgery for which the aide was convicted took place roughly five years before was of no consequence as 24 C.F.R. § 5.855 authorized the landlord to obtain the aide's criminal history and did not provide any time limitation; and (2) Assuming that the landlord accepted rent after serving the notice and with full knowledge of the default, T.C.A. § 66-28-508 did not apply because federal public policy, in providing safe subsidized housing, was paramount to any policy at issue in T.C.A. § 66-28-508. Ross v. Broadway Towers, Inc., 228 S.W.3d 113, 2006 Tenn. App. LEXIS 788 (Tenn. Ct. App. Dec. 14, 2006), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 622 (Tenn. June 25, 2007), dismissed, — S.W.3d —, 2007 Tenn. LEXIS 781 (Tenn. Aug. 20, 2007), cert. denied, 169 L. Ed. 2d 389, 128 S. Ct. 543, 552 U.S. 1019, 2007 U.S. LEXIS 12037 (2007).

T.R.A.P. 13(d) governed the standard of review upon appeal where T.C.A. § 27-1-113 did not apply; many of the findings were unnecessary to determine whether the child was abandoned where the facts concerning the issue of abandonment in the supreme court's opinion reflected the preponderance of the evidence in the case. In re Adoption of A.M.H., 215 S.W.3d 793, 2007 Tenn. LEXIS 235 (Tenn. 2007).

Under T.R.A.P. 13(d), the trial court correctly determined that the claimant was entitled to judgment as a matter of law and entered summary judgment in the claimant's favor because after the trial court's order giving the company ten days to respond to the claimant's outstanding requests for admission, production of documents and interrogatories, the company made no response for four months and offered no reason or explanation for the delay; thus, the trial court was authorized to sanction the company and establish as admitted those matters that the claimant presented in its discovery request for admissions. Meyer Laminates (SE), Inc. v. Primavera Distrib., 293 S.W.3d 162, 2008 Tenn. App. LEXIS 19 (Tenn. Ct. App. Jan. 18, 2008), appeal denied, Meyer Laminates (Se), Inc. v. Primavera Distrib., Inc., — S.W.3d —, 2008 Tenn. LEXIS 594 (Tenn. Aug. 25, 2008).

Jury could have reasonably concluded that there was no violation of the Tennessee Consumer Protection Act, T.C.A. § 47-18-101, because insured referenced no evidence presented at trial showing that it suffered an ascertainable loss as a consequence of any of the alleged actions/omissions, and independent review of the record revealed no such evidence. PacTech, Inc. v. Auto-Owners Ins. Co., 292 S.W.3d 1, 2008 Tenn. App. LEXIS 548 (Tenn. Ct. App. Sept. 22, 2008).

Time at which a party knows or should have known that the adverse party would not perform as the parties' contract required is a question of fact, which is reviewed under a preponderance of the evidence standard. Coleman Mgmt. v. Meyer, 304 S.W.3d 340, 2009 Tenn. App. LEXIS 150 (Tenn. Ct. App. Apr. 22, 2009), appeal denied, — S.W.3d —, 2009 Tenn. LEXIS 745 (Tenn. Nov. 23, 2009).

Though substantial evidence supported the Tennessee Civil Service Merit Board's finding that a corrections officer's (CO's) appearance in a video, professing to be a gang member, violated the sheriff's department's rules, as neither the Board nor the trial court addressed the CO's claim that his free speech rights were violated by his termination, the case was remanded to the Board. Parker v. Shelby County Gov't Civil Serv. Merit Bd., 392 S.W.3d 603, 2012 Tenn. App. LEXIS 680 (Tenn. Ct. App. Sept. 27, 2012), appeal denied, Parker v. Shelby County Gov't Civ. Serv. Merit Bd., — S.W.3d —, 2013 Tenn. LEXIS 31 (Tenn. Jan. 9, 2013).

Pursuant to T.R.A.P. 13(d), the evidence did not preponderate against the findings of fact made by a trial court with regard to the notice of acceleration and a lender's legal possession of the note, such that foreclosure by non-judicial action, based on the deed of trust, was deemed proper; the findings were deemed dispositive. Patelco Credit Union v. Dutton, 413 S.W.3d 75, 2013 Tenn. App. LEXIS 115 (Tenn. Ct. App. Feb. 21, 2013), appeal denied, — S.W.3d —, 2013 Tenn. LEXIS 655 (Tenn. Aug. 14, 2013).

Father failed to prove that he sent the mother notice of the relocation, and the court of appeals did not consider the contents of a sealed envelope that was made an exhibit at trial because the evidence did not concern something that occurred after judgment and thus, would not properly be considered a post-judgment fact. McDonough v. McDonough, 499 S.W.3d 401, 2016 Tenn. App. LEXIS 368 (Tenn. Ct. App. May 26, 2016), appeal denied, — S.W.3d —, 2016 Tenn. LEXIS 689 (Tenn. Sept. 23, 2016).

Trial court erred in denying a mother's motion to alter or amend an order finding her guilty of criminal contempt for non-payment of child support because its failure to make specific findings of fact and conclusions of law in its order, together with its apparent failure to even consider the excessiveness of the sentence imposed, created an injustice or error of law sufficient to justify reconsideration. Burris v. Burris, 512 S.W.3d 239, 2016 Tenn. App. LEXIS 698 (Tenn. Ct. App. Sept. 20, 2016).

Trial court's valuation of marital property was vacated because it appeared that the trial violated the statutory directive found subsection (b)(1)(A), and the wife did not object to certified appraisals or to the appraisers' testimony at trial; the court of appeals could not

determine whether the trial court applied an incorrect legal standard or relied on reasoning that caused an injustice because it did not know what legal standard the trial court applied or what reasoning it employed. Trezevant v. Trezevant, 568 S.W.3d 595, 2018 Tenn. App. LEXIS 213 (Tenn. Ct. App. Apr. 25, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 622 (Tenn. Sept. 18, 2018).

Evidence did not preponderate against the Tennessee Claims Commissioner's finding that a state university's alleged negligence was not the cause in fact of student-athlete's death because the Commissioner acted within his province in assigning greater weight to the causation testimony of the state's expert than the testimony of the expert offered by the student's parents Jones v. State, — S.W.3d —, 2019 Tenn. App. LEXIS 363 (Tenn. Ct. App. July 24, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 542 (Tenn. Dec. 5, 2019).

Appellate court could not conclude that the photographic evidence preponderated against the trial court's finding that appellee had proffered no evidence that any substantial debris from appellee's property actually spilled over onto her property. Because appellant failed to meet her burden of proof, the trial court properly dismissed appellant's nuisance claim regarding debris flowing from appellee's property onto hers. Magness v. Couser, — S.W.3d —, 2020 Tenn. App. LEXIS 188 (Tenn. Ct. App. Apr. 27, 2020).

25. Termination of Parental Rights.

Termination of parental rights under T.C.A. §§ 36-1-113(g)(6) and (i) was affirmed because prior to the child's birth, the father began serving a ten-year prison sentence for felony possession of cocaine and possession with intent to sell, and there was ample evidence supporting the trial court's conclusion that termination of parental rights is in the best interest of the child. Fisher v. Young (In re K.B.H.), 206 S.W.3d 80, 2006 Tenn. App. LEXIS 246 (Tenn. Ct. App. 2006), appeal denied, In re Adoption of K. B. H., — S.W.3d —, 2006 Tenn. LEXIS 638(Tenn. 2006).

State established by clear and convincing evidence that conditions persisted that prevented the children's safe return to their mother at an early date under T.C.A. § 36-1-113(g)(3)(A) because; (1) It was undisputed that at the time of trial the mother was still living with her boyfriend, who had sexually abused the children, was financially dependent on him, and had no intention of severing her relationship with him; (2) Continuing the children's relationship with their mother would greatly diminish the children's chances of integration into a safe, stable, and permanent home; and (3) The mother refused to acknowledge and properly address her children's allegations of abuse. R.M.S. v. Orange, 223 S.W.3d 240, 2006 Tenn. App. LEXIS 823 (Tenn. Ct. App. 2006), appeal denied, Dep't of Children's Servs. v. Orange (In re R.M.S.), — S.W.3d —, 2007 Tenn. LEXIS 289 (Tenn. 2007).

Clear and convincing evidence showed that it was in the children's best interests to terminate their mother's parental rights due to her continued relationship with the man who had sexually abused them because: (1) There was ample evidence that the children had improved upon leaving their mother's custody, were doing well in school, and that their foster mother had made arrangements to adopt them; (2) It was clear that the mother had not made, and was not willing to make, an adjustment of circumstances or conditions so as to make it safe for the children to return home; and (3) It would be harmful for the children to continue a relationship with their mother. R.M.S. v. Orange, 223 S.W.3d 240, 2006 Tenn. App. LEXIS 823 (Tenn. Ct. App. 2006), appeal denied, Dep't of Children's Servs. v. Orange (In re R.M.S.), — S.W.3d —, 2007 Tenn. LEXIS 289 (Tenn. 2007).

In actions for the termination of parental rights, the appellate court reviews findings of fact by the trial court de novo on the record, with a presumption of correctness of the findings, unless the preponderance of the evidence is otherwise. In re B. W., 397 S.W.3d 105, 2013 Tenn. LEXIS 199 (Tenn. Feb. 21, 2013).

Clear and convincing evidence supported the trial court's decision to terminate a father's parental rights on the ground of failure to visit because the father stipulated and testified that he never requested a visit with the child. In re Rilyn S., — S.W.3d —, 2019 Tenn. App. LEXIS 124 (Tenn. Ct. App. Mar. 12, 2019).

Clear and convincing evidence supported the trial court's finding that termination of a father's parental rights was in the best interest of the child because there was no evidence the father made any change in his circumstances such as to make it safe or in the child's best interests to place the child in his home; there was no relationship at all between the child and the father, and it would be detrimental to the child's emotional, psychological and medical condition to change caretakers. In re Rilyn S., — S.W.3d —, 2019 Tenn. App. LEXIS 124 (Tenn. Ct. App. Mar. 12, 2019).

Clear and convincing evidence did not support the trial court's decision to terminate a father's parental rights on the ground of failure to support because there was an absence of proof of a regular income for the father; the father stated that he was doing construction work with his brother. In re Rilyn S., — S.W.3d —, 2019 Tenn. App. LEXIS 124 (Tenn. Ct. App. Mar. 12, 2019).

Clear and convincing evidence supported the finding that a father failed to manifest an ability and willingness to assume legal and physical custody of a child because based upon his course of conduct, he did not have the

ability to provide a reliable source of financial support and a stable household for the child; the father was incarcerated at the time the petition was filed, he acknowledged his criminal history and past problems with alcohol, and he had not paid child support in the past. In re Rilyn S., — S.W.3d —, 2019 Tenn. App. LEXIS 124 (Tenn. Ct. App. Mar. 12, 2019).

Clear and convincing evidence supported the trial court's termination of a father's parental rights on the ground of failure to seek to establish paternity because despite having notice of his alleged paternity, the father failed to file a petition to establish paternity within thirty days. In re Rilyn S., — S.W.3d —, 2019 Tenn. App. LEXIS 124 (Tenn. Ct. App. Mar. 12, 2019).

Clear and convincing evidence supported the trial court's determination to terminate a father's parental rights on the ground that placing custody of the child in his custody would pose a risk of substantial harm to the physical or psychological welfare of the child because the father had never met the child and had no relationship with the child; there was a significant bond between the child and his foster parents, and his removal from the foster parents would cause emotional trauma. In re Rilyn S., — S.W.3d —, 2019 Tenn. App. LEXIS 124 (Tenn. Ct. App. Mar. 12, 2019).

There was no error in the trial court's best interest analysis because it carefully considered the best interest factors set forth in the termination statute and found that the mother did not have any meaningful relationship with the child; the child was removed from the mother's care and custody shortly after birth, the mother had remained incarcerated throughout the entirety of the child's life, and the child bonded with the grandparents and was thriving in their care. In re C.S., — S.W.3d —, 2020 Tenn. App. LEXIS 197 (Tenn. Ct. App. Apr. 29, 2020).

Because a mother was sentenced to more than two years' imprisonment for conduct against the child's sibling that met the definition of severe child abuse, the trial court did not err in terminating her parental rights. In re C.S., — S.W.3d —, 2020 Tenn. App. LEXIS 197 (Tenn. Ct. App. Apr. 29, 2020).

Ground of severe child abuse was proven by clear and convincing evidence because the child's brother was injured while in the mother's care and treated for skull fractures and subdural hematoma, for which the mother pleaded guilty to child abuse with serious injuries, unlawful wounding of a child, and cruelty to a child. In re C.S., — S.W.3d —, 2020 Tenn. App. LEXIS 197 (Tenn. Ct. App. Apr. 29, 2020).

26. Zoning Ordinance.

Denial of application for an adult book and video store was affirmed because the zoning ordinance was content-neutral, the ordinance was aimed at combating the adverse secondary effects of adult businesses, and the decision to place restrictions on the location of adult businesses was not arbitrary, as it was not more burdensome than necessary in combating the adverse secondary effects associated with adult businesses; the zoning ordinance was not so restrictive that it provided no location or alternative for the applicant's lawful operation, and the ordinance used plain language, the meaning of which was clear. City of Cleveland v. Wade, 206 S.W.3d 51, 2006 Tenn. App. LEXIS 143 (Tenn. Ct. App. 2006), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 718 (Tenn. Aug. 21, 2006).

27. Waiver.

Because an appellant did not challenge a chancery court's determination that an agreement for support was unenforceable under Tennessee law, the appellate court considered the issue waived. Winebrenner v. Godwin, — S.W.3d —, 2019 Tenn. App. LEXIS 195 (Tenn. Ct. App. Apr. 25, 2019).

Former wife waived the wife's arguments concerning the proper classification of an obligation contained in the parties' marital dissolution agreement as an alimony obligation rather than as a division of marital debt that was extinguished upon the foreclosure of the subject property by not raising the argument in the trial court. McCormick v. McCormick, — S.W.3d —, 2020 Tenn. App. LEXIS 93 (Tenn. Ct. App. Mar. 4, 2020).

Although in the concluding sentence of appellee's responsive brief, appellee requested that the appellate court award attorney's fees to appellee, appellee did not raise an issue concerning attorney's fees on appeal in appellee's statement of the issues. Therefore, the appellate court deemed appellee's request for attorney's fees on appeal to have been waived. Adams v. Adams, — S.W.3d —, 2020 Tenn. App. LEXIS 199 (Tenn. Ct. App. Apr. 29, 2020).

Inasmuch as a lessor failed to raise the award of attorney's fees as an issue in its statement of the issues, the appellate court deemed the lessor's request for an award of attorney's fees to be waived. Southeast Diamond Jubilee Invs., LLC v. Uma Shiv, Inc., — S.W.3d —, 2020 Tenn. App. LEXIS 539 (Tenn. Ct. App. Nov. 30, 2020).

28. Illustrative Cases.

Where a candidate lost a judicial election by 119 votes and alleged that irregularities involving the time limit for voting, the use of paper ballots, and evidence of identification warranted a new election, the complaint was properly dismissed in part because the allegations of misconduct on the part of election officials were insufficient to taint the election; however, the complaint stated a cause of action upon which relief could be granted on the basis that the number of claimed illegal votes cast was 120 or more. Stuart v. Anderson County Elec-

tion Comm'n, 237 S.W.3d 297, 2007 Tenn. App. LEXIS 215 (Tenn. Ct. App. Apr. 13, 2007), rehearing denied, 237 S.W.3d 297, 2007 Tenn. App. LEXIS 824 (Tenn. Ct. App. 2007), rehearing denied, 237 S.W.3d 297, 2007 Tenn. App. LEXIS 823 (Tenn. Ct. App. 2007), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 831 (Tenn. Sept. 17, 2007).

Trial court erred by interpreting the court's earlier opinion as conclusively deciding that the testator's third codicil had not been revoked, had been lost or destroyed, and that the contents were the same as the contents of the purported copy, and therefore the trial court erred by granting the widow summary judgment under the law of the case doctrine; rather, the court's prior opinion stated that nothing in its opinion prevented the testator's daughters from also contesting the will and all three codicils if that was their desire, and on remand the trial court was to require the daughters to state whether they were contesting the testator's will or any of the codicils, and if so, the basis for their contest. In re Estate of Boote, 265 S.W.3d 402, 2007 Tenn. App. LEXIS 818 (Tenn. Ct. App. Dec. 27, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 384 (Tenn. May 27, 2008).

Where employee had surgery for neck injuries and returned to work for 16 months before retiring, trial court properly found that the higher ceiling on permanent partial disability benefits in T.C.A. § 50-6-241(b) [version applicable to injuries occurring prior to July 1, 2014; now deleted] applied because employee's return to work was not meaningful since the retirement was reasonably related to the employee's previous neck injuries; it was not reversible error to accept parties' decision to treat the neck condition in 2005 as resulting from the first two neck injuries rather than a subsequent third unidentified neck injury. Tryon v. Saturn Corp., 254 S.W.3d 321, 2008 Tenn. LEXIS 364 (Tenn. May 20, 2008).

Denial of a petition filed by appellants, the decedent's widow and stepdaughters, to recognize and establish a copy of the decedent's will as his last will and testament, was affirmed because appellants failed to present sufficient evidence to overcome the strong presumption that the decedent revoked the lost will, as: (1) The evidence did not show that the decedent was mentally incapable of revoking his will; (2) Defendant's failure to advise his attorney or his best friend of the revocation did not constitute clear and convincing evidence that will was not revoked; (3) The evidence did not indicate such a disparity in the relationship between appellants and the decedent's daughter as to necessitate the conclusion that the decedent would not have revoked his will to favor one party over the other; and (4) There was no basis for concluding that any party with access to the will other than the decedent either destroyed or lost it. In re Estate of Leath, 294 S.W.3d 571, 2008 Tenn. App. LEXIS 123 (Tenn. Ct. App. Mar. 3, 2008), appeal denied, Estate of Leath v. Wilkerson, — S.W.3d —, 2008 Tenn. LEXIS 705 (Tenn. Sept. 15, 2008).

Trial court did not err by granting a shareholder's motion for involuntary dismissal under Tenn. R. Civ. P. 41.02 in a customer's action to recover the money she paid for a hot tub that was never delivered due to the corporation's ceasing to operate because the shareholder was divested of title to any shares of the corporation's stock and received only attorney fees and costs. Pamperin v. Streamline Mfg., 276 S.W.3d 428, 2008 Tenn. App. LEXIS 154 (Tenn. Ct. App. Mar. 17, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 771 (Tenn. Oct. 6, 2008).

Trial court erred by granting a shareholder's motion for involuntary dismissal under Tenn. R. Civ. P. 41.02 in a customer's action to recover the money she paid for a hot tub that was never delivered due to the corporation's ceasing to operate because the value of the property that was transferred to the shareholder clearly exceeded the lien debt, so that an equity interest should have been available to pay the corporation's other creditors; because the shareholder directed all of the corporation's assets to his own personal use, the corporation became unable to fulfill its existing obligations to its creditors, and therefore piercing the corporate veil to impose liability on the shareholder was proper. Pamperin v. Streamline Mfg., 276 S.W.3d 428, 2008 Tenn. App. LEXIS 154 (Tenn. Ct. App. Mar. 17, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 771 (Tenn. Oct. 6, 2008).

Homeowners were properly awarded damages for breach of a home construction contract and violation of the Tennessee Consumer Protection Act, T.C.A. § 47-18-101 et seq., because: (1) Contractors failed to construct the house in a workmanlike manner; (2) Contractors intentionally concealed the fact that they were not bonded; and (3) Homeowners did not abandon the contract since funding for construction of the house continued until work ceased and contractors' employment was not terminated. Bowling v. Jones, 300 S.W.3d 288, 2008 Tenn. App. LEXIS 293 (Tenn. Ct. App. May 16, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 901 (Tenn. Dec. 8, 2008).

Appellate court was unable to find that trial court abused discretion or that overall property distribution was not equitable because trial court correctly valued the husband's 401k as of a date as near as reasonably possible to the final divorce hearing when the wife and the husband were not legally separated prior to trial, and the house was not subject to classification and distribution in the divorce, when the agreement constituted a rent-to-own contract on the house and neither party had any ownership interest in the house. Bunch v. Bunch, 281

S.W.3d 406, 2008 Tenn. App. LEXIS 374 (Tenn. Ct. App. June 30, 2008), appeal denied, — S.W.3d —, 2009 Tenn. LEXIS 171 (Tenn. Jan. 20, 2009).

On appeal from attorney disciplinary proceedings, the attorney's argument that the hearing panel's decision was "made upon unlawful procedure" because a panel member and an attorney witness were later disciplined was rejected because it was not appropriately supported by record evidence or facts which could be judicially noticed, pursuant to T.R.A.P. 13(c) and T.R.A.P. 14. Threadgill v. Bd. of Prof'l Responsibility of the Supreme Court of Tenn., 299 S.W.3d 792, 2009 Tenn. LEXIS 736 (Tenn. Nov. 30, 2009), overruled in part, Lockett v. Bd. of Prof'l Responsibility, 380 S.W.3d 19, 2012 Tenn. LEXIS 469 (Tenn. July 3, 2012).

When a mother voluntarily dismissed a wrongful death suit against a railroad and a conductor brought in the mother's individual capacity, as well as the mother's representative capacity as administratrix of the decedent's estate, and a trial court awarded discretionary costs against the mother, the mother could argue on appeal that the trial court lacked subject matter jurisdiction to award such costs, despite failing to raise the issue before the trial court, because subject matter jurisdiction could be raised in any court at any time. Freeman v. CSX Transp., Inc., 359 S.W.3d 171, 2010 Tenn. App. LEXIS 691 (Tenn. Ct. App. Nov. 3, 2010).

Defendant was entitled to reversal of his conviction for contempt, which was based on fact he talked to a client's codefendant who was represented by another attorney, because the evidence was insufficient to show "willful misconduct" for purposes of contempt; defendant vigorously contended that he had effective consent by virtue of the close cooperation of both attorneys in preparing a joint defense and the other attorney testified that he would have permitted the attorney to ask his client the question had the attorney sought permission. State v. Beeler, 387 S.W.3d 511, 2012 Tenn. LEXIS 810 (Tenn. May 9, 2012).

Images found in unallocated space on defendant's computer were sufficient to support defendant's convictions for sexual exploitation of a minor, as the evidence showed that the images had to have been manually downloaded and defendant's search history evinced that he knowingly sought out child pornography. State v. Aguilar, 437 S.W.3d 889, 2013 Tenn. Crim. App. LEXIS 1101 (Tenn. Crim. App. Dec. 18, 2013), appeal denied, — S.W.3d —, 2014 Tenn. LEXIS 436 (Tenn. May 16, 2014).

Although the issues which a pro se prisoner sought to argue would have been more clearly raised had the prisoner been represented by counsel in the proceedings below, the appellate court found that the prisoner sufficiently raised to the lower courts the multiple procedural deficiencies in the forfeiture proceedings, so that the court exercised its discretion to address the important due process issues raised regarding the procedural deficiencies in the forfeiture proceedings. State v. Sprunger, 458 S.W.3d 482, 2015 Tenn. LEXIS 177 (Tenn. Mar. 9, 2015), rehearing denied, — S.W.3d —, 2015 Tenn. LEXIS 258 (Tenn. Mar. 16, 2015).

Trial court properly ordered forfeiture of the $1,098,050 cash seized when a search warrant was executed. The state satisfied its burden of establishing by a preponderance of the evidence that the cash was subject to forfeiture based on defendant's conspiracy convictions arising from 2012 drug trafficking activities. State v. Tuttle, 515 S.W.3d 282, 2017 Tenn. LEXIS 190 (Tenn. Apr. 5, 2017).

Trial court did not err in finding that a business was marital property because sufficient evidence supported its conclusion of transmutation of any of the business that could have ever been a husband's separate property; marital funds were used to purchase the later-acquired properties that comprised the business, all of the various properties the parties owned were under the umbrella of a corporation that was a marital asset, and the business, was held out as the parties' joint property. Trezevant v. Trezevant, 568 S.W.3d 595, 2018 Tenn. App. LEXIS 213 (Tenn. Ct. App. Apr. 25, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 622 (Tenn. Sept. 18, 2018).

Evidence does not preponderate against the trial court's determination that a husband dissipated the more than $2 million dollars that he transferred to his attorney during the divorce proceedings because the record showed that the husband transferred the money during the course of the divorce to an associate in the Cayman Islands without any evidence that the friend was entitled to that sum of money; the husband was unable to identify what the friend's expenses were when asked about them at trial. Trezevant v. Trezevant, 568 S.W.3d 595, 2018 Tenn. App. LEXIS 213 (Tenn. Ct. App. Apr. 25, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 622 (Tenn. Sept. 18, 2018).

Trial court did not err in finding a husband guilty of criminal contempt for failure to disclose his ownership interest in property because the trial court explained its findings regarding the propery in substantial detail and concluded that the husband's testimony regarding the property was emblematic of his overall disregard for his sworn oath; the record did not preponderate against the trial court's findings. Trezevant v. Trezevant, 568 S.W.3d 595, 2018 Tenn. App. LEXIS 213 (Tenn. Ct. App. Apr. 25, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 622 (Tenn. Sept. 18, 2018).

Trial court properly determined that real properties were marital property because the evidence did not preponderate against its findings that the husband had no credibility and

that since, by the husband's own admission, the properties were worthless when he acquired them, the entire values of the properties were marital property by virtue of his use of marital funds to contribute to the preservation and appreciation of the property's interest. Trezevant v. Trezevant, 568 S.W.3d 595, 2018 Tenn. App. LEXIS 213 (Tenn. Ct. App. Apr. 25, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 622 (Tenn. Sept. 18, 2018).

Although defendant claimed that the drugs were only for his personal use, the jury was entitled to discredit him and accredit the testimony of the experienced drug enforcement officers about the typical amount of drugs purchased by the average user and thus, the evidence was sufficient to support defendant's convictions for possession of heroin with the intent to deliver, a Class B felony and possession of methamphetamine with intent to deliver, a Class C felony. State v. Rodgers, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 657 (Tenn. Crim. App. Aug. 24, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 63 (Tenn. Jan. 18, 2019).

Preponderance of the evidence supported the trial court's determination that a decedent's son had not advanced a combination of suspicious circumstances that would sustain a finding of a confidential relationship between the decedent and his daughter. The son did not establish that the daughter had opportunities to sequester the decedent in order to exert dominion and control over him. In re Estate of Caldwell, — S.W.3d —, 2019 Tenn. App. LEXIS 114 (Tenn. Ct. App. Mar. 7, 2019).

Preponderance of the evidence supported the trial court's determination that a decedent was of sound mind and had the required mental capacity to execute a November 2012 will. Although the evidence in the record on appeal showed that the decedent suffered at least one stroke within two to three months before the execution of the November 2012 will, the record also revealed that the strokes suffered by the decedent did not cause him to suffer any significant diminishment of mental capacity. In re Estate of Caldwell, — S.W.3d —, 2019 Tenn. App. LEXIS 114 (Tenn. Ct. App. Mar. 7, 2019).

Trial court's classification of a fifth wheel camper as marital property because its finding that a husband and a wife owned the camper when the divorce action was initiated was supported by the wife's testimony, her aunt's testimony, photographs, and documentary evidence; the husband pointed to nothing in the record other than his own testimony that contradicted the trial court's finding. Parker v. Parker, — S.W.3d —, 2019 Tenn. App. LEXIS 173 (Tenn. Ct. App. Apr. 9, 2019).

Trial court erred by declining to find a husband in civil contempt of court for failure to comply with the alimony provision of the parties' marital dissolution agreement because the evidence preponderated against its determination that the husband's failure to comply was not willful; also, the evidence preponderated in favor of a determination that the husband's failure to pay was intentional and voluntary because he had the assets available to him to pay but chose not to do so. Lattimore v. Lattimore, — S.W.3d —, 2019 Tenn. App. LEXIS 177 (Tenn. Ct. App. Apr. 12, 2019).

Property owners failed to show that the evidence preponderated against a trial court's determination of the boundary line between adjoining properties. The trial court put more credence into the testimony of the seller of the adjoining properties that the seller erected the privacy fence where the seller believed the property line was between the properties and that the seller treated the privacy fence as the boundary between the properties. Weber v. Kroeger, — S.W.3d —, 2019 Tenn. App. LEXIS 503 (Tenn. Ct. App. Oct. 10, 2019).

Trial court properly awarded a county clerk funding for a new full-time employee in place of a half-time employee, as well as two part-time employees for when county chancery court was in session, because the evidence did not preponderate against its finding that the clerk's workspace was so structurally inefficient that her office required more staff; the clerk presented evidence that, between an antiquated workspace and the loss of key experienced staff, she was unable to discharge her duties. Armstrong v. Morrison, — S.W.3d —, 2019 Tenn. App. LEXIS 540 (Tenn. Ct. App. Nov. 7, 2019).

Trustee's argument that, because the decedent's estate lacked standing, the appellate court did not have subject matter jurisdiction to adjudicate the issues raised on appeal, was without merit because the trustee conflated the doctrine of standing with the appellate court's subject matter jurisdiction to adjudicate the issues raised on appeal. In addition, the trustee failed to raise the issue of standing in the trial court, and the issue could not be raised for the first time on appeal. In re Conservatorship of Cross, — S.W.3d —, 2020 Tenn. App. LEXIS 449 (Tenn. Ct. App. Oct. 9, 2020).

Dismissal of a pro se litigant's appeal was appropriate because the litigant's brief and reply brief contained several deficiencies and hindered the appellate court's ability to ascertain the gravamen of the litigant's arguments. The litigant repeatedly referred in briefs to matters that were not within the appellate record, failed to cite relevant authority in argument, raised issues that were not included in the statement of issues presented for review, and referenced the litigant's own arguments rather than the evidence at trial. Vazeen v. US Med, — S.W.3d —, 2020 Tenn. App. LEXIS 589 (Tenn. Ct. App. Dec. 22, 2020).

Post-conviction court did not err in denying petitioner post-conviction relief because he failed to show that trial counsel's performance

was deficient for failure to make a motion for a change of venue; trial counsel consulted with attorneys experienced in cases involving a change of venue, and based on his research and the facts of petitioner's case, he believed that petitioner's risk of conviction could have been greater if the case was tried before a more conservative jury. Logan v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 139 (Tenn. Crim. App. Feb. 26, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 397 (Tenn. July 20, 2020).

Trial court properly granted an order of protection to an ex-boyfriend against his ex-girlfriend because its factual findings demonstrated that the ex-boyfriend was a domestic abuse victim, that he and the ex-girlfriend were formerly in a relationship, and that she threatened him, putting him in fear of physical harm; the record contained no evidence that would preponderate against the trial court's findings. Thomas v. Gallman, — S.W.3d —, 2021 Tenn. App. LEXIS 117 (Tenn. Ct. App. Mar. 24, 2021).

29. Standard of Review.

In the absence of any administrative proceedings in a civil forfeiture proceeding, for want of a better option, an appellate court applied the standard of review applicable to appellate review of a bench trial, instead of the standard utilized for judicial review of an administrative decision. Therefore, the court reviewed the trial court's findings of fact de novo on the record and reviewed the trial court's legal conclusions de novo. State v. Sprunger, 458 S.W.3d 482, 2015 Tenn. LEXIS 177 (Tenn. Mar. 9, 2015), rehearing denied, — S.W.3d —, 2015 Tenn. LEXIS 258 (Tenn. Mar. 16, 2015).

Rule 14. Consideration of Post-Judgment Facts in the Appellate Court. — (a) Power to Consider Post-Judgment Facts. — The Supreme Court, Court of Appeals, or Court of Criminal Appeals on its motion or on motion of a party may consider facts concerning the action that occurred after judgment. Consideration of such facts lies in the discretion of the appellate court. While neither controlling nor fully measuring the court's discretion, consideration generally will extend only to those facts, capable of ready demonstration, affecting the positions of the parties or the subject matter of the action such as mootness, bankruptcy, divorce, death, other judgments or proceedings, relief from the judgment requested or granted in the trial court, and other similar matters. Nothing in this rule shall be construed as a substitute for or limitation on relief from the judgment available under the Tennessee Rules of Civil Procedure or the Post-Conviction Procedure Act.

(b) Motion to Consider Post-Judgment Facts. — A motion in the Supreme Court, Court of Appeals, or Court of Criminal Appeals to consider post-judgment facts pursuant to subdivision (a) of this rule shall be made in the manner provided in Rule 22. The appellate court may grant or deny the motion in whole or in part and subject to such conditions as it may deem proper.

(c) Procedure for Consideration of Post-Judgment Facts. — If a motion to consider post-judgment facts is granted or the appellate court acts on its own motion, the court, by appropriate order, shall direct that the facts be presented in such manner and pursuant to such reasonable notice and opportunity to be heard as it deems fair.

Advisory Commission Comments. Although the appellate court should generally consider only those facts established at trial, it occasionally is necessary for the appellate court to be advised of matters arising after judgment. These facts, unrelated to the merits and not genuinely disputed, are necessary to keep the record up to date. This rule gives the appellate court discretion to consider such facts. This rule is not intended to permit a retrial in the appellate court.

Compiler's Notes. In the first sentence of (a), "or Court of Criminal Appeals" was substituted by the compiler for "and Court of Criminal Appeals."

The Post-Conviction Procedure Act referred to in (a) is compiled in Tenn. Code Ann. § 40-30-101 et seq.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), No. 2-14-1.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 27, 98, 129, 249; 4 Tenn. Juris., Bankruptcy, § 18.

Law Reviews. The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 1.

NOTES TO DECISIONS

Analysis

1. Constitutionality.
2. Purpose of Motion Under Rule.
3. Aid of Appellate Jurisdiction.
4. Court Opinions.
5. Timeliness.
6. Facts Subject to Consideration.
7. Subsequent Litigation.
8. Limitation on Appellate Jurisdiction.

1. Constitutionality.

A statute permitting appellate courts to receive additional evidence would be unconstitutional if construed to authorize prolongation or renewal of the trial of issues of fact or appeal; however, it would be constitutional if interpreted as merely providing a means of exercising its appellate jurisdiction. Accordingly, the scope of such evidence is limited so as not to include what would be mere cumulative evidence, nor evidence which it would be possible to controvert or dispute in the trial court, nor concerning the effect of which there might be differences of opinion, or from which different conclusions could possibly be drawn. Duncan v. Duncan, 672 S.W.2d 765, 1984 Tenn. LEXIS 815 (Tenn. 1984).

2. Purpose of Motion Under Rule.

The purpose of a motion under T.R.A.P. 14 is to bring before the court material facts that arise after judgment and not to vary or augment a trial stipulation with facts extant at the time of its entry. State v. Doe, 588 S.W.2d 549, 1979 Tenn. LEXIS 499 (Tenn. 1979), superseded by statute as stated in, State v. Bridges, — S.W.2d —, 1996 Tenn. Crim. App. LEXIS 433 (Tenn. Crim. App. July 26, 1996); Office of Disciplinary Counsel v. McKinney, 668 S.W.2d 293, 1984 Tenn. LEXIS 769 (Tenn. 1984).

In an action stemming from an automobile accident, while the driver's subsequent death was undisputed, the manufacturer's purpose in presenting that fact for consideration was not unrelated to the merits; to the contrary, the manufacturer was essentially asking for a retrial on damages based on the fact, only known postjudgment, that the driver did not reach her estimated life-expectancy, and that was simply not the intended purpose of T.R.A.P. 14. Duran v. Hyundai Motor Am., Inc., 271 S.W.3d 178, 2008 Tenn. App. LEXIS 79 (Tenn. Ct. App. Feb. 13, 2008), rehearing denied, 271 S.W.3d 178, 2008 Tenn. App. LEXIS 127 (Tenn. Ct. App. Feb. 27, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 632 (Tenn. Aug. 25, 2008).

3. Aid of Appellate Jurisdiction.

Insofar as a trial court hears new evidence pursuant to a remand under the authority of T.R.A.P. 14, it is acting in aid of the court of appeals' appellate jurisdiction and is bound accordingly. Duncan v. Duncan, 672 S.W.2d 765, 1984 Tenn. LEXIS 815 (Tenn. 1984).

4. Court Opinions.

T.R.A.P. 14 contemplated facts concerning the action that occurred after judgment; opinions in state or federal courts were not facts that fell under T.R.A.P. 14 and were not to be considered in evidence. Office of Disciplinary Counsel v. McKinney, 668 S.W.2d 293, 1984 Tenn. LEXIS 769 (Tenn. 1984).

When a Tennessee trial court granted an attorney's motion under the Uniform Interstate Depositions and Discovery Act, T.C.A. § 24-9-206, for a protective order and quashed a subpoena issued and served at the request of adult clubs as a part of their discovery in a Florida case, the clubs' appeal of the ruling was rendered moot by the dismissal of the underlying Florida action. Cheetah Lounge v. Sarasota County (In re Cheetah Lounge), 387 S.W.3d 10, 2012 Tenn. App. LEXIS 351 (Tenn. Ct. App. May 31, 2012), appeal denied, Cheetah Lounge, Inc. v. Sarasota County, — S.W.3d —, 2012 Tenn. LEXIS 788 (Tenn. Oct. 17, 2012).

5. Timeliness.

The time restraints applicable to Tenn. R. Civ. P. 60 motions to be applied in the trial courts, are those expressed in Tenn. R. Civ. P. 60.02, without regard to the status of an appeal. If the Rule 60 proceedings are concluded in the trial court while the appeal is still pending, it may be brought to the appellate courts by a motion under T.R.A.P. 14 for consideration of post-judgment facts. In the appellate courts, the issue of timeliness will be governed by a reasonable time rule, considering the posture of the case at the time the motion and the record of the proceedings in the trial court are presented. Andrews Distrib. Co. v. Oak Square at Gatlinburg, 757 S.W.2d 663, 1988 Tenn. LEXIS 274 (Tenn. 1988), overruled in part, Spence v. Allstate Ins. Co., 883 S.W.2d 586, 1994 Tenn. LEXIS 251 (Tenn. 1994).

6. Facts Subject to Consideration.

A motion to consider post-judgment facts generally must be unrelated to the merits, and

lies within the discretion of the court. Dandridge v. Patterson, 827 S.W.2d 797, 1991 Tenn. App. LEXIS 893 (Tenn. Ct. App. 1991), appeal denied, — S.W.2d —, 1992 Tenn. LEXIS 264 (Tenn. Mar. 16, 1992).

T.R.A.P. 14 may not be used to relitigate the value of assets that were divided between the parties in divorce action, even if that value has changed. Wade v. Wade, 897 S.W.2d 702, 1994 Tenn. App. LEXIS 388 (Tenn. Ct. App. 1994), rehearing denied, 897 S.W.2d 702, 1994 Tenn. App. LEXIS 703 (Tenn. Ct. App. 1994), appeal denied, — S.W.2d —, 1995 Tenn. LEXIS 155 (Tenn. 1995).

Although the trial judge in a divorce action agreed to allow a post-trial deposition which became part of the appellate record, the appellate court would not consider the deposition on appeal since it was neither presented to nor considered by the trial judge. Kinard v. Kinard, 986 S.W.2d 220, 1998 Tenn. App. LEXIS 543 (Tenn. Ct. App. 1998), modified, 986 S.W.2d 220, 1998 Tenn. App. LEXIS 598 (Tenn. Ct. App. 1998).

Motion for consideration of post-judgment facts was improper and properly denied given that it did not contain post-judgment facts but rather reasserted matters that had been denied by the trial court and were not appealed at all by petitioner; also, relief based on DNA analysis could be sought upon making the required showing pursuant to the appropriate procedure under T.C.A. § 40-30-401 (now 40-30-301). Nichols v. State, 90 S.W.3d 576, 2002 Tenn. LEXIS 419 (Tenn. 2002).

In a juvenile case, an appellate court improperly determined the custody of a juvenile defendant during oral argument; since the court of appeals was acting on its own motion, it should have directed that the facts be presented in such manner and pursuant to such reasonable notice and opportunity to be heard as it deemed fair under T.R.A.P. 14. State v. Rodgers, 235 S.W.3d 92, 2007 Tenn. LEXIS 744 (Tenn. Aug. 17, 2007).

On appeal from attorney disciplinary proceedings, the attorney's argument that the hearing panel's decision was "made upon unlawful procedure" because a panel member and an attorney witness were later disciplined was rejected because it was not appropriately supported by record evidence or facts which could be judicially noticed, pursuant to T.R.A.P. 13(c) and T.R.A.P. 14. Threadgill v. Bd. of Prof'l Responsibility of the Supreme Court of Tenn., 299 S.W.3d 792, 2009 Tenn. LEXIS 736 (Tenn. Nov. 30, 2009), overruled in part, Lockett v. Bd. of Prof'l Responsibility, 380 S.W.3d 19, 2012 Tenn. LEXIS 469 (Tenn. July 3, 2012).

In a tenant's appeal from an order that granted a housing authority's request to evict him, the housing authority's request to consider the post-judgment fact that the tenant had surrendered the possession of the premises already was warranted pursuant to T. R. A. P. 14(a) with respect to determining whether the matter was moot. Harriet Tubman Dev. v. Locklin, 386 S.W.3d 239, 2012 Tenn. App. LEXIS 353 (Tenn. Ct. App. May 31, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 789 (Tenn. Oct. 17, 2012).

Father failed to prove that he sent the mother notice of the relocation, and the court of appeals did not consider the contents of a sealed envelope that was made an exhibit at trial because the evidence did not concern something that occurred after judgment and thus, would not properly be considered a post-judgment fact. McDonough v. McDonough, 499 S.W.3d 401, 2016 Tenn. App. LEXIS 368 (Tenn. Ct. App. May 26, 2016), appeal denied, — S.W.3d —, 2016 Tenn. LEXIS 689 (Tenn. Sept. 23, 2016).

7. Subsequent Litigation.

New lawsuits filed by the defendant would not be considered on appeal since the allegations therein had not been tested in the trial court, and they went to the merits of the case. Book-Mart v. National Book Warehouse, 917 S.W.2d 691, 1995 Tenn. App. LEXIS 672 (Tenn. Ct. App. 1995).

8. Limitation on Appellate Jurisdiction.

Since the ability of the appellate courts to receive and hear evidence not presented in the trial court is severely restricted, a party is not necessarily afforded a meaningful opportunity to present evidence and be heard merely because an issue had been raised and determined in the appellate courts. State v. Hicks, 55 S.W.3d 515, 2001 Tenn. LEXIS 658 (Tenn. 2001).

Rule 15. Voluntary Dismissal. — (a) Where to File Dismissal. — An appeal may be dismissed by filing in the appellate court a stipulation for dismissal signed by all parties or on motion and notice by appellant. Any party wanting to litigate appellate issues despite dismissal of the original appeal must provide notice of such intent in a response to the motion to dismiss. A copy of the dismissal shall be filed by the clerk of the appellate court with the clerk of the trial court. If the record has not been filed with the clerk of the appellate court, the clerk of the trial court shall file a copy of the appeal bond with the clerk of the appellate court.

(b) Dismissal After Permission to Appeal Granted. — If an application for permission to appeal has been granted under Rule 11 and all parties thereafter wish to have the appeal dismissed, the appellant shall file a motion and proposed order with the clerk of the Supreme Court.

(c) Dismissal Contingent on Settlement Agreement. — If the parties agree to settle a case on appeal and the settlement agreement is subject to the approval of the trial court, the parties shall file a motion in the appellate court asking the court to remand the case to the trial court for the limited purpose of considering the proposed settlement. If the trial court approves the settlement upon remand, the parties jointly shall file in the appellate court a motion to dismiss the appeal; the motion shall provide for the assessment of costs on appeal and shall be accompanied by a copy of the settlement agreement and the trial court's order approving that settlement. If the trial court disapproves the settlement, the appellant shall file a notice in the appellate court stating that the trial court disapproved the settlement, in which case the appeal shall proceed under these rules. A motion to dismiss the appeal based upon the trial court's approval of a settlement or a notice of the trial court's disapproval shall be filed within 30 days of the trial court's order. [As amended by order entered January 23, 1986, effective August 1, 1986; and by order entered February 12, 1986; and by order effective July 1, 1996; by order effective July 1, 1997; by order effective July 1, 1998; and by order filed January 31, 2002, effective July 1, 2002; and by order filed January 31, 2003, effective July 1, 2003.]

Advisory Commission Comments [2002]. See internal rule 11 of the Court of Criminal Appeals as it applies to defendants in criminal cases.

The new second sentence in Rule 15(a) provides a procedure for keeping some appellate issues viable despite the original appellant's dismissal.

Advisory Commission Comments [2003]. New paragraph (c) states the procedure for dismissing an appeal based upon a settlement that is subject to the trial court's approval.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 31, 2003, was ratified and approved by 2003 House Resolution 19 and Senate Resolution 9. The order promulgating the 2003 amendment of this rule provided that it take effect on July 1, 2003.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 2-15-1 — 2-15-4.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, § 111.

Law Reviews. The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 1.

Attorney General Opinions. Voluntary dismissal, OAG 88-175 (9/23/88).

Rule 16. Joint and Consolidated Appeals. — (a) Joint Appeals. — If two or more persons are entitled to appeal from a judgment or order and their interests are such as to make joinder practicable, they may proceed on appeal jointly. If two or more persons file separate notices of appeal from one judgment or order, the case shall be docketed in the appellate court as a single appeal.

(b) Consolidated Appeals. — When separate appeals involving a common question of law or common facts are pending before the appellate court, the appeals may be consolidated by order of the appellate court on its own motion or on motion of a party. [As amended by order entered January 6, 2005, effective July 1, 2005.]

Advisory Commission Comments [2005]. Paragraph (a) is amended to harmonize this rule with the 2004 amendment to Rule 3(f) (regarding content of notice of appeal). Under paragraph (a) parties either may file a joint notice of appeal in compliance with Rule 3(f) or

they may file separate notices of appeal. In either situation, when parties are seeking to appeal from a single judgment or order, the case will be docketed as a single appeal. Paragraph (b) is amended to clarify that appeals from separate cases may be consolidated on the court's own motion or on motion of a party, when the separate cases involve a common question of law or a common set of facts.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 6, 2005, was ratified and approved by House Resolution 14 and Senate Resolution 10. The order promulgating the amendment of this rule provided that it take effect July 1, 2005.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), No. 2-16-1.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 27, 47, 52, 219.

Law Reviews. The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 1.

Rule 17. Transfer of Cases Appealed to the Wrong Court. — If a case is appealed to the Supreme Court, Court of Appeals, or Court of Criminal Appeals that should have been appealed to another court, the case shall be transferred to the proper court.

Advisory Commission Comments. This rule simply provides that cases appealed to the wrong appellate court shall be transferred to the proper appellate court.

Compiler's Notes. T.R.A.P. 17 may affect Tenn. Code Ann. § 16-5-110.

Textbooks. Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, § 17.

Law Reviews. The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 1.

The Theoretical Foundations of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 45 Tenn. L. Rev. 161.

NOTES TO DECISIONS

ANALYSIS

1. Construction.
2. Transfer.

1. Construction.

This rule does not provide any statutory authority for the transfer of an appeal from chancery court to circuit court. Graves v. Kraft Gen. Foods, 45 S.W.3d 584, 2000 Tenn. App. LEXIS 692 (Tenn. Ct. App. 2000).

2. Transfer.

Because defendant was found guilty of violating a municipal ordinance, the court of criminal appeals was without subject matter jurisdiction to consider the case, and thus, it had to transfer the case to the court of appeals for further adjudication; a circuit court order found defendant guilty of violating a city ordinance for failure to adhere to a stop sign. City of McMinnville v. Hubbard, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 104 (Tenn. Crim. App. Feb. 20, 2019).

Rule 18. Appeals by Indigent Persons. — (a) Parties Previously Permitted to Proceed as Indigent Persons in the Trial Court. — A party who has been permitted to proceed in an action in the trial court as an indigent person (which includes a person who has been permitted to proceed there as one who is financially unable to obtain adequate defense in a criminal case) may proceed on appeal as an indigent person unless, before or after the appeal is taken, the trial court finds the party is not entitled so to proceed, in which event the trial court shall state in writing the reasons for such finding.

(b) Leave to Proceed as an Indigent Person on Appeal. — Except as provided in [subsection] (a), a party to an action in the trial court who desires to proceed as an indigent person on appeal shall seek leave so to proceed in the trial court. If leave to proceed as an indigent person is granted, the party may proceed

without further application in the appellate court and without prepayment of fees or costs in either court or the giving of security therefor. If leave is denied, the trial court shall state in writing the reasons for the denial.

(c) Subsequent Proceedings on Denial of Leave to Proceed as a Poor Person. — If leave to proceed as an indigent person is denied, or the trial court finds that the party is not entitled so to proceed, the clerk of the trial court shall forthwith serve notice of such action. A motion for leave to proceed as an indigent person may be filed in the appellate court within 30 days after service of notice of the action of the trial court. The motion shall be accompanied by copies of the papers filed in the trial court seeking leave to proceed as an indigent person and by a copy of the statement of reasons given by the trial court for its action.

(d) Motion in an Appellate Court for Leave to Proceed as an Indigent Person on Appeal. — If a party to an action on appeal is unable to bear the expenses of the appeal due to poverty, but that party has not sought leave from the trial court to proceed on appeal as an indigent person, or that party becomes indigent during the appeal, the party may seek leave from the appellate court to proceed on appeal as an indigent person. A motion for leave to proceed on appeal as an indigent person filed in the appellate court shall be accompanied by a Uniform Affidavit of Indigency as set forth in Supreme Court Rule 13 (criminal cases) or by a Uniform Civil Affidavit of Indigency as set forth in Supreme Court Rule 29 (civil cases). If leave to proceed as an indigent person is denied by an intermediate appellate court, the appellate court shall state in writing the reasons for the denial.

(e) Subsequent Proceedings on Denial by an Intermediate Appellate Court of Leave to Proceed as an Indigent Person on Appeal. — If leave to proceed as an indigent person is denied by an intermediate appellate court, or an intermediate appellate court finds that the party is not entitled so to proceed, the clerk of the appellate courts shall forthwith serve notice of such action. A motion for leave to proceed as an indigent person may thereafter be filed in the Supreme Court within 15 days after service of notice of the action of the intermediate appellate court. The motion shall be accompanied by copies of any papers filed in the trial and appellate courts seeking leave to proceed as an indigent person and by a copy of the statement of reasons given by the trial and intermediate appellate courts for their actions.

(f) Appointment of Counsel in Criminal Actions. — In a criminal action, on overruling a motion for a new trial or in arrest of judgment, whichever is later, the trial court shall advise the defendant and appoint counsel on appeal as provided in Rule 37(c) of the Tennessee Rules of Criminal Procedure. [As amended by order entered January 26, 1990, effective July 9, 1990; by order filed December 29, 2005, effective July 1, 2006; and by order filed December 18, 2012, effective July 1, 2013.]

Advisory Commission Comments. Authority to allow a person to proceed on appeal in a criminal case with appointed counsel is found in Tenn. Code Ann. § 40-14-203. *See also*, Tenn. S. Ct. R. 13 (applying to criminal cases and to specified civil cases). A poor person may also obtain a transcript in criminal actions without payment of the reporter's fee pursuant to Tenn. Code Ann. § 40-14-312. Under subdivision (a) a person who has been permitted to proceed as a poor person in the trial court may proceed as a poor person on appeal without a redetermination of indigency, unless the trial court finds that the party is not entitled so to proceed. If a

person has not previously been permitted to proceed as a poor person, he or she may seek leave from the trial court to do so on appeal pursuant to subdivision (b). If leave to proceed as a poor person on appeal is granted, there is no requirement that leave be sought from the appellate court.

Whenever the trial court denies leave to appeal as a poor person, the court must state in writing the reasons for its denial. Review of the trial court's denial may be sought in the appellate court within 30 days after service of notice of the action of the trial court. Review in the appellate court is by way of motion, rather than by way of an appeal. This simple and expeditious procedure seems clearly preferable to an appeal.

Compensation and reimbursement of attorneys who appeal criminal cases on behalf of poor persons is permitted by Tenn. Code Ann. § 40-14-207. *See also*, Tenn. S. Ct. R. 13 (applying to criminal cases and to specified civil cases).

Advisory Commission Comments [1990]. The exception in subdivision (b) referring to subdivision (a) is to make it clear that a person already proceeding as a pauper through the trial need not obtain additional leave to proceed under the pauper's oath on appeal.

Advisory Commission Comments [2006]. Prior to this amendment, the rule authorized trial courts to determine whether a party should be permitted to proceed on appeal as a poor person, but the Rule did not expressly authorize an appellate court to do so. In some cases, however, the issue of a party's financial condition does not arise until after the notice of appeal is filed. New paragraphs (d) and (e) give the appellate courts the authority to determine whether an appealing party should be permitted to proceed on appeal as a poor person; it should be noted, however, that the new paragraphs do not preclude the appellate court from remanding the matter to the trial court for a hearing on the issue, if necessary. The term "poor person" as used in the Rule is intended to refer to persons who are indigent for purposes of Rule 13 (appointment, qualifications and compensation of counsel for indigent defendants), or Rule 29 (uniform civil affidavit of indigency), Tenn. S. Ct. R., or any other provision of law.

Advisory Commission Comments [2013]. The rule was amended to replace the term "poor" person(s) with the term "indigent" person(s). The amendment was not intended to change the meaning or application of the rule.

Compiler's Notes. T.R.A.P. 18 may supersede Tenn. Code Ann. § 27-6-110.

The amendment of Rule 18, as promulgated and adopted by the Supreme Court in its order dated December 29, 2005, was ratified and approved by 2006 House Resolution 201 and Senate Resolution 99. The order promulgating the amendment of Rule 18 provided that it take effect July 1, 2006.

The amendment of Rule 18, which substituted "an indigent person" for "a poor person" throughout the rule and in the headings and added the 2013 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 18, 2012, was ratified and approved by House Resolution 35 and Senate Resolution 13. The order promulgating the substitution of "an indigent person" for "a poor person" throughout Rule 18 and the addition of the 2013 Advisory Commission Comments provided that it take effect July 1, 2013.

Textbooks. Tennessee Criminal Practice and Procedure (Raybin), § 33.101.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 2-18-1, 2-18-2.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 30-51, 63, 65-69, 74, 81; 8 Tenn. Juris., Costs, § 12; 12 Tenn. Juris., Exceptions, Bill of, § 13.

Law Reviews. The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 1.

Rule 19. Substitution, Addition and Dropping of Parties. — (a) Death of a Party. — If a party dies after a notice of appeal is filed or while a proceeding is otherwise pending in the appellate court and the claim sought to be enforced is not thereby extinguished, the appellate court may order substitution of the proper parties. A motion for substitution may be made by any party or by the successor or representative of the deceased party. If a party against whom an appeal may be taken dies after entry of a judgment or order in the trial court but before notice of appeal is filed, an appellant may proceed as if death had not occurred. After notice of appeal is filed, substitution shall be effected in the appellate court in accordance with this subdivision. If a party entitled to appeal shall die before filing notice of appeal, notice of appeal shall be filed and served by the deceased party's personal representative or, if there is no such personal representative, by the deceased party's counsel of record

within the time prescribed in these rules. After notice of appeal is filed and served, substitution shall be effected in the appellate court in accordance with this subdivision.

(b) Substitution for Other Causes. — If substitution of a party in the appellate court is necessary by reason of marriage, bankruptcy, assignment, or any reason other than death, substitution shall be effected in accordance with the procedure prescribed in subdivision (a) of this rule.

(c) Public Officers; Death or Separation from Office. — When an officer of the state, a county, a city or other governmental agency is a party to an appeal or other proceeding in the appellate court in the officer's official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and the officer successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not causing harmful error shall be disregarded.

When an officer of the state, a county, a city or other governmental agency is a party to an appeal or other proceeding in the officer's official capacity, the officer may be described as a party by official title rather than by name; but the appellate court may require that the officer's name be added.

(d) Effect of Failing to Order Substitution. — An order of substitution may be entered at any time, but the omission to enter such order shall not affect the substitution.

(e) Addition and Dropping of Parties. — Parties may be added or dropped by order of the appellate court on its own motion or on motion of a party and on such terms as are just.

Advisory Commission Comments. Subdivisions (a) through (d) provide that no appeal shall be dismissed because of the death or removal from office of any party, as long as the claim sought to be enforced is not extinguished by reason of death. The procedure for substitution described in this rule is similar to the rule on substitution of parties in civil actions specified in Rule 25 of the Tennessee Rules of Civil Procedure.

Subdivision (a) is in accord with Federal Rule of Appellate Procedure 43. It authorizes an attorney of record for the deceased to take an appeal on behalf of successors in interest if the deceased has no personal representative. Without such a provision, it is possible to argue that if a party entitled to appeal dies before the notice of appeal is filed, the appeal can be taken only by the deceased party's legal representative and must be taken within the time ordinarily prescribed. Subdivision (a) also authorizes an appeal to be taken against someone who has died after the entry of a judgment but before notice of appeal is filed.

In accordance with the general spirit of these rules, the omission of an order of substitution is not fatal to an appeal, but may be entered at any time under subdivision (d).

Subdivision (e) permits the addition or dropping of parties by the appellate court. This subdivision finds a parallel in Tennessee Rule of Civil Procedure 21.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 681, 690.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 2-19-1, 2-24-5.

Tennessee Jurisprudence. 1 Tenn. Juris., Abatement, Survival and Revival, §§ 12, 29, 37; 1 Tenn. Juris., Amendments, § 7; 2 Tenn. Juris., Appeal and Error, §§ 27, 48.

Law Reviews. The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 1.

NOTES TO DECISIONS

ANALYSIS

1. Clerk Added as Appellee.
2. Standing.

1. Clerk Added as Appellee.

Clerk, the person to whom the fee was awarded, was named as an appellee only to the extent that he would seek to defend his fee, which he had done with full participation in the appeal. Therefore, because the court could add parties on such terms as were just, TRAP 19(e), the appellate court adhered to its initial decision to add the clerk as an appellee in the proceedings. Marra v. Bank of N.Y., 310 S.W.3d 329, 2009 Tenn. App. LEXIS 529 (Tenn. Ct. App. Aug. 4, 2009), rehearing denied, 310 S.W.3d 329, 2009 Tenn. App. LEXIS 909 (Tenn. Ct. App. 2009), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 214 (Tenn. Feb. 22, 2010).

2. Standing.

Appellate court lacked jurisdiction to consider an appeal because, inter alia, neither a decedent's daughter nor an attorney satisfied the statutory standing requirement since the decedent died more than nine months before the notice of appeal was filed, there was no evidence that an estate was opened for the decedent much less that her daughter obtained letters of administration or letters testamentary, and there was no indication that the attorney who filed the appeal represented the decedent at any point in the case. In re Estate of Lake, — S.W.3d —, 2020 Tenn. App. LEXIS 570 (Tenn. Ct. App. Dec. 15, 2020).

Rule 20. [Current rule. See Proposed rule and compiler's notes.] Filing and Service of Papers. — (a) Filing. — Papers required or permitted to be filed in the appellate court shall be filed with the clerk. Filing shall not be timely unless the papers are received by the clerk within the time fixed for filing or mailed to the office of the clerk by certified return receipt mail or registered return receipt mail within the time fixed for filing. Filing will also be timely if placed with a commercial delivery service, having computer tracking capacity, within the time for filing.

Official drop boxes for filing of papers shall be located at the Supreme Court Buildings in Knoxville, Nashville, and Jackson and shall be maintained by agents of the Clerk of the Appellate Courts. These boxes shall be opened at the beginning of each business day. Papers found therein will be deemed filed on the last business day preceding opening of the box.

(b) Service of All Papers Required. — Copies of all papers filed by any party shall, at or before time of filing, be served by a party or person acting for that party on all other parties to the appeal or proceeding. Service on a party represented by counsel shall be made on counsel.

(c) Manner of Service. — Service may be personal or by mail. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel or, if a party is not represented by counsel, by leaving it at the party's residence with some person of the family of the age of ten years or upwards. Service by mail is complete on mailing.

(d) Several Parties Represented by the Same Counsel; Multiple Counsel. — If one counsel appeals for several parties, the counsel is entitled to only one copy of any paper served upon him or her by any other party. If more than one counsel appeals for a party, service upon one of them is sufficient.

(e) Proof of Service. — Papers presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and the names of the persons served, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed. The clerk may permit papers to be filed without acknowledgment or proof of service but shall require such to be filed

promptly thereafter.

(f) Number of Copies for Court Sitting in Sections. — Whenever these rules require copies for each judge of the appellate court and the appellate court sits in sections, copies are required only for each judge of the section.

(g) Filing by Pro Se Litigant Incarcerated in Correctional Facility. — If papers required or permitted to be filed pursuant to the rules of appellate procedure are prepared by or on behalf of a pro se litigant incarcerated in a correctional facility and are not received by the clerk of the court until after the time fixed for filing, filing shall be timely if the papers were delivered to the appropriate individual at the correctional facility within the time fixed for filing. This provision shall also apply to service of papers by such litigants pursuant to the rules of appellate procedure. "Correctional facility" shall include a prison, jail, county workhouse or similar institution in which the pro se litigant is incarcerated. Should timeliness of filing or service become an issue, the burden is on the pro se litigant to establish compliance with this provision. [As amended by orders entered January 31, 1984, effective August 15, 1984, January 25, 1991, effective July 1, 1991, and January 28, 1993, effective July 1, 1993, January 28, 2000, effective July 1, 2000; and by order filed January 31, 2002, effective July 1, 2002.]

Advisory Commission Comments. It is commonplace to require service of all papers filed with the clerk. Rules of some other jurisdictions provide for the service of papers only on "adverse" parties. In view of the simplicity of service by mail, and the difficulty in some circumstances of determining who is an "adverse" party, there seems to be no good reason why a party who files a paper should not be required to serve all other parties to the proceeding in the appellate court. The common requirement of proof of service is retained, but the rule permits it to be made by certification, which may be endorsed on the copy that is filed.

Whenever these rules require a copy for each judge of the appellate court, and the appellate court sits in sections, a party is required to furnish copies only for each judge of the section. Thus, for example, appeals to the intermediate court of appeals will generally require the filing of only four copies of a brief, one for the clerk and one for each judge of the section.

Advisory Commission Comments [2000]. Pro se litigants who are incarcerated in correctional facilities cannot ensure the timely mailing for their mail and, as a consequence, cannot control the timely filing of their legal papers. This amendment deletes the previous pro se prisoner filing provision contained in Rule 20(a) and substitutes a clarified provision in the new Rule 20(g). The pro se prisoner filing provision covers all "papers required or permitted to be filed pursuant to the rules of appellate procedure," including notices of appeal.

Advisory Commission Comments [2002]. Two changes are made to subdivision (a). Commercial delivery services are approved for transmitting filings, assuming computer tracking capacity. Also, official drop boxes can be utilized at the three Supreme Court Buildings.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), § 685.

Tennessee Forms (Robinson, Ramsey and Harwell), No. 2-5-1.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 27, 49.

Law Reviews. An Update of the New Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 727.

The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 1.

NOTES TO DECISIONS

Analysis

1. Notice to Counsel.
2. Timeliness.

1. Notice to Counsel.

T.R.A.P. 20(d) envisions a situation where joint counsel are each aware of the cause of action and are in communication with each other throughout the proceedings; where, however, a district attorney general represents the state at trial and the attorney general represents the state on appeals, service of notice of application for extraordinary appeal must be made upon the attorney general as well as upon the district attorney general. State v. Fiveash,

626 S.W.2d 477, 1981 Tenn. Crim. App. LEXIS 395 (Tenn. Crim. App. 1981).

2. Timeliness.

Where inmate delivered his notice of appeal to appropriate prison personnel well within the period allowed, as provided in T.R.A.P. 20(a), his notice was deemed to have been timely filed even though it was not received and filed until 31 days after the entry of the trial court's final order. Goodwin v. Hendersonville Police Dep't, 5 S.W.3d 633, 1999 Tenn. LEXIS 550 (Tenn. 1999), rehearing denied, — S.W.3d —, 1999 Tenn. LEXIS 651 (Tenn. Dec. 13, 1999).

Defendant waived consideration of the issues in defendant's appeal because defendant's notice of appeal was untimely filed as it was filed more than 30 days after the date of entry of the judgment and the envelope used to mail the notice of appeal was neither certified return receipt mail, nor registered return receipt mail. Furthermore, defendant did not address the untimely filing in defendant's brief or in a reply brief to the appellate court, and the court did not find that the interests of justice required waiving the timely filing. Sanders v. State, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 24 (Tenn. Crim. App. Jan. 11, 2019).

Appellate court granted defendant's request to waive the timely filing of the notice of appeal, when defendant's prior counsel sent in the notice of appeal by regular mail, due to a presumed misunderstanding of the filing procedures by prior counsel and defendant's then counsel presuming the notice of appeal was filed correctly when then counsel was substituted in representation. Sanders v. State, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 114 (Tenn. Crim. App. Feb. 21, 2019).

Defendant's notice of appeal was not timely filed because it was filed with the appellate court clerk more than thirty days after the judgment appealed from was entered; defendant had adequate time to comply with the rule but failed to do so because the order showed on its face that it was stamped "Filed January 15, 2019" by the circuit court clerk and that a deputy clerk certified that it was mailed to defendant the next day. State v. Russell, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 17 (Tenn. Crim. App. Jan. 14, 2020).

Rule 20. [Proposed rule. See Current rule and compiler's notes.] Filing and Service of Papers. — (a) Filing. — Papers required or permitted to be filed in the appellate court shall be filed with the clerk. Filing shall not be timely unless the papers are received by the clerk within the time fixed for filing or mailed to the office of the clerk by certified return receipt mail or registered return receipt mail within the time fixed for filing. Filing will also be timely if placed for delivery with computer tracking, either through a commercial delivery service or the United States Postal Service, within the time fixed for filing.

Official drop boxes for filing of papers shall be located at the Supreme Court Buildings in Knoxville, Nashville, and Jackson and shall be maintained by agents of the Clerk of the Appellate Courts. These boxes shall be opened at the beginning of each business day. Papers found therein will be deemed filed on the last business day preceding opening of the box.

(b) Service of All Papers Required. — Copies of all papers filed by any party shall, at or before time of filing, be served by a party or person acting for that party on all other parties to the appeal or proceeding. Service on a party represented by counsel shall be made on counsel.

(c) Manner of Service. — Service may be personal or by mail. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel or, if a party is not represented by counsel, by leaving it at the party's residence with some person of the family of the age of ten years or upwards. Service by mail is complete on mailing.

(d) Several Parties Represented by the Same Counsel; Multiple Counsel. — If one counsel appeals for several parties, the counsel is entitled to only one copy of any paper served upon him or her by any other party. If more than one counsel appeals for a party, service upon one of them is sufficient.

(e) Proof of Service. — Papers presented for filing shall contain an acknowledgment of service by the person served or proof of service in the form of a statement of the date and manner of service and the names of the persons served, certified by the person who made service. Proof of service may appear on or be affixed to the papers filed. The clerk may permit papers to be filed without acknowledgment or proof of service but shall require such to be filed promptly thereafter.

(f) Number of Copies for Court Sitting in Sections. — Whenever these rules require copies for each judge of the appellate court and the appellate court sits in sections, copies are required only for each judge of the section.

(g) Filing by Pro Se Litigant Incarcerated in Correctional Facility. — If papers required or permitted to be filed pursuant to the rules of appellate procedure are prepared by or on behalf of a pro se litigant incarcerated in a correctional facility and are not received by the clerk of the court until after the time fixed for filing, filing shall be timely if the papers were delivered to the appropriate individual at the correctional facility within the time fixed for filing. This provision shall also apply to service of papers by such litigants pursuant to the rules of appellate procedure. "Correctional facility" shall include a prison, jail, county workhouse or similar institution in which the pro se litigant is incarcerated. Should timeliness of filing or service become an issue, the burden is on the pro se litigant to establish compliance with this provision. [As amended by orders entered January 31, 1984, effective August 15, 1984, January 25, 1991, effective July 1, 1991, and January 28, 1993, effective July 1, 1993, January 28, 2000, effective July 1, 2000; by order filed January 31, 2002, effective July 1, 2002; and by order filed December 3, 2020, effective July 1, 2021.]

Advisory Commission Comments. It is commonplace to require service of all papers filed with the clerk. Rules of some other jurisdictions provide for the service of papers only on "adverse" parties. In view of the simplicity of service by mail, and the difficulty in some circumstances of determining who is an "adverse" party, there seems to be no good reason why a party who files a paper should not be required to serve all other parties to the proceeding in the appellate court. The common requirement of proof of service is retained, but the rule permits it to be made by certification, which may be endorsed on the copy that is filed.

Whenever these rules require a copy for each judge of the appellate court, and the appellate court sits in sections, a party is required to furnish copies only for each judge of the section. Thus, for example, appeals to the intermediate court of appeals will generally require the filing of only four copies of a brief, one for the clerk and one for each judge of the section.

Advisory Commission Comments [2000]. Pro se litigants who are incarcerated in correctional facilities cannot ensure the timely mailing for their mail and, as a consequence, cannot control the timely filing of their legal papers. This amendment deletes the previous pro se prisoner filing provision contained in Rule 20(a) and substitutes a clarified provision in the new Rule 20(g). The pro se prisoner filing provision covers all "papers required or permitted to be filed pursuant to the rules of appellate procedure," including notices of appeal.

Advisory Commission Comments [2002]. Two changes are made to subdivision (a). Commercial delivery services are approved for transmitting filings, assuming computer tracking capacity. Also, official drop boxes can be utilized at the three Supreme Court Buildings.

Advisory Commission Comments [2021]. Subdivision (a) is amended to clarify that, as with commercial delivery services, filing is timely if placed for delivery with computer tracking with the United States Postal Service within the time fixed for filing.

Compiler's Notes. In its order filed December 3, 2020, the Supreme Court adopted the amendment to this rule, effective July 1, 2021, subject to approval by resolution of the General Assembly.

The amendment of Rule 20, which amended subdivision (a) and added the [2021] Advisory Comments, as promulgated and adopted by the Supreme Court in its order dated December 3, 2020, was ratified and approved by 2021 House

Resolution 22 and Senate Resolution 20. The order promulgating the amendment of subdivision (a) and the addition of the [2021] Advisory Comments, provided that it take effect July 1, 2021.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), § 685.

Tennessee Forms (Robinson, Ramsey and Harwell), No. 2-5-1.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 27, 49.

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NOTES TO DECISIONS

Analysis

1. Notice to Counsel.
2. Timeliness.

1. Notice to Counsel.

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2. Timeliness.

Where inmate delivered his notice of appeal to appropriate prison personnel well within the period allowed, as provided in T.R.A.P. 20(a), his notice was deemed to have been timely filed even though it was not received and filed until 31 days after the entry of the trial court's final order. Goodwin v. Hendersonville Police Dep't, 5 S.W.3d 633, 1999 Tenn. LEXIS 550 (Tenn. 1999), rehearing denied, — S.W.3d —, 1999 Tenn. LEXIS 651 (Tenn. Dec. 13, 1999).

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Appellate court granted defendant's request to waive the timely filing of the notice of appeal, when defendant's prior counsel sent in the notice of appeal by regular mail, due to a presumed misunderstanding of the filing procedures by prior counsel and defendant's then counsel presuming the notice of appeal was filed correctly when then counsel was substituted in representation. Sanders v. State, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 114 (Tenn. Crim. App. Feb. 21, 2019).

Defendant's notice of appeal was not timely filed because it was filed with the appellate court clerk more than thirty days after the judgment appealed from was entered; defendant had adequate time to comply with the rule but failed to do so because the order showed on its face that it was stamped "Filed January 15, 2019" by the circuit court clerk and that a deputy clerk certified that it was mailed to defendant the next day. State v. Russell, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 17 (Tenn. Crim. App. Jan. 14, 2020).

Rule 20A. Facsimile Filing of Papers. — (a) Definitions.

(1) "Facsimile filing" means the facsimile transmission of an original document which is received in the original document's entirety by the appellate court clerk and filed by the clerk.

(2) "Facsimile machine" means a device capable of sending a facsimile transmission using the international standard for scanning, coding, and transmission established for Group 3 machines by the Consultative Committee of International Telegraphy and Telephone of the International Telecommunications Union in regular resolution. Any facsimile machine used to send documents to a court must send at an initial transmission speed of no less than 4800 baud and be able to generate a transmission record.

(3) "Facsimile transmission" is the transmission of a document by a system that encodes a document into electrical signals, transmits these electrical signals over a telephone line, and reconstructs the signals to print a duplicate of the original document at the receiving end.

(4) "Sender" is the person or entity sending the facsimile transmission to the court.

(5) "Transmission record" means the document printed by the sending facsimile machine stating the telephone number of the receiving machine, the number of pages sent, the transmission time and date, and an indication of any errors in transmission.

(b) Filing Procedures.

(1) The appellate court clerk shall accept for filing by facsimile transmission only those papers designated in subparagraph (b)(4) of this rule. No other papers shall be filed by facsimile transmission, except as provided in subparagraph (b)(5) of this rule.

(2) Each document filed by facsimile transmission shall be accompanied by the uniform cover sheet set forth in Appendix A to the appellate rules stating: the caption of the case; the appellate docket number; the title of the transmitted document; the number of pages of the facsimile transmission (including the cover sheet); the sender's name, address, voice telephone number, and facsimile telephone number; and the date of the facsimile transmission. The cover sheet shall also contain clear and concise instructions as to the filing of the transmitted document.

(3) The filing of the original document shall not be required after facsimile filing. The sender shall retain the original document in the sender's possession or control during the pendency of the action and shall produce such document upon request by the court or any party to the action. Upon failure to produce such document, the court may strike the document filed by facsimile transmission.

(4) Only the following documents may be filed in an appellate court by facsimile transmission:

(*a*) [Reserved];

(*b*) motion for extension of time within which to file transcript of the evidence;

(*c*) request from trial court clerk for extension of time within which to file appellate record;

(*d*) motion to correct, modify, or supplement record;

(*e*) motion relating to bond;

(*f*) motion for extension of time to file brief;

(*g*) motion to waive page limitation on brief;

(*h*) motion to submit case on briefs;

(*i*) motion relating to oral argument;

(*j*) motion for continuance;

(*k*) motion or stipulation to dismiss appeal;

(*l*) motion to withdraw as counsel of record;

(*m*) response to any motion listed in this subparagraph;

(*n*) response to show cause order entered by the appellate court.

For purposes of subparagraph (b)(4), "motion" and "response" shall include

any affidavit, exhibit or proposed order submitted in support thereof.

(5) Notwithstanding subparagraph (b)(4), the appellate court, in its discretion, may direct the appellate court clerk to accept any document for filing by facsimile transmission if the court finds that extraordinary circumstances necessitate facsimile filing.

(6) No facsimile filing shall exceed fifty (50) pages in length, including the cover sheet, unless authorized by the court. A facsimile filing may not be split into multiple facsimile transmissions to avoid this page limitation. All documents filed by facsimile transmission shall comply with all applicable rules of court, including, without limitation, rules governing the content and form of the papers, and the service of all papers.

(7) The original document sent by facsimile transmission shall be on letter-sized paper (8 ½ by 11 inches). Originals on larger-sized paper may be reduced prior to facsimile transmission if the reduction to 8 ½ by 11 inch paper renders a legible and complete copy of the original.

(8) The clerk is not required to notify the sender by return facsimile transmission or voice telephone call that the facsimile document has been received by the clerk or that the facsimile document has not been received in its entirety. This provision shall not relieve the clerk of any notice requirements imposed by law or by the court.

(c) Effect of Facsimile Filing.

(1) A facsimile transmission received by the clerk after 4:30 p.m. but before midnight, clerk's local time, on a day the clerk's office is open for filing shall be deemed filed as of that business day. A facsimile transmission received after midnight but before 8:00 a.m., clerk's local time, on a business day, or a facsimile transmission received by the clerk on a Saturday, Sunday, legal holiday, or other day on which the clerk's office for filing is closed, shall be deemed filed on the preceding business day. Upon receiving a facsimile transmission in its entirety, the clerk shall note the filing date on the facsimile filing in the same manner as with original pleadings or other documents filed by mail or in person. For purposes of this provision, "received by the clerk" means the date and time the facsimile transmission is received by the clerk as indicated by the date and time printed on the facsimile transmission by the clerk's facsimile machine.

(2) A signature reproduced by facsimile transmission shall be treated as an original signature.

(3) The sender bears the risk of using facsimile transmission to convey a document to a court for filing, including, without limitation, malfunction of facsimile equipment, whether the sender's or the clerk's equipment; electrical power outages; incorrectly dialed telephone numbers; or receipt of a busy signal from the clerk's facsimile telephone number. In the event that a facsimile transmission to the clerk is unsuccessful, the sender may file the document by mail or in person; in such cases, the filing date shall be determined as provided in Rules 20 and 21. However, if a facsimile transmission is not received in its entirety by the clerk because of a transmission error, the sender may move acceptance nunc pro tunc by filing a written motion with the court. The motion shall be accompanied by the sender's transmission record, the original document that was the subject of the attempted transmis-

sion, and an affidavit of the sender detailing the facts concerning the attempted transmission. The court, in its discretion, may order filing of the original document nunc pro tunc.

(d) Facsimile Service Charge. The sender of the facsimile transmission shall pay to the appellate court clerk a service charge for each facsimile filing in the amount of five dollars ($5.00) plus one dollar ($1.00) per page of the facsimile filing (including the cover sheet) as a photocopying charge for the clerk's processing of the facsimile filing. Payment of the service charge and photocopying charge, accompanied by a copy of the facsimile filing cover sheet, shall be received by the appellate court clerk not later than ten (10) calendar days after the facsimile filing. The facsimile service charge and photocopying charge shall be paid by the sender as provided in this rule and shall not be taxed as court costs. The trial court clerk shall not be liable for a facsimile service charge for filing any document that may be filed by the trial court clerk pursuant to this rule. [Adopted by order filed January 31, 2002, effective July 1, 2002; as amended by order filed December 21, 2016, effective July 1, 2017.]

Advisory Commission Comments [2017]. In 2017, the Appellate Court Clerk's office will implement electronic filing and begin charging fees at the initiation of an appeal. To accommodate these initiatives, Rule 4 is amended to change the location for filing the notice of appeal from the office of the trial court clerk to the office of the appellate court clerk. Subdivision (b)(4)(a) of this rule is no longer necessary due to the amendment to Rule 4.

Rule 20A(b)(6) is amended to increase the page limit for facsimile filings from ten (10) to fifty (50).

Compiler's Notes. The amendment of Rule 20A, which amended subdivision (b) and added the [2017] Advisory Comments, as promulgated and adopted by the Supreme Court in its order dated December 21, 2016, was ratified and approved by 2017 House Resolution 19 and Senate Resolution 16. The order promulgating the amendment of subdivision (b) and the addition of the [2017] Advisory Comments, provided that it take effect July 1, 2017.

Rule 21. Computation and Extension of Time. — (a) Computation of Time. — In computing any period of time prescribed or allowed by these rules, the date of the act, event, or default after which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, a Sunday, or a legal holiday as defined in Tenn. Code Ann. § 15-1-101, or, when the act to be done is the filing of a paper in court, a day on which the office of the court clerk is closed or on which weather or other conditions have made the office of the court clerk inaccessible, in which event the period runs until the end of the next day which is not one of the aforementioned days. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays and legal holidays shall be excluded from the computation.

(b) Extension of Time. — For good cause shown the appellate court may enlarge the time prescribed by these rules or by its order for doing any act or may permit an act to be done after the expiration of such time; however, the court may not enlarge the time for filing a notice of appeal prescribed in Rule 4, an application for permission to appeal to the Supreme Court from the denial of an application for interlocutory appeal by an intermediate appellate court prescribed in Rule 9(c), an application for permission to appeal to the Supreme Court from an intermediate appellate court's denial of an extraordinary appeal prescribed in Rule 10(b), an application for permission to appeal

prescribed in Rule 11, or a petition for review prescribed in Rule 12.

(c) Unaffected by Expiration of Term. — The period of time provided for the doing of any act or the taking of any proceeding shall not be affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding. [As amended by order entered January 21, 1988, effective August 1, 1988; and by order effective July 1, 1997; by order entered December 10, 2003, effective July 1, 2004; and by order entered December 21, 2010, effective July 1, 2011.]

Advisory Commission Comments. Subdivision (b), on extension of time, should be read in connection with Rule 2 of these rules, dealing with the time for filing a notice of appeal, an application for permission to appeal, or a petition for review.

If a motion is made for extension of time, it should comply with Rule 22, which provides for the service of all motions on all parties.

Advisory Commission Comments [1988]. If a clerk's office is closed all day on a date other than a Saturday, Sunday, or legal holiday, a lawyer would be unable to gain entrance to file a document on the "deadline." Consequently the amendment extends the deadline to the next business day that the courthouse is open.

Advisory Commission Comments [2004]. The second sentence of Rule 21(a) is altered to adopt federal language covering snow days and the like which make a clerk's office "inaccessible" for filing. Earlier language required that the office be "closed."

Rule 21(b) was amended to conform with Rule 2, which was recently amended to clarify that the filing deadlines to the Supreme Court under Rules 9(c) and 10(b) are jurisdictional, as are those in Rules 4, 11 and 12.

Termination of Parental Rights Proceedings. Rule 8A imposes special requirements governing the appeal of any termination of parental rights proceeding. In particular, Rule 8A(i) imposes a special provision regarding extensions of time in such an appeal.

Advisory Commission Comments [2011]. Rule 21(a) is amended to define "legal holiday" by reference to statute, Tenn. Code Ann. § 15-1-101. The status of a day as a legal holiday is statutory; thus, for the purpose of filing papers in court, it does not depend on whether the clerk's office is open for business. For example, state offices might be open on Columbus Day, pursuant to the governor's authority under Tenn. Code Ann. § 4-4-105(a)(3) to substitute the day after Thanksgiving for the Columbus Day holiday; in such circumstances, however, Columbus Day is still a "legal holiday" for purposes of computing time periods under the rule.

Rule 21(a) also is amended to add a reference to days on which the office of the court clerk is closed.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated December 10, 2003, was ratified and approved by 2004 House Resolution 234 and Senate Resolution 117. The order promulgating the amendment of this rule provided that it take effect July 1, 2004.

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order filed December 21, 2010, was ratified and approved by 2011 House Resolution 35 and Senate Resolution 13. The order promulgating the amendment of this rule provided that it take effect July 1, 2011.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), No. 2-21-1.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 30-51, 63, 65-68, 74, 137; 12 Tenn. Juris., Exceptions, Bill of, § 13.

Law Reviews. Seeking Justice on Appeal, 27 No. 4 Tenn. B.J. 28 (1991).

The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 1.

NOTES TO DECISIONS

Analysis

1. Timeliness.
2. Good Faith Intention and Belief.

1. Timeliness.

T.R.A.P. 21(b) did not operate to extend the 15-day filing period established by T.C.A. § 50-6-225(e)(5) [version applicable to injuries occurring prior to July 1, 2014; see now § 50-6-225(a)(5)]; as a result, the appellate court was without jurisdiction to consider an untimely motion for review. Young v. Nashville Elec. Serv., 142 S.W.3d 292, 2004 Tenn. LEXIS 629 (Tenn. 2004).

Plaintiffs' notice of appeal was filed more than 30 days after the entry of summary judgment for defendants in a slander of title action, therefore the court lacked jurisdiction to hear the appeal and was required to dismiss the

appeal. Under T.R.A.P. 2 and 21(b), an appellate court is not authorized to extend the time for filing a notice of appeal and cannot enlarge the time for filing a notice of appeal prescribed in T.R.A.P. 4. Briley v. Chapman, 182 S.W.3d 884, 2005 Tenn. App. LEXIS 466 (Tenn. Ct. App. 2005), appeal denied, — S.W.3d —, 2005 Tenn. LEXIS 1105 (Tenn. Dec. 5, 2005).

2. Good Faith Intention and Belief.

Mere good faith intention and belief that notices were sent at the appropriate time does not provide good cause under T.R.A.P. 21(b) for permitting an act to be done after the expiration of the time prescribed in the rules. G. F. Plunk Constr. Co. v. Barrett Properties, Inc., 640 S.W.2d 215, 1982 Tenn. LEXIS 435 (Tenn. 1982).

Rule 22. Motions. — (a) Content of Motion; Response. — Unless another form is elsewhere prescribed by these rules, an application for an order, unless made during a hearing, shall be made by filing a written motion for such order or relief with proof of service on all other parties. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion and the papers, if any, on which it is based. The motion shall state the grounds on which it is based and the order or other relief requested. Each copy of a motion shall be accompanied by a memorandum of law and if the motion is based on matters not appearing of record, by affidavits or other evidence in support thereof. Any showing in opposition to a motion, other than a procedural motion, shall be served and filed within 10 days after the motion is filed. The court may shorten or extend the time for responding to any motion.

(b) Motions for Procedural Orders. — Notwithstanding the provisions of (a) of this Rule 22 as to motions generally, motion for procedural orders, including any motion under Rule 21(b), may be acted upon at any time, without awaiting a response. The motion shall contain a statement concerning efforts to contact adverse counsel and shall reflect whether there is opposition to the motion. An party adversely affected by such action may by application to the court request consideration, vacation or modification of such action. Pursuant to rule or order of the courts, motions for specified types of procedural orders may be disposed of by the clerk.

(c) Disposition of Motions. — On request of a party or on its own motion, the appellate court may place any motion on the calendar for hearing or the court may otherwise dispose of the motion as it may determine. When a motion has been placed on the calendar for hearing, the clerk shall notify each party of the date and the time designated for the hearing. Pursuant to rule or order of the court, motions for specified types of procedural orders may be disposed of by the clerk.

(d) Power of Single Judge to Entertain Motions. — A single judge of the appellate court may entertain and may grant or deny any request for relief that under these rules may be sought by motion, except that a single judge may not dismiss or otherwise finally dispose of an appeal or other proceeding. The action of a single judge may be reviewed by the court.

(e) Form of Motions; Number of Copies. — All papers relating to motions shall comply with the form prescribed in Rule 30. Two copies of the motion shall be filed, but the court may require that additional copies be furnished. [As amended by order filed February 1, 1995, effective July 1, 1995; by order

effective July 1, 1997; and by order filed January 13, 2012, effective July 1, 2012.]

Advisory Commission Comments. *Subdivision (d).* This subdivision permits a single judge to grant or deny any requested relief that under these rules may be sought by motion. It is, however, expressly provided that a single judge may not dismiss or otherwise finally dispose of an appeal or other proceeding. Final disposition of an appeal means the termination of an appeal, whether by decision, dismissal, or otherwise. Nothing in this subdivision authorizes a single judge of an appellate court to grant relief that must be sought by some procedure other than by a motion. Some rules require preparation of an application or petition. Since relief under those rules may not properly be sought by motion, a single judge may not grant the requested relief. It would, therefore, be inappropriate for a single judge to grant a request for permission to appeal, since permission is requested by the filing of an application, not by a motion. On the other hand, a single appellate judge may grant a stay or injunction under Rule 7 pending disposition of an application for permission to appeal by the full court. In all cases, the disposition of a motion by a single judge is subject to review by the entire court.

Advisory Commission Comments [1995]. Paragraph (b) allows expeditious disposition of purely procedural motions by the court or the clerk, without awaiting a response. In instances where justice miscarries, a lawyer could apply to the court for retroactive remedy. Paragraph (c) authorizes the court, in its discretion, to grant a hearing on a motion.

Advisory Commission Comments [1997]. Filing rather than service of a motion triggers the response time. The time for opposing a motion is extended from 5 to 10 days.

Advisory Commission Comments [2012]. Paragraphs (b) and (c) are amended to supply a subtitle for each paragraph.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 12, 2012, was ratified and approved by 2012 House Resolution 194 and Senate Resolution 80. The order promulgating the amendment of this rule provided that it take effect on July 1, 2012.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), § 604.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 2-14-1, 2-22-1.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 87, 108.

Law Reviews. Criminal Appeals as of Right in Tennessee (W. Mark Ward), 31 No. 6 Tenn. B.J. 19 (1995).

The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 1.

NOTES TO DECISIONS

1. Timeliness.

Motion for extension of time for oral argument did not comply with the Tennessee Rules of Appellate Procedure in that it was not accompanied by a memorandum of law and affidavit, and did not specify efforts to contact adverse counsel or indicate if there was opposition to the motion. After careful review of the extensive procedural history in the appeal, as well as the many prior accommodations already granted to appellant, the appellate court found that further delay of the appeal was not justified. Singh v. Singh, — S.W.3d —, 2019 Tenn. App. LEXIS 334 (Tenn. Ct. App. July 3, 2019).

Rule 23. Duty of Clerk to Give Notice of Filed Orders. — Immediately on the filing of an order the clerk of the appellate court shall serve by mail notice of its filing on each party to the proceeding, together with a copy of any written reasons respecting the order if not explicitly stated in the notice, and shall make a record of the mailing. [As amended by order entered January 26, 1999, effective July 1, 1999.]

Advisory Commission Comments. This rule imposes a duty upon the clerk of the appellate court to notify all parties immediately upon the entry of an order by the appellate court. The purpose of this rule is to keep the parties up-to-date with regard to the disposition of the appeal or other proceeding before the appellate court.

Law Reviews. The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 1.

F. THE RECORD ON APPEAL

Rule 24. Content and Preparation of the Record. — (a) Content of the Record. — The record on appeal shall consist of: (1) copies, certified by the clerk of the trial court, of all papers filed in the trial court except as hereafter provided; (2) the original of any exhibits filed in the trial court; (3) the transcript or statement of the evidence or proceedings, which shall clearly indicate and identify any exhibits offered in evidence and whether received or rejected; (4) any requests for instructions submitted to the trial judge for consideration, whether expressly acted upon or not; and (5) any other matter designated by a party and properly includable in the record as provided in subdivision (g) of this rule.

The following papers filed in the trial court are excluded from the record: (1) subpoenas or summonses for any witness or for any defendant when there is an appearance for such defendant; (2) all papers relating to discovery, including depositions, interrogatories and answers thereto, reports of physical or mental examinations, requests to admit, and all notices, motions or orders relating thereto; (3) any list from which jurors are selected; and (4) trial briefs; and (5) minutes of opening and closing of court. Any paper relating to discovery and offered in evidence for any purpose shall be clearly identified and treated as an exhibit. No paper need be included in the record more than once.

If less than the full record on appeal as defined in this subdivision is deemed sufficient to convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal or if a party wishes to include any papers specifically excluded in this subdivision, the party shall, within 15 days after filing the notice of appeal, file with the clerk of the trial court and serve on the appellee a description of the parts of the record the appellant intends to include on appeal, accompanied by a short and plain declaration of the issues the appellant intends to present on appeal. If the appellee deems any other parts of the record to be necessary, the appellee shall, within 15 days after service of the description and declaration, file with the clerk of the trial court and serve on the appellant a designation of additional parts to be included. All parts of the record described or designated by the parties shall be included by the clerk of the trial court as the record on appeal. The declaration and description of the parts of the record to be included on appeal provided in this subdivision may be filed and served with the declaration and description of the parts of the transcript to be included in the record provided in subdivision (b) of this rule. If a party wishes to include any papers specifically excluded in this subdivision, but fails to timely designate such items, the trial court clerk may supplement the record as provided for in subdivision (e) without modifying the previously prepared record.

(b) Transcript of Stenographic or Other Substantially Verbatim Recording of Evidence or Proceedings. — Except as provided in subdivision (c), if a stenographic report or other contemporaneously recorded, substantially verbatim recital of the evidence or proceedings is available, the appellant shall have prepared a transcript of such part of the evidence or proceedings as is necessary to convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal. Unless the entire

transcript is to be included, the appellant shall, within 15 days after filing the notice of appeal, file with the clerk of the trial court and serve on the appellee a description of the parts of the transcript the appellant intends to include in the record, accompanied by a short and plain declaration of the issues the appellant intends to present on appeal. If the appellee deems a transcript of other parts of the proceedings to be necessary, the appellee shall, within 15 days after service of the description and declaration, file with the clerk of the trial court and serve on the appellant a designation of additional parts to be included. The appellant shall either have the additional parts prepared at the appellant's own expense or apply to the trial court for an order requiring the appellee to do so. The transcript, certified by the appellant, the appellant's counsel, or the reporter as an accurate account of the proceedings, shall be filed with the clerk of the trial court within 60 days after filing the notice of appeal. Upon filing the transcript, the appellant shall simultaneously serve notice of the filing on the appellee. Proof of service shall be filed with the clerk of the trial court with the filing of the transcript. If the appellee has objections to the transcript as filed, the appellee shall file objections thereto with the clerk of the trial court within fifteen days after service of notice of the filing of the transcript. Any differences regarding the transcript shall be settled as set forth in subdivision (e) of this rule.

Within 15 days after filing the notice of appeal the appellant in a criminal action shall order from the reporter a transcript of such parts of the evidence or proceedings not already on file as the appellant deems necessary. The order shall be in writing and within the same period a copy shall be filed with the clerk of the trial court. If funding is to come from the state of Tennessee, the order shall so state.

(c) Statement of the Evidence When No Report, Recital, or Transcript Is Available. — If no stenographic report, substantially verbatim recital or transcript of the evidence or proceedings is available, or if the trial court determines, in its discretion, that the cost to obtain the stenographic report in a civil case is beyond the financial means of the appellant or that the cost is more expensive than the matters at issue on appeal justify, and a statement of the evidence or proceedings is a reasonable alternative to a stenographic report, the appellant shall prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement should convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal. The statement, certified by the appellant or the appellant's counsel as an accurate account of the proceedings, shall be filed with the clerk of the trial court within 60 days after filing the notice of appeal. Upon filing the statement, the appellant shall simultaneously serve notice of the filing on the appellee, accompanied by a short and plain declaration of the issues the appellant intends to present on appeal. Proof of service shall be filed with the clerk of the trial court with the filing of the statement. If the appellee has objections to the statement as filed, the appellee shall file objections thereto with the clerk of the trial court within fifteen days after service of the declaration and notice of the filing of the statement. Any differences regarding the statement shall be settled as set forth in subdivision (e) of this rule.

(d) Procedure When No Transcript or Statement Is to Be Filed. — If no transcript or statement of the evidence or proceedings is to be filed, the appellant shall, within 15 days after filing the notice of appeal, file with the clerk of the trial court and serve upon the appellee a notice that no transcript or statement is to be filed. If the appellee deems a transcript or statement of the evidence or proceedings to be necessary, the appellee shall, within 15 days after service of the appellant's notice, file with the clerk of the trial court and serve upon the appellant a notice that a transcript or statement is to be filed. The appellee shall prepare the transcript or statement at the appellee's own expense or apply to the trial court for an order requiring the appellant to assume the expense. The other provisions of subdivisions (b) and (c) of this rule are applicable to the transcript or statement filed by the appellee under this subdivision, except that the appellee under this subdivision shall perform the duties assigned to the appellant in subdivisions (b) and (c) of this rule and the appellant under this subdivision shall perform the duties assigned to the appellee in subdivisions (b) and (c) of this rule.

(e) Correction or Modification of the Record. — If any matter properly includable is omitted from the record, is improperly included, or is misstated therein, the record may be corrected or modified to conform to the truth. Any differences regarding whether the record accurately discloses what occurred in the trial court shall be submitted to and settled by the trial court regardless of whether the record has been transmitted to the appellate court. Absent extraordinary circumstances, the determination of the trial court is conclusive. If necessary, the appellate or trial court may direct that a supplemental record be certified and transmitted.

(f) Approval of the Record by the Trial Judge or Chancellor. — The trial judge shall approve the transcript or statement of the evidence and shall authenticate the exhibits as soon as practicable after the filing thereof or after the expiration of the 15-day period for objections by appellee, as the case may be, but in all events within 30 days after the expiration of said period for filing objections. Otherwise the transcript or statement of the evidence and the exhibits shall be deemed to have been approved and shall be so considered by the appellate court, except in cases where such approval did not occur by reason of the death or inability to act of the trial judge. In the event of such death or inability to act, a successor or replacement judge of the court in which the case was tried shall perform the duties of the trial judge, including approval of the record or the granting of any other appropriate relief, or the ordering of a new trial. Authentication of a deposition authenticates all exhibits to the deposition. The trial court clerk shall send the trial judge transcripts of evidence and statements of evidence.

(g) Limit on Authority to Add or Subtract from the Record. — Nothing in this rule shall be construed as empowering the parties or any court to add to or subtract from the record except insofar as may be necessary to convey a fair, accurate and complete account of what transpired in the trial court with respect to those issues that are the bases of appeal.

(h) Filing of Transcript or Statement; Service of Notice to Parties. — Nothing in this rule shall be construed as prohibiting any party from preparing and filing with the clerk of the trial court a transcript or statement of the

evidence or proceedings at any time prior to entry of an appealable judgment or order. Upon filing, the party preparing the transcript or statement shall simultaneously serve notice of the filing on all other parties, accompanied by a short and plain declaration of the issues the party may present on appeal. Proof of service shall be filed with the clerk of the trial court with the filing of the transcript or statement. Any differences regarding the transcript or statement shall be settled as set forth in subdivision (e) of this rule. [As amended effective July 1, 1980; as amended effective May 7, 1981, and by order entered January 21, 1988, effective August 1, 1988; and by order entered February 18, 1996, effective July 1, 1996; as amended effective July 1, 2000; by order entered January 6, 2005, effective July 1, 2005; and by order filed January 2, 2007, effective July 1, 2007; and by order entered December 16, 2013, as amended, March 14, 2014, effective July 1, 2014.]

Advisory Commission Comments. *General Note.* This rule seeks to provide a method of preparation of the record that is both inexpensive and simple, and to provide that the record conveys an accurate account of what transpired in the trial court.

Subdivision (a). Under this subdivision the parties need do nothing (other than order preparation of a transcript) if the full record is deemed necessary for the appeal. The full record consists of: (1) copies of all papers filed in the trial court, (2) the original of any exhibits, (3) the transcript or statement of the evidence or proceedings, and (4) any other matter designated by a party and properly includable in the record. Certain papers filed in the trial court, such as subpoenas, summonses, papers relating to discovery, and jury lists, are automatically excluded from the record since they are typically unnecessary. However, if any party desires such matters to be included in the record on appeal, the party may have them included by designating in writing that such matters are to be included.

In some situations it may not be desirable to prepare a full record as defined in the first paragraph of this subdivision. The third paragraph of this subdivision gives the parties the opportunity to designate which matters are to be included in the record on appeal. All matters designated by the parties are included by the clerk in the record on appeal.

Subdivision (b). Because of the need to have an exact record of what transpired in the trial court and to avoid the inaccuracies that inevitably attend preparation of a narrative record, this subdivision requires a verbatim transcript if a stenographic report or other contemporaneously recorded, substantially verbatim recital of the evidence or proceedings is available. This subdivision does not require that a stenographic report be made of all the evidence or proceedings. If a stenographic or other substantially verbatim record is not available, subdivision (c) establishes a procedure for generating a narrative record.

The procedure for preparing a verbatim transcript of the proceedings is similar to the procedure specified in subdivision (a) for taking an appeal on less than a full record as defined in that subdivision. Each party has the option to designate and have included whatever portions of the transcript the party deems relevant and appropriate for the appellate court to consider. The designation of the parts of the record to be included on appeal may be filed and served with the designation of the parts of the transcript to be included in the record.

Subdivision (c). This subdivision is available only in those situations in which a stenographic report or other substantially verbatim recital or transcript of the evidence is unavailable. It permits the preparation of a narrative record of the evidence or proceedings.

Subdivision (e). This subdivision sets forth the procedure to be followed if it is necessary to correct or modify the record. Omissions, improper inclusions, and misstatements may be remedied at any time, either pursuant to stipulation of the parties or on the motion of a party or the motion of the trial or appellate court. If it is necessary to inform the appellate court of facts that have arisen after judgment in the trial court, resort should be made not to this subdivision but to Rule 14 of these rules.

Subdivision (f). This subdivision preserves the current requirement that the record be approved by the trial judge. This rule makes clear it is unnecessary for the judge or chancellor who presided at the trial to approve the record if such approval cannot be obtained by reason of the death or inability to act of the presiding judge or chancellor. In such circumstances any successor or replacement judge or chancellor may approve the record, though in some circumstances the fact that the judge or chancellor who presided at the proceedings is unavailable may require the ordering of a new trial. If, however, a stenographic transcript of the proceedings is available, only rarely would it be necessary to order a new trial due to the

death or inability to act of the presiding judge or chancellor.

Subdivision (g). Under subdivision (a) the parties are empowered to designate any matter to be included in the record on appeal even though it is not automatically includable under the provisions of that subdivision. This subdivision makes clear, however, that the ability to designate additional parts to be included in the record extends only insofar as it is necessary to convey a fair, accurate and complete account of what transpired in the trial court. The ability to designate additional parts under subdivision (a) does not permit a party to augment the record by evidence entered ex parte.

Subdivision (h). This subdivision permits the preparation of a transcript or statement of the evidence prior to the entry of an appealable judgment if it is deemed desirable to do so. It would only be in unusual cases that it would be necessary to resort to this subdivision if a stenographic report of the proceedings is made.

Advisory Commission Comments [1980]. Most of the changes in Rule 24 amount to a simple relettering of subdivisions. There is an addition to Rule 24(b), which requires appellant in a criminal action to order the transcript from the court reporter within 15 days after filing notice of appeal, so that the court reporter will not be notified at the last minute of the need for a transcript. The only other change of substance in Rule 24 is the addition of a new subdivision (d). In some cases, no transcript or statement of the evidence or proceedings will be filed. For example, an action may be dismissed on a pretrial motion without a hearing in open court. This subdivision sets forth the procedure to be followed in such cases and any other case in which no transcript or statement is to be filed.

Advisory Commission Comments [1986]. Amended T.R.Civ.P. 30.02(4)(B) allows for videotape depositions without a stenographic record at the parties' option. Because the appellate courts generally do not review lengthy videotapes, however, an appellant must make certain that relevant portions of any videotape deposition introduced in evidence be presented to the appellate tribunal in written form. Usually the court reporter at trial should take down the testimony while the videotape is being played in the courtroom.

Advisory Commission Comments [1988]. *Subdivision (a).* The new fourth category of documents constituting the record makes clear that special requests for jury instructions automatically go to the appellate court. Probably that has always been the case, because the first category consists of papers "filed," which under Tenn. R. Civ. P. 5.06 includes papers filed with the trial judge as well as those filed with the clerk. The request need not be made an exhibit to the transcript of evidence, although that is a permissible procedure.

The amendment requires only submission to the judge of written requests for a jury charge under Tenn. R. Civ. P. 51 or Tenn. R. Crim. P. 30; the judge's failure to expressly deny a request does not affect inclusion of the request in the record. The traditional judicial method of writing the action, date, and signature on the document itself continues to be a desirable but not essential procedure under the amendment. The important element is that the judge be made aware of the request and be given an opportunity to charge it or decline. If the requested instruction is submitted at a pretrial proceeding or simply filed with the clerk before trial, the better practice would be to specifically direct the judge's attention to the document, but that practice is not mandatory. Again, the only criterion is that the request be "submitted to the trial judge for consideration."

Trial briefs are superfluous in view of appellate briefs, and they should not be sent to the appellate court absent unusual circumstances.

Subdivision (f). The next-to-last sentence in (f) was added to relieve the trial judge from any supposed duty to separately authenticate each deposition exhibit. If a document was made an exhibit during the deposition and the deposition is authentic, the exhibits become part of the transcript of evidence.

Advisory Commission Comments [1996]. The final sentence of Rule 24(f) ensures that trial judges will have a record in chambers to approve.

Advisory Commission Comments [2000]. The amendment excludes from the appellate record various items, including minutes of opening and closing of court. The third paragraph provides for inclusion at a party's request.

Advisory Commission Comments [2004]. *Termination of Parental Rights Proceedings.* Rule 8A imposes special requirements governing the appeal of any termination of parental rights proceeding. In particular, Rules 8A(c) and 8A(d) impose special provisions regarding the content and preparation of the record in such an appeal.

Advisory Commission Comments [2005]. Paragraph (h) is amended to remove obsolete references to "bills of exception" and "wayside bills of exception."

Advisory Commission Comments [2007]. A transcript or statement of the evidence must be filed with the trial court clerk within 60 days after the filing of the notice of appeal unless extended by the court. The period was formerly 90 days.

Advisory Commission Comments [2012]. Tenn. R. App. P. 3(b) and (c), as well as Tenn. R. Crim. P. 36, were amended in 2012 to provide for an appeal as of right from the trial court's filing of a corrected judgment or order.

Tenn. R. App. P. 24(a) lists the items which must be included in the record on appeal. In an

appeal as of right from the entry of a corrected judgment or order pursuant to Tenn. R. Crim. P. 36, the record on appeal should include the listed items (e.g., papers filed in the trial court, exhibits, transcript or statement of the evidence or proceedings, etc.) pertaining to the original judgment or order, as well as those items pertaining to the corrected judgment or order. As provided by Tenn. R. App. P. 24(a), however, the parties may designate that only certain items be included "[i]f less than the full record on appeal...is deemed sufficient to convey a fair, accurate and complete account of what transpired with respect to those issues that are the bases of appeal[.]"

Advisory Commission Comments [2014]. *Subdivision (b).* Tenn. R. App. P. 24(b) was amended to cross-reference subdivision (c), which sets out an exception to subdivision (b)'s requirement that the appellant prepare a "stenographic report or other contemporaneously recorded, substantially verbatim recital of the evidence or proceedings[,]" if "available."

Subdivision (c). Tenn. R. App. P. 24(c) was amended to provide that a statement of the evidence or proceedings may be filed in a civil case – instead of a stenographic report or other contemporaneously recorded, substantially verbatim recital of the evidence or proceedings – if the trial court determines, in its discretion, that the cost to obtain the stenographic report is beyond the financial means of the appellant or that the cost is more expensive than the matters at issue on appeal may justify. In making its determination, the trial court should start with the presumption that the cost to obtain the stenographic report is beyond the financial means of an appellant who is appealing as an indigent person as allowed by Tenn. R. App. P. 18. The amendment to subdivision (c) is limited to civil cases because matters pertaining to the transcript in criminal proceedings are governed by statute and by case law. *See* Title 40, Chapter 14, Part 3 ("Transcripts and Court Reporters"), Tennessee Code Annotated; *Britt v. N. Carolina*, 404 U.S. 226 (1971) (stating, "the State must, as a matter of equal protection, provide indigent prisoners with the basic tools of an adequate defense or appeal, when those tools are available for a price to other prisoners"); *accord State v. Elliott*, 524 S.W.2d 473, 475 (Tenn. 1975).

Compiler's Notes. T.R.A.P. 24(e) may supersede Tenn. Code Ann. § 27-3-128.

T.R.A.P. 24 may affect Tenn. Code Ann. §§ 16-4-115, 18-4-103, 40-14-309, 40-30-120, 43-6-105, 52-931 [now § 53-7-217], 53-3417 [now § 68-25-110], 57-3-214, 57-9-203.

T.R.A.P. 24(a) and (h) may affect Tenn. Code Ann. § 58-1-230.

The order amending this rule, as promulgated and adopted by the Supreme Court in its order dated January 6, 2005, was ratified and approved by 2005 House Resolution 14 and Senate Resolution 10. The order promulgating the amendment of this rule provided that it take effect July 1, 2005.

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 2, 2007, was ratified and approved by 2007 House Resolution 19 and Senate Resolution 12. The order promulgating the 2007 amendment of this rule provided that it take effect July 1, 2007.

The addition of the 2012 Advisory Commission Comments for this rule, as promulgated and adopted by the Supreme Court in its order dated January 13, 2012, was ratified and approved by 2012 House Resolution 194 and Senate Resolution 80. The order promulgating the amendment of the comments provided that the amendment take effect July 1, 2012.

The amendment of rule 24, which amended subdivisions (b) and (c) and added the 2014 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 16, 2013, as amended, March 14, 2014, was ratified and approved by 2014 House Resolution 156 and Senate Resolution 75. The order promulgating the 2014 amendment of subdivisions (b) and (c) and the addition of the 2014 Advisory Commission Comments provided that it take effect on July 1, 2014.

Supreme Court order No. ADM2013-02056, filed June 5, 2014, indefinitely suspends, pending further consideration, the effective date of certain amendments to Rule 24(b) made by the Supreme Court in its order dated December 16, 2013, as amended, March 14, 2014, and ratified and approved by 2014 House Resolution 156 and Senate Resolution 75 , which were to take effect July 1, 2014. The suspension applies only to the addition of the following language near the end of the first paragraph of (b), preceding "Upon filing the transcript, the...": "An electronic copy of the transcript, meeting the technical specifications set by the Administrative Office of the Courts, shall be filed with the original transcript." and the related 2014 Advisory Commission Comments, which read: "Tenn. R. App. P. 24(b) also was amended to require the filing of an electronic copy of the transcript, along with the original transcript. The electronic copy must meet the technical specifications established by the Administrative Office of the Courts ("AOC"); those specifications may be obtained on the Tennessee appellate courts' website (http://www.tncourts.gov) or by contacting the AOC." The remaining 2014 amendments to Rule 24(b) and (c) and to Rule 25(a) and (h) are unaffected by this order and will take effect, as scheduled, on July 1, 2014.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), § 661.

Pritchard on Wills and Administration of Estates (4th ed., Phillips and Robinson), § 910.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 2-24-1, 2-24-7, 2-26-1.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 22, 30, 32-51, 53, 58, 61, 63, 79, 81, 83-92, 94-119, 128, 130-134, 137-212, 214, 223; 3 Tenn. Juris., Attachment and Garnishment, §§ 84, 94, 184; 5 Tenn. Juris., Carriers, § 58; 6 Tenn. Juris., Clerks of Court, § 10; 6 Tenn. Juris., Constitutional Law, §§ 45, 54; 8 Tenn. Juris., Costs, §§ 32, 37, 42; 8 Tenn. Juris., Courts, § 8; 8 Tenn. Juris., Criminal Procedure, §§ 31, 39; 9 Tenn. Juris., Demurrers and Motions to Dismiss, § 18; 9 Tenn. Juris., Discovery, § 13; 10 Tenn. Juris., Ejectment, § 30; 11 Tenn. Juris., Evidence, §§ 7, 13, 101; 12 Tenn. Juris., Exceptions, Bill of, §§ 1-3, 6-9, 11-16; 15 Tenn. Juris., Injunctions, §§ 21, 22, 36; 15 Tenn. Juris., Insurance, § 107; 16 Tenn. Juris., Intoxicating Liquors, § 19; 16 Tenn. Juris., Judicial Sales, § 14; 17 Tenn. Juris., Jury, §§ 7, 32; 18 Tenn. Juris., Lost Instruments and Records, § 4; 18 Tenn. Juris., Mandamus, §§ 21, 29; 19 Tenn. Juris., Motions and Summary Proceedings, §§ 2, 9; 23 Tenn. Juris., Stipulations, § 1; 25 Tenn. Juris., Witnesses, § 28.

Law Reviews. Waiting for the Jury (George W. Jenkins III), 20 Tenn. B.J. 31 (1984).

Warning Non-Patients Now Includes Non-Contagious Diseases (Roy F. Satterwhite III), 29 No. 5 Tenn. B.J. 12 (1993).

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1. Purpose.

One of the primary purposes of T.R.A.P. 24 was to abolish the distinction between the bill of exceptions and the technical record. Allstate Ins. Co. v. Young, 639 S.W.2d 916, 1982 Tenn. LEXIS 356 (Tenn. 1982).

The Tennessee rules of appellate procedure should not be used to thwart appeals where no prejudice to the appellee can be shown. Wallace v. Wallace, 733 S.W.2d 102, 1987 Tenn. App. LEXIS 2630 (Tenn. Ct. App. 1987).

While this rule abolished the distinction between what was formerly referred to as the "bill of exception" and the "technical record," creating what is now called the "record on appeal," it did not abolish the previous rule governing exhibits. State v. Cooper, 736 S.W.2d 125, 1987 Tenn. Crim. App. LEXIS 2259 (Tenn. Crim. App. 1987).

T.C.A. § 27-3-128 and the present version of T.R.A.P. 24 are geared toward a correction of the record, rather than a remand after reversal of the trial court. First Tennessee Bank Nat'l Ass'n v. Hurd Lock & Mfg. Co., 816 S.W.2d 38, 1991 Tenn. App. LEXIS 302 (Tenn. Ct. App. 1991), appeal denied, — S.W.2d —, 1991 Tenn. LEXIS 345 (Tenn. Sept. 3, 1991).

2. Adequate Record Required.

It is the appellant's obligation to have prepared an adequate record in order to allow meaningful review on appeal; an appellate court cannot consider an issue which is not preserved in the record for review. State v. Banes, 874 S.W.2d 73, 1993 Tenn. Crim. App. LEXIS 718 (Tenn. Crim. App. 1993).

Husband submitted a statement of the evidence to the trial court and the wife submitted objections to the husband's statement, whereupon the trial court corrected the husband's statement to accurately reflect the testimony presented at trial; clearly, the parties and the trial court followed the procedure described in

T.R.A.P. 24 and the wife's assertion that the appellate court had to presume that every fact under the pleadings was found favorably to the wife by the trial court was without merit. Gleason v. Gleason, 164 S.W.3d 588, 2004 Tenn. App. LEXIS 565 (Tenn. Ct. App. 2004), appeal denied, — S.W.3d —, 2005 Tenn. LEXIS 90 (Tenn. Jan. 31, 2005).

Store owner had a responsibility to ensure that the appellate record was sufficient to determine if the trial court's summary judgment in its favor was proper; the record was incomplete, and the supreme court was unable to determine the basis for the judgment entered by the trial court. Jennings v. Sewell-Allen Piggly Wiggly, 173 S.W.3d 710, 2005 Tenn. LEXIS 825 (Tenn. 2005).

Judgment declaring the candidate's opponent the winner of the election was affirmed in accordance with T.R.A.P. 24(c) because the appellate court must presume that the evidence supported the trial court's findings and ultimate conclusion that the candidate had not proven that the two votes were illegal such that a new election should be ordered; in order for the candidate to prove that there were two illegal votes, he must demonstrate that the two voters voted by paper ballot when all others voters voted by machine, and that these two voters did not use a paper ballot because they were in need of assistance pursuant to T.C.A. § 2-7-116. Reinhardt v. Neal, 241 S.W.3d 472, 2007 Tenn. App. LEXIS 368 (Tenn. Ct. App. June 11, 2007), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 919 (Tenn. Oct. 15, 2007), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 947 (Tenn. Oct. 22, 2007).

Husband's appeal was frivolous and undertaken solely to delay payment of the spousal support he was obligated to pay; husband consistently flouted trial court's order to pay pendente lite support to the wife and he gave appellate court an appellate record with little to support his argument. Williams v. Williams, 286 S.W.3d 290, 2008 Tenn. App. LEXIS 416 (Tenn. Ct. App. July 28, 2008).

As expressly stated in T.R.A.P. 24(e), the trial court was to settle any disputes about the record regardless of whether the record had been transmitted to the appellate court and the trial court was to resolve the conflicts in the parties' statements of the proceedings and then certify and transmit a proper supplemental record to the court of appeals for resolution of the issues. Bellamy v. Cracker Barrel Old Country Store, Inc., 302 S.W.3d 278, 2009 Tenn. LEXIS 823 (Tenn. Dec. 7, 2009).

College professor argued that the trial court erred in denying his motion to compel discovery. However, the appellate record did not indicate the basis for the trial court's denial of the professor's motion to compel and it was his duty to prepare a record that conveyed a fair, accurate, and complete account of what transpired in the trial court regarding the issues that formed the basis of the appeal. Jones v. Lemoyne-Owen College, 308 S.W.3d 894, 2009 Tenn. App. LEXIS 425 (Tenn. Ct. App. July 8, 2009), appeal denied, Jones v. Lemoyne-Owen College, — S.W.3d —, 2010 Tenn. LEXIS 318 (Tenn. Mar. 1, 2010).

Father's appeal of an order modifying a permanent parenting plan to include payment for children's private school tuition was dismissed because failed to avail himself of the opportunity given by the court of appeals in its order to either amend his brief or to supplement the record with the necessary documents in order to comply with T.R.A.P. 24; the father's failure to do so put the court of appeals in the position of being unable to conduct a thorough and proper review of the trial court's actions, and, therefore, the father waived the issues raised in the appeal. Chiozza v. Chiozza, 315 S.W.3d 482, 2009 Tenn. App. LEXIS 793 (Tenn. Ct. App. Nov. 20, 2009), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 540 (Tenn. May 20, 2010).

3. Inadequate Record Presented.

Judgment awarding a landlord possession of the property and for unpaid rent against a tenant was affirmed because neither a transcript of the proceedings nor a statement of the evidence was filed and the pleadings filed contained minimal information; without a complete record or sufficient statement of the evidence, the appellate court assumed the sufficiency of the evidence to support the judgment pursuant to T.R.A.P. 13(d). The Court of Appeals of Tennessee had appellate jurisdiction only, and its power to review was limited to those factual and legal issues for which an adequate legal record had been preserved. Reid v. Reid, 388 S.W.3d 292, 2012 Tenn. App. LEXIS 554 (Tenn. Ct. App. Aug. 9, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 846 (Tenn. Nov. 20, 2012).

In a case in which a wife challenged the trial court's division of the marital assets and liabilities, the appellate court concluded that the wife failed to present any proof to establish that the trial court committed error. The wife failed to present an adequate appellate record that allowed for the proper review of the issues she raised. Kramer v. Kramer, — S.W.3d —, 2019 Tenn. App. LEXIS 132 (Tenn. Ct. App. Mar. 18, 2019).

Although appellant provided a transcript of the trial, because there was no transcript or statement of the evidence regarding the hearing on appellant's motion to reopen proof, the facts found by the trial court concerning the motion were conclusive on appeal. As such, the appellate court found that the trial court did not reach an illogical result, resolve the case on a clearly erroneous assessment of the evidence, or otherwise abuse its discretion in denying the husband's motion. Westbrooks v. Westbrooks,

— S.W.3d —, 2019 Tenn. App. LEXIS 520 (Tenn. Ct. App. Oct. 29, 2019).

4. Record Excessive.

Appellate court ordered disallowance of trial clerk's costs for including in the record many pages of trial briefs and memorandum of authority of counsel, as such documents had no place in the appellate record under T.R.A.P. 24(a). Aclin v. Speight, 611 S.W.2d 54, 1980 Tenn. App. LEXIS 401 (Tenn. Ct. App. 1980).

Trial briefs and memoranda of authority of counsel have no place in the appellate record. Atkins v. Kirkpatrick, 823 S.W.2d 547, 1991 Tenn. App. LEXIS 547 (Tenn. Ct. App. 1991).

5. Less Than Complete Transcript.

Where the contestants have failed to carry their burden of demonstrating that less than a complete manuscript of the record conveyed a fair, accurate and complete account of what transpired with respect to the issues they sought to raise on appeal, the costs of preparing the entire transcript of the proceedings in the trial court are taxed to them. Rogers v. Russell, 733 S.W.2d 79, 1987 Tenn. App. LEXIS 3162 (Tenn. Ct. App. 1987).

Mere filing of a form which included a request that the entire voir dire proceedings be transcribed was insufficient and any possible error was waived. State v. Newsome, 744 S.W.2d 911, 1987 Tenn. Crim. App. LEXIS 2697 (Tenn. Crim. App. 1987).

The failure to provide a transcript from which the appellate court can determine sufficiency of evidence resulted in a frivolous appeal. McDonald v. Onoh, 772 S.W.2d 913, 1989 Tenn. App. LEXIS 282 (Tenn. Ct. App. 1989), cert. denied, 493 U.S. 859, 110 S. Ct. 168, 107 L. Ed. 2d 125, 1989 U.S. LEXIS 4157 (1989).

Statements of fact made in pleadings, briefs and oral argument may not be considered by an appellate court in lieu of a transcript of an evidentiary hearing. State v. Bennett, 798 S.W.2d 783, 1990 Tenn. Crim. App. LEXIS 396 (Tenn. Crim. App. 1990), appeal denied, — S.W.2d —, 1990 Tenn. LEXIS 372 (Tenn. Oct. 15, 1990), cert. denied, Bennett v. Tennessee, 500 U.S. 915, 111 S. Ct. 2009, 114 L. Ed. 2d 98, 1991 U.S. LEXIS 2747 (1991).

When the record is incomplete, and does not contain the proceedings and documents relevant to an issue, the court is precluded from considering the issue. State v. Bennett, 798 S.W.2d 783, 1990 Tenn. Crim. App. LEXIS 396 (Tenn. Crim. App. 1990), appeal denied, — S.W.2d —, 1990 Tenn. LEXIS 372 (Tenn. Oct. 15, 1990), cert. denied, Bennett v. Tennessee, 500 U.S. 915, 111 S. Ct. 2009, 114 L. Ed. 2d 98, 1991 U.S. LEXIS 2747 (1991).

An appellate court is precluded from considering an issue when the record does not contain a transcript or statement of what transpired in the trial court with respect to that issue. State v. Draper, 800 S.W.2d 489, 1990 Tenn. Crim. App. LEXIS 469 (Tenn. Crim. App. 1990).

In the absence of an adequate record on appeal, the appellate court must presume that the trial court's rulings were supported by sufficient evidence. State v. Oody, 823 S.W.2d 554, 1991 Tenn. Crim. App. LEXIS 405 (Tenn. Crim. App. 1991).

The appellate court cannot review the facts de novo without an appellate record containing the facts, and therefore, in the absence of a transcript of a statement of the evidence, the court must assume that the record, had it been preserved, would have contained sufficient evidence to support the trial court's factual findings. Sherrod v. Wix, 849 S.W.2d 780, 1992 Tenn. App. LEXIS 848 (Tenn. Ct. App. 1992).

It is the duty of the appellant to prepare a record which conveys a fair, accurate and complete account of what transpires in the trial court, with respect to the issues which form the basis of the appeal. State v. Boling, 840 S.W.2d 944, 1992 Tenn. Crim. App. LEXIS 384 (Tenn. Crim. App. 1992), appeal denied, — S.W.2d —, 1992 Tenn. LEXIS 530 (Tenn. Aug. 31, 1992); Nickas v. Capadalis, 954 S.W.2d 735, 1997 Tenn. App. LEXIS 182 (Tenn. Ct. App. 1997).

When a party seeks appellate review there is a duty to prepare a record which conveys a fair, accurate and complete account of what transpired with respect to the issues forming the basis of the appeal; where the record is incomplete and does not contain a transcript of the proceedings relevant to an issue presented for review, or portions of the record upon which the party relies, an appellate court is precluded from considering the issue. State v. Ballard, 855 S.W.2d 557, 1993 Tenn. LEXIS 193 (Tenn. 1993).

Where evidence is not preserved in record, appellate courts are precluded from considering issues relating to that evidence. State v. Gray, 960 S.W.2d 598, 1997 Tenn. Crim. App. LEXIS 544 (Tenn. Crim. App. 1997).

Trial court erred in excluding its comment admittedly made in the course of a witness' testimony, but did not err in excluding parenthetical information added by one party's counsel ostensibly to provide context for the court's comment. Parker v. Parker, 986 S.W.2d 557, 1999 Tenn. LEXIS 126 (Tenn. 1999).

In the absence of a transcript or statement of the evidence, a presumption arises that the parties presented sufficient evidence to support the trial court's judgment, and the court of appeals will affirm the judgment. Manufacturers Consolidation Serv., Inc. v. Rodell, 42 S.W.3d 846, 2000 Tenn. App. LEXIS 148 (Tenn. Ct. App. 2000).

With no transcript or statement of the evidence presented in child support action, it was presumed that the record would have contained sufficient evidence to support the trial court's factual findings concerning parent's income.

Tallent v. Cates, 45 S.W.3d 556, 2000 Tenn. App. LEXIS 416 (Tenn. Ct. App. 2000), rehearing denied, — S.W.3d —, 2000 Tenn. App. LEXIS 840 (Tenn. Ct. App. July 13, 2000), review or rehearing denied, — S.W.3d —, 2001 Tenn. LEXIS 131 (Tenn. Feb. 20, 2001).

6. Late Filing of Transcript.

In keeping with the purpose of the rules of appellate procedure, an appellate court should permit the late filing of a transcript in all cases where there has been a good faith attempt on the part of the appellant to file the transcript within the time limit set forth in T.R.A.P. 24(b), and where the appellee is not prejudiced by the delay in filing. Davis v. Sadler, 612 S.W.2d 160, 1981 Tenn. LEXIS 406 (Tenn. 1981); State v. Blevins, 736 S.W.2d 120, 1987 Tenn. Crim. App. LEXIS 2223 (Tenn. Crim. App. 1987).

7. Lapse in Entering Judgment.

Lapse of five years between trial and entry of final judgment did not abridge the right to appeal on the grounds that it was no longer possible to perfect an appeal with a transcript; the burden was on the appellant to prepare a transcript and there was no evidence that the appellant could not, either in the past or the present, have prepared a transcript. Lallemand v. Smith, 667 S.W.2d 85, 1983 Tenn. App. LEXIS 640 (Tenn. Ct. App. 1983).

Appellant's allegations that there was a lapse of over four years from the trial to the rendition of judgment and that her husband, a party, was deceased, were not sufficient to demonstrate that a narrative transcript could not be made. Justice v. Sovran Bank, 918 S.W.2d 428, 1995 Tenn. App. LEXIS 754 (Tenn. Ct. App. 1995), appeal denied, — S.W.2d —, 1996 Tenn. LEXIS 216 (Tenn. Mar. 25, 1996).

8. Notice of Transcript Filing.

Where T.R.A.P. 24(c) did not take effect until July 1, 1980, and appellant's notice of appeal was filed more than 15 days before the effective date of the amendment, and his brief was filed only one day after the effective date of the amendment, the failure to give notice under T.R.A.P. 24(d) did not amount to a waiver of the right to appeal. State v. Hedden, 614 S.W.2d 383, 1980 Tenn. Crim. App. LEXIS 354 (Tenn. Crim. App. 1980).

Because the official audio-visual recording of the hearing constituted the transcript, plaintiffs' notice that no transcript would be filed was in error. Ellithorpe v. Weismark, 479 S.W.3d 818, 2015 Tenn. LEXIS 827 (Tenn. Oct. 8, 2015).

9. Failure to Present Evidence to Trial Judge.

A trial judge will not be placed in error for failing to consider something which was never presented to him. State v. Williams, 638 S.W.2d 417, 1982 Tenn. Crim. App. LEXIS 379 (Tenn. Crim. App. 1982).

Rule did not authorize the trial court to enter an order nunc pro tunc granting one party leave to intervene in the trial court proceedings when the party did not file a motion to intervene in the trial court, and the trial court made no ruling during the original proceedings regarding intervention; this was not a situation involving a matter that was properly includable being omitted from the record, nor did it convey an accurate account of what transpired in the trial court. In re Neveah W., 525 S.W.3d 223, 2017 Tenn. App. LEXIS 77 (Tenn. Ct. App. Feb. 3, 2017), appeal denied, — S.W.3d —, 2017 Tenn. LEXIS 276 (Tenn. May 9, 2017).

10. Proprietary Interest in Records.

The transcript of the evidence when it is filed with the clerk of the trial court becomes a record of that court and when transmitted to the clerk of the criminal court of appeals becomes a record of the criminal court of appeals, the property of the state of Tennessee, and a defendant, even though he has paid for the transcript, has no proprietary interest in the records filed in a court. State v. Watts, 670 S.W.2d 246, 1984 Tenn. Crim. App. LEXIS 2332 (Tenn. Crim. App. 1984).

11. Corrections.

Whether the proceedings be memorialized by a stenographer, tape or by counsel's memory, it is subject to correction. Artrip v. Crilley, 688 S.W.2d 451, 1985 Tenn. App. LEXIS 2604 (Tenn. Ct. App. 1985).

The issue of omissions from or improper inclusions in the record should be first raised in the trial court. If the trial court errs in its ruling, the appellate court has inherent power to correct that ruling. Atkins v. Kirkpatrick, 823 S.W.2d 547, 1991 Tenn. App. LEXIS 547 (Tenn. Ct. App. 1991).

The procedure for correction or modification of the record reflects the policy of avoiding technicality and expediting a just resolution on the merits by according deference to the trial court's decision on which matters are properly includable in the record, thereby avoiding additional litigation on that subject alone. Bradshaw v. Daniel, 854 S.W.2d 865, 1993 Tenn. LEXIS 145 (Tenn. 1993).

There were no "extraordinary circumstances" which would have justified disregarding the defendant's testimony in the record on appeal; therefore, ruling that defendant's testimony be included in the record could not be corrected or modified. Bradshaw v. Daniel, 854 S.W.2d 865, 1993 Tenn. LEXIS 145 (Tenn. 1993).

12. Supplements to Record.

Supplements to the record ordinarily must be ordered by the trial judge and accepted upon motion to and order of the appellate court. Steve Frost Agency v. Spurlock, 859 S.W.2d 337, 1993 Tenn. App. LEXIS 213 (Tenn. Ct. App. 1993).

Although it is the duty of an appellant to prepare the record on appeal under T.R.A.P. 24, when a record does not include a transcript of the hearing on a guilty plea, the Tennessee Court of Criminal Appeals should determine on a case-by-case basis whether the record is sufficient for a meaningful review under the standard adopted in *State v. Bise,* 2012 Tenn. Crim. App. *Lexis 951 (Tenn. Crim. App. 2012)*; the Tennessee Court of Criminal Appeals does not have to and should not order supplementation of the record in every case where the appellant fails to provide a transcript of the hearing on a guilty plea, but supplementation may be considered on a case-by-case basis and should be ordered only if the record is otherwise inadequate to conduct a meaningful appellate review on the merits of the sentencing decision. State v. Caudle, 388 S.W.3d 273, 2012 Tenn. LEXIS 824 (Tenn. Nov. 27, 2012).

Counsel expressed concern about disclosing a juvenile court record, but such records were open to inspection with permission, and counsel should have sought permission; the record should have been supplemented and the procedure for filing the record should have been complied with by counsel. Ellithorpe v. Weismark, 479 S.W.3d 818, 2015 Tenn. LEXIS 827 (Tenn. Oct. 8, 2015).

Because of the deference afforded to a trial court's decision regarding the matters properly includable in the appellate record, the trial court did not err in supplementing the appellate record with the pleadings that the party unsuccessfully attempted to file in the trial court in order to convey a fair, accurate and complete account of what transpired in the trial court with respect to those issues that were the bases of appeal. In re Neveah W., 525 S.W.3d 223, 2017 Tenn. App. LEXIS 77 (Tenn. Ct. App. Feb. 3, 2017), appeal denied, — S.W.3d —, 2017 Tenn. LEXIS 276 (Tenn. May 9, 2017).

Denial of appellant's petition to supplement the record with a statement of evidence, which appellant alleged was inadvertently omitted from the record, and for the appellate court then to reconsider its opinion in light of the statement was appropriate because appellant failed to seek permission from the appellate court to file the statement beyond the time limitation imposed by rule, failed to demonstrate good cause existed to extend the time limitation, and failed to demonstrate the existence of any ground for rehearing. McCollough v. Rawls, — S.W.3d —, 2019 Tenn. App. LEXIS 77 (Tenn. Ct. App. Feb. 11, 2019).

Appellate court found no error in the trial court's refusal to supplement the record on appeal because the full depositions from a prior action were not a part of the record when the trial court ruled on a summary judgment motion, and in its ruling, the trial court did not rely on parts of the depositions not excerpted by the parties. Thus, appellants did not show why the full depositions transcripts were necessary for a fair, accurate, and complete record for the appeal. Miller v. TRH Health Ins. Co., — S.W.3d —, 2019 Tenn. App. LEXIS 487 (Tenn. Ct. App. Oct. 2, 2019).

Police report was satisfactorily contained in the record because, although defendant failed to mark the police report for identification for the record, the appellate record was properly supplemented to include the police report by order of the trial court. State v. Brown, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 690 (Tenn. Crim. App. Oct. 23, 2020).

13. Final Arbiter of Transcripts.

The trial court is the final arbiter of the transcript or statement of the proceedings. Artrip v. Crilley, 688 S.W.2d 451, 1985 Tenn. App. LEXIS 2604 (Tenn. Ct. App. 1985).

14. Making and Receiving of Transcripts.

There is a question as to whether the trial court has the power to order a private court reporter to prepare a transcript of the trial for use by a stranger to the proceeding. State v. Hurley, 712 S.W.2d 493, 1986 Tenn. Crim. App. LEXIS 2601 (Tenn. Crim. App. 1986).

When the appellant is unable to prepare or have prepared a transcript of the evidence and proceedings, the burden is on the appellant to show his or her inability to prepare a transcript, the reasons for the inability, and that the inability was brought about by matters outside his or her control. State v. Rhoden, 739 S.W.2d 6, 1987 Tenn. Crim. App. LEXIS 2562 (Tenn. Crim. App. 1987).

It is the duty of appellants to have prepared an adequate record to convey a fair, accurate and complete account of what transpired with respect to those issues that are the basis of appeal. State v. Newsome, 744 S.W.2d 911, 1987 Tenn. Crim. App. LEXIS 2697 (Tenn. Crim. App. 1987); State v. Roberts, 755 S.W.2d 833, 1988 Tenn. Crim. App. LEXIS 172 (Tenn. Crim. App. 1988), rehearing denied, 755 S.W.2d 833, 1988 Tenn. Crim. App. LEXIS 384 (Tenn. Crim. App. 1988); State v. Oody, 823 S.W.2d 554, 1991 Tenn. Crim. App. LEXIS 405 (Tenn. Crim. App. 1991).

15. Depositions.

The proper manner of preserving depositions for consideration on appeal is to copy them into the transcript or authenticate them as exhibits to a transcript filed within 90 days after notice of appeal. Lundy v. Lundy, 719 S.W.2d 154, 1986 Tenn. App. LEXIS 3182 (Tenn. Ct. App. 1986).

Depositions which were neither made exhibits nor introduced into evidence could not be considered on appeal, because the issues before the appellate court related solely to questions concerning the adequacy or preponderance of the evidence presented to the chancellor below, when he granted defendants' motion for dis-

missal. Atkins v. Kirkpatrick, 823 S.W.2d 547, 1991 Tenn. App. LEXIS 547 (Tenn. Ct. App. 1991).

Because the husband's family did not include the videotape of the husband's deposition nor a transcript of the videotape in the record, the appellate court could not consider the family's claim that the trial court erred by allowing the wife's parents to play the videotape to the jury in their action to recover the wife's personal property. Levine v. March, 266 S.W.3d 426, 2007 Tenn. App. LEXIS 728 (Tenn. Ct. App. Nov. 27, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 352 (Tenn. Apr. 28, 2008).

16. Search Warrant.

Where search warrant apparently never became a part of the record at all, appellate review of warrant was denied. State v. Johnson, 854 S.W.2d 897, 1993 Tenn. Crim. App. LEXIS 16 (Tenn. Crim. App. 1993), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 119 (Tenn. Mar. 22, 1993).

Court of criminal appeals erred in holding that it could not consider defendants' contention in a certified question that a search warrant was not valid where the copy of the search warrant was in the record and was reviewed and considered by the trial court; however, the Supreme Court of Tennessee held that because the hour was not endorsed by the magistrate on the search warrant, the warrant failed to explicitly show that it was issued first, then executed, and thus, the warrant violated Tenn. R. Crim. P. 41(c), so as to render all of the evidence seized pursuant thereto, illegal and inadmissible. State v. Bobadilla, 181 S.W.3d 641, 2005 Tenn. LEXIS 1043 (Tenn. 2005).

Record on appeal established that the trial court reviewed and considered the search warrant and the affidavit in denying defendant's motion to suppress; the trial court referred to the search warrant in its order denying the motion to suppress, in its order attaching the certified question of law to the judgment, and during the plea hearing, and it was also referenced in the certified question of law included in the final judgment; accordingly, the search warrant and the affidavit were properly includable in the supplemental record and therefore may be considered upon appellate review. State v. Smotherman, 201 S.W.3d 657, 2006 Tenn. LEXIS 691 (Tenn. 2006).

17. Nonsuits.

In Tennessee, the court rules and the case law are silent with respect to a plaintiff's right to take a nonsuit after the grant of a new trial. The absolute right of a plaintiff to take a voluntary nonsuit without prejudice is terminated at some point in the first trial, and thereafter, the granting of such a dismissal is within the sound discretion of the trial judge. The trial judge should bear in mind the position of the defendant at the time of plaintiff's motion and may impose such conditions on the plaintiff as may be appropriate to prevent defendant from being unfairly affected by such dismissal. The trial court should impose only those conditions such as costs, attorney's fees, reasonable expenses of preparing for trial, etc., that are necessary to alleviate harm to defendant, and the court's discretion is reviewable only for abuse of discretion. This rule is applicable at all times subsequent to the retirement of the jury to consider its verdict at the first trial. Panzer v. King, 743 S.W.2d 612, 1988 Tenn. LEXIS 5 (Tenn. 1988).

Where, following the trial judge's grant of a new trial to the plaintiff, the judge granted plaintiff's voluntary nonsuit without prejudice, the order of a nonsuit was a final judgment appealable under T.R.A.P. 3; however, whether the plaintiff had a right to a nonsuit without prejudice depended on whether the trial court was correct in granting a new trial. Panzer v. King, 743 S.W.2d 612, 1988 Tenn. LEXIS 5 (Tenn. 1988).

18. Suspension of Rule.

Notice and declaration of issues requirements were suspended pursuant to T.R.A.P. 2. Roberts v. Roberts, 767 S.W.2d 646, 1988 Tenn. App. LEXIS 528 (Tenn. Ct. App. 1988).

19. Sentencing Hearings.

T.R.A.P. 24 applies to sentencing hearings. State v. Meeks, 779 S.W.2d 394, 1988 Tenn. Crim. App. LEXIS 643 (Tenn. Crim. App. 1988).

20. Summation.

When the defendant intends to present issues concerning summation, a transcript of the proceedings must be included in the record transmitted to the appellate court. State v. Draper, 800 S.W.2d 489, 1990 Tenn. Crim. App. LEXIS 469 (Tenn. Crim. App. 1990).

21. Voir Dire Proceedings.

When the defendant intends to present issues concerning the voir dire proceedings, a transcript of the proceedings must be included in the record transmitted to the appellate court. State v. Draper, 800 S.W.2d 489, 1990 Tenn. Crim. App. LEXIS 469 (Tenn. Crim. App. 1990).

Defendant waived the alleged jury composition error by not including in the record, under T.R.A.P. 24(b), a transcript of the jury selection process. State v. Robinson, 73 S.W.3d 136, 2001 Tenn. Crim. App. LEXIS 858 (Tenn. Crim. App. 2001).

22. Verbatim Record.

T.R.A.P. 24 expresses a preference for a verbatim record if reasonably available, and an approval of other statements of evidence and proceedings if a verbatim record is not available. Beef N' Bird, Inc. v. Continental Casualty Co., 803 S.W.2d 234, 1990 Tenn. App. LEXIS 749 (Tenn. Ct. App. 1990).

In ruling upon availability of a verbatim record, the trial judge may properly consider the financial ability of appellant to pay for the transcription of a verbatim record, the willingness of the stenographer and those who paid him to make the transcription available, and any other relevant circumstance. Beef N' Bird, Inc. v. Continental Casualty Co., 803 S.W.2d 234, 1990 Tenn. App. LEXIS 749 (Tenn. Ct. App. 1990).

If an appellant conceives that a verbatim transcript is unavailable to him, he may initially perform his duty by filing a narrative statement of the evidence and proceedings within ninety days after notice of appeal. If the appellee files timely objection and shows that a verbatim record is available to appellant, the trial court may require the production and substitution of a verbatim record instead of the informal narrative. Beef N' Bird, Inc. v. Continental Casualty Co., 803 S.W.2d 234, 1990 Tenn. App. LEXIS 749 (Tenn. Ct. App. 1990).

None of the following can be considered by an appellate court in lieu of a verbatim transcript or statement of the evidence and proceedings: allegations contained in pleadings, statements made by counsel during a hearing or the trial, recitation of facts and argument contained in a brief submitted to appellate court, and statements made by counsel during oral argument. State v. Draper, 800 S.W.2d 489, 1990 Tenn. Crim. App. LEXIS 469 (Tenn. Crim. App. 1990).

23. Good Cause.

T.R.A.P. 24 is reasonable and fair and, in the absence of "good cause" being shown, must be enforced. H.D. Edgemon Contracting Co. v. King, 803 S.W.2d 220, 1991 Tenn. LEXIS 46 (Tenn. 1991).

Good cause was not shown where failure to comply with T.R.A.P. 24 was due to the oversight of plaintiff's counsel in not completing filings before becoming involved in trials and leaving on vacation. H.D. Edgemon Contracting Co. v. King, 803 S.W.2d 220, 1991 Tenn. LEXIS 46 (Tenn. 1991).

24. Entitlement to Transcript.

As a general rule, the defendant is entitled to a transcript of the proceedings relevant to the issues raised in his motion for a new trial if counsel asserts that the issues will be raised in the appellate court. State v. Draper, 800 S.W.2d 489, 1990 Tenn. Crim. App. LEXIS 469 (Tenn. Crim. App. 1990).

As a general rule, a trial judge should not deny the defendant a transcription of the proceedings because he is of the opinion the issue lacks merit or has been waived. State v. Draper, 800 S.W.2d 489, 1990 Tenn. Crim. App. LEXIS 469 (Tenn. Crim. App. 1990).

If a trial judge rules that a defendant is not entitled to a transcript of all or part of the proceedings designated by defense counsel, he must state his reasons for denying the transcript on the record. State v. Draper, 800 S.W.2d 489, 1990 Tenn. Crim. App. LEXIS 469 (Tenn. Crim. App. 1990).

When the trial judge rules that the defendant is not entitled to a transcript of all or a portion of the proceedings designated by defense counsel, the defendant may seek relief in the appellate court pursuant to T.R.A.P. 10. State v. Draper, 800 S.W.2d 489, 1990 Tenn. Crim. App. LEXIS 469 (Tenn. Crim. App. 1990).

The trial court did not err in refusing to order the court reporter to file a transcript where the appellant had not ordered the necessary transcript within 90 days of filing the notice of appeal, and had not timely sought an extension of time within which to file the transcript. Word v. Word, 937 S.W.2d 931, 1996 Tenn. App. LEXIS 490 (Tenn. Ct. App. 1996), appeal denied, — S.W.2d —, 1997 Tenn. LEXIS 88 (Tenn. Jan. 6, 1997).

25. Filing Requirement Satisfied.

The requirement for filing within ninety days is satisfied by timely filing of a proposed transcript or statement of the evidence and proceedings, and, after such timely filing, objections, rulings thereon, and amendments and substitutions under orders of the trial court may properly occur after the expiration of the prescribed ninety-day period. Beef N' Bird, Inc. v. Continental Casualty Co., 803 S.W.2d 234, 1990 Tenn. App. LEXIS 749 (Tenn. Ct. App. 1990).

26. Content of Transcript.

Defense counsel may designate the portions of the proceedings that are to be transcribed by the court reporter since he determines which issues will be presented for review and formulates the strategy that will be used in presenting and arguing the issues. State v. Draper, 800 S.W.2d 489, 1990 Tenn. Crim. App. LEXIS 469 (Tenn. Crim. App. 1990).

When a party in interest questions the necessity of transcribing certain portions of the proceedings designated by defense counsel, the trial judge must conduct a hearing to determine whether the portion of the proceedings in question should be transcribed. State v. Draper, 800 S.W.2d 489, 1990 Tenn. Crim. App. LEXIS 469 (Tenn. Crim. App. 1990).

The person questioning the need for a transcript of the particular proceedings has the burden of showing that the designated proceedings are not relevant to or necessary for a determination of the issues. State v. Draper, 800 S.W.2d 489, 1990 Tenn. Crim. App. LEXIS 469 (Tenn. Crim. App. 1990).

In criminal cases the trial judge has the authority to require the parties to designate the portions of the record that will be prepared and submitted to the appellate court. State v. Peak, 823 S.W.2d 228, 1991 Tenn. Crim. App. LEXIS 950 (Tenn. Crim. App. 1991).

The trial judge has no authority to dismiss an appeal as a means of settling any controversy over the designation of portions of the record. State v. Peak, 823 S.W.2d 228, 1991 Tenn. Crim. App. LEXIS 950 (Tenn. Crim. App. 1991).

27. Stenographer.

A party who does not join in the engagement and payment of a stenographer has no contract right to require the stenographer to transcribe the record, which is therefore unavailable to him unless and until made available to him on terms satisfactory to the stenographer and the party or parties who engaged the stenographer. Beef N' Bird, Inc. v. Continental Casualty Co., 803 S.W.2d 234, 1990 Tenn. App. LEXIS 749 (Tenn. Ct. App. 1990).

28. Certification of Transcript.

Defense counsel is not required to execute a certificate attesting to the accuracy and content of a transcript filed on appeal where the transcript already contains the certificate of the court reporter. When the court reporter's certificate is attached to the transcript, defense counsel should limit his role to giving notice to the district attorney general or his assistant that the transcript has been filed with the clerk. State v. Matthews, 805 S.W.2d 776, 1990 Tenn. Crim. App. LEXIS 597 (Tenn. Crim. App. 1990).

29. Matters Not Part of Record.

Mere statements of counsel, which are not appropriate proffers or not effectively taken as true by the parties, cannot establish what occurred in the trial court unless supported by evidence in the record. State v. Thompson, 832 S.W.2d 577, 1991 Tenn. Crim. App. LEXIS 656 (Tenn. Crim. App. 1991).

Memorandum of law accompanying motion was not a part of the appellate record. Pendleton v. Mills, 73 S.W.3d 115, 2001 Tenn. App. LEXIS 689 (Tenn. Ct. App. 2001).

Court of criminal appeals could not consider a letter as it was not properly made a part of the record before it. Fuller v. State, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 636 (Tenn. Crim. App. Oct. 8, 2019).

Rule imposes an obligation on the parties to designate the paper or matter filed in the trial court that the party wishes to include in the record; given the protracted nature of this lawsuit and the multitude of rulings made pretrial, the trial court was not obligated, consistent with the language of the rule, to correct or modify the record when defendants failed to satisfy their obligation to clearly identify the materials they wanted included or the issues they planned to present on appeal. Nesmith v. Clemmons, — S.W.3d —, 2019 Tenn. App. LEXIS 545 (Tenn. Ct. App. Nov. 7, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 137 (Tenn. Mar. 26, 2020).

Appellate court discerned no basis for departing from the trial court's decision to exclude appellant'spretrial brief and the brief's attached exhibits from the record on appeal because the brief and exhibits were not introduced into evidence at trial by the appellant, who was acting pro se both in the trial and on appeal. Vazeen v. Sir, — S.W.3d —, 2021 Tenn. App. LEXIS 81 (Tenn. Ct. App. Mar. 8, 2021).

30. Authentication of Exhibits.

When statement of the evidence was without the authentication of the trial judge and without the automatic authentication provided for in T.R.A.P. 24(f), and neither the note on which the suit was based nor the affidavit which allegedly traced the note through the Federal Deposit Insurance Corporation to the appellant appeared in the statement of the case, the appellant failed to preserve the evidence necessary for consideration of its issues on appeal. Cadle Co. v. Singleton, 851 S.W.2d 814, 1992 Tenn. App. LEXIS 881 (Tenn. Ct. App. 1992), rehearing denied, — S.W.2d —, 1992 Tenn. App. LEXIS 957 (Tenn. Ct. App. 1992).

Where a transcript of the evidence was not filed, and documents attached to the record, marked as exhibits, were not authenticated by the trial judge, automatic authentication as provided in T.R.A.P. 24(f) did not apply. Bishop v. Bishop, 939 S.W.2d 109, 1996 Tenn. App. LEXIS 600 (Tenn. Ct. App. 1996).

31. Dismissal Not Warranted.

Although the provisions of T.R.A.P. 24 regarding the designation, preparation and certification of the transcript are clear and unambiguous, dismissal of plaintiff's appeal for counsel's failure to comply was inconsistent with the general policy of the rules, which emphasizes reaching a just result and disregarding technicality in form. Johnson v. Hardin, 926 S.W.2d 236, 1996 Tenn. LEXIS 466 (Tenn. 1996).

Defendant risked waiving the issue of whether the trial court properly refused requested instructions because defendant failed to include the discussion about the jury instructions, which would have included the discussion about the requested instructions, in the appellate record. The appellate court reviewed the issue because the trial court addressed the issue at the hearing on defendant's motion for new trial and concluded that it properly refused to give the requested instructions. State v. Pettis, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 314 (Tenn. Crim. App. May 17, 2019).

32. Statement of the Evidence.

In a divorce action, where the father did not have a court reporter present when the case was tried, tape recorded most of the trial himself, had the recordings transcribed for appeal purposes, and submitted the concededly incomplete transcript as a statement of the evidence

under T.R.A.P. 24(c) without objection by the mother, on appeal the court accepted the transcript as a statement of evidence, albeit an incomplete one, and discussed only that testimony that pertained to the issues on appeal. Buss-Flinn v. Flinn, 121 S.W.3d 383, 2003 Tenn. App. LEXIS 351 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2003 Tenn. LEXIS 1032 (Tenn. 2003).

In an appeal involved the continuing post-divorce discord between the mother and father, the father did not include a transcript of the proceedings below in the record on appeal. The trial court approved the mother's statement of the evidence in accordance with T.R.A.P. 24(e), (f). Beard v. Beard, 206 S.W.3d 463, 2006 Tenn. App. LEXIS 293 (Tenn. Ct. App. 2006), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 875 (Tenn. 2006).

Appellate court's review of the entire record showed that appellant's statement of the evidence did not convey a fair, accurate and complete account of what transpired in the juvenile court below and largely was unhelpful in that it simply laid out appellant's conclusory assertions, including appellant's testimony that the juvenile court acted unjustly and inappropriately. Furthermore, the appellate court found nothing in the record presented to the court showing any error by the juvenile court. Karpovich v. Brannick, — S.W.3d —, 2019 Tenn. App. LEXIS 9 (Tenn. Ct. App. Jan. 8, 2019).

Because no objection to a statement of the evidence was filed, and because a juvenile court took no action, the statement of the evidence and the exhibits were deemed to have been approved and were so considered by the appellate court. Karpovich v. Brannick, — S.W.3d —, 2019 Tenn. App. LEXIS 9 (Tenn. Ct. App. Jan. 8, 2019).

Trial court properly declined to accept a judgment creditor's statement of the evidence because (1) the statement mostly contained arguments of counsel, and (2) no extraordinary circumstances were shown. Smith v. Smith, — S.W.3d —, 2019 Tenn. App. LEXIS 59 (Tenn. Ct. App. Jan. 31, 2019).

Sufficient evidence supported an order of protection because the trial court's statement of evidence, which controlled over a husband's contrary statement, showed the husband committed domestic abuse against a wife. Purswani v. Purswani, 585 S.W.3d 907, 2019 Tenn. App. LEXIS 147 (Tenn. Ct. App. Mar. 26, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 415 (Tenn. Aug. 14, 2019).

Mother's appeal of contempt and parenting plan modification orders was remanded because the trial court did not settle differences between competing statements of the evidence, as required, frustrating the mother's right to review. Blakney v. White, — S.W.3d —, 2019 Tenn. App. LEXIS 498 (Tenn. Ct. App. Oct. 8, 2019).

When an appellant submitted a statement of the evidence, no objection was lodged as to the statement, and it was approved by virtue of the trial court's silence. McCormick v. McCormick, — S.W.3d —, 2020 Tenn. App. LEXIS 93 (Tenn. Ct. App. Mar. 4, 2020).

Trial court did not err by not approving for consideration by the appellate court a spouse's statement of the evidence in a divorce action because, although no objection was filed to the proposed statement, the statement did not convey an accurate and complete account of the final hearing in the matter, was not certified by the spouse, and was not accompanied by a short and plain description of the issues which the spouse wished to raise on appeal. In fact, the spouse admitted to adding testimony that was not heard by the court. Montgomery v. Montgomery, — S.W.3d —, 2020 Tenn. App. LEXIS 488 (Tenn. Ct. App. Nov. 2, 2020).

When the parties agreed to and the trial court approved a statement of the evidence adopting verbatim the court's memorandum opinion, the statement of evidence was not sufficiently complete to allow for appellate review of the termination of a father's parental rights. Due to the insufficient findings of fact concerning the grounds for termination and the insufficient record for review of the appeal, the judgment terminating the father's parental rights was vacated and the matter was remanded for the court to make sufficient findings of fact. In re Maddox F., — S.W.3d —, 2020 Tenn. App. LEXIS 594 (Tenn. Ct. App. Dec. 23, 2020).

33. Limited Transcript Insufficient.

In a criminal appeal, where a defendant raised issues relating to the state's closing arguments, the defendant was required to provide the portions of the relevant proceedings; because no record of the closing arguments was provided, the arguments were waived. State v. Mickens, 123 S.W.3d 355, 2003 Tenn. Crim. App. LEXIS 107 (Tenn. Crim. App. 2003), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 805 (Tenn. Sept. 2, 2003).

34. Presumption of Regularity.

Defendant did not show consecutive sentencing erred because (1) consecutive sentencing was mandatory for a firearm charge and attempted first degree murder, (2) defendant did not contest a finding of being a dangerous offender whose behavior indicated little or no regard for human life and no hesitation about committing a crime in which the risk to human life was high, and (3) the evidence presumably sufficed when defendant did not include the presentence report in the appellate record. State v. Chambers, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 241 (Tenn. Crim. App. Apr. 15, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 330 (Tenn. July 19, 2019).

35. Record Sufficient.

Lawyer failed to establish extraordinary circumstances regarding the completeness and accuracy of the record on appeal because the trial court held a hearing and acknowledged that it had shredded the record, believing it to be a courtesy copy; the trial court reviewed the replacement copy that was provided, resolved the disputes concerning its accuracy and authenticity, and certified the record for appeal Bd. of Prof'l Responsibility of the Supreme Court of Tenn. v. Justice, 577 S.W.3d 908, 2019 Tenn. LEXIS 288 (Tenn. July 2, 2019), cert. denied, 206 L. Ed. 2d 187, 140 S. Ct. 1212, — U.S. —, 2020 U.S. LEXIS 944 (U.S. Feb. 24, 2020).

Because the trial court complied with the procedure mandated by this rule, the statement of the evidence it approved constituted an equivalent report of the events at trial. State v. Schmitz, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 674 (Tenn. Crim. App. Oct. 22, 2019).

Inmate's appeal of a denial of post-conviction relief was considered, despite the inmate's presentation of an insufficient record, because the post-conviction court's summary of the procedural history, including relevant portions of a guilty plea hearing, was not disputed. Cole v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 486 (Tenn. Crim. App. July 16, 2020).

36. Failure to Provide Transcript or Statement of Evidence.

As plaintiff did not have a transcript prepared as required by T.R.A.P. 24(b) and no statement of the evidence was filed under Rule 24(c), the only basis the appellate court had for evaluating the denial of plaintiff's motion for a continuance was a statement in the order dismissing the case that the motion for a continuance was not supported by sufficient evidence. Howell v. Ryerkerk, 372 S.W.3d 576, 2012 Tenn. App. LEXIS 156 (Tenn. Ct. App. Mar. 9, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 430 (Tenn. June 19, 2012).

Defendant was not entitled to relief under the plain error doctrine because the inaccuracy in the State's election of offenses was not so significant that it probably changed the outcome of the trial, and defendant failed to provide a record that clearly established what occurred in the trial court. State v. Knowles, 470 S.W.3d 416, 2015 Tenn. LEXIS 591 (Tenn. July 31, 2015).

Trial court's findings of fact were presumed to be correct because a mother filed no transcript or statement of the evidence from the trial court proceedings, and thus, the trial court's denial of the mother's motion to alter or amend on the issue of whether the mother's failure to pay child support and uncovered medical expenses was willful was affirmed; therefore, the trial court's underlying judgment finding the mother guilty of criminal contempt was also affirmed. Burris v. Burris, 512 S.W.3d 239, 2016 Tenn. App. LEXIS 698 (Tenn. Ct. App. Sept. 20, 2016).

Mother failed to comply with the clear mandates of the rule because she filed no transcript or statement of the evidence from the trial court proceedings; because the trial court's findings of fact were presumed to be correct in the absence of a transcript or statement of the evidence, the denial of the mother's motion to alter or amend was affirmed, and the underlying judgment finding the mother guilty of criminal contempt for failure to pay child support was therefore affirmed. Burris v. Burris, 512 S.W.3d 239, 2016 Tenn. App. LEXIS 698 (Tenn. Ct. App. Sept. 20, 2016).

Appellate record contained neither a transcript of a final hearing, nor a statement of the evidence. As a result, the appellate court was unable to review the proceedings in the trial court to determine whether, in fact, the appellants were denied their rights to due process, as they contended. Hunt v. Lowery, — S.W.3d —, 2019 Tenn. App. LEXIS 519 (Tenn. Ct. App. Oct. 24, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 184 (Tenn. Mar. 26, 2020).

Petitioner waived appellate review of the denial of his petition for a writ of error coram nobis from his first degree murder conviction because he failed to prepare an adequate record on appeal, as the appellate record did not contain a transcript of the coram nobis hearing. Harris v. State, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 101 (Tenn. Crim. App. Feb. 19, 2019).

Although appellant, who was living in India and acting pro se in an attempt to set aside an order granting a divorce, failed to provide the appellate court with a transcript or statement of the evidence and further failed to comply with the rules concerning the content of the appellate brief, the issues raised sounded in law and not in fact. As such, the court's review was de novo with no presumption of correctness. Singh v. Singh, — S.W.3d —, 2019 Tenn. App. LEXIS 334 (Tenn. Ct. App. July 3, 2019).

Although the resolution of the issue presented rested largely on the facts of the case, the appellate record contained neither a transcript of the hearing nor a statement of the evidence; in the absence of any record of the proceedings, the court could not make a meaningful review of the issue and the facts found by the trial court were conclusive on appeal. Johnson v. Millington Mun. Sch., — S.W.3d —, 2020 Tenn. App. LEXIS 386 (Tenn. Ct. App. Aug. 27, 2020).

Defendant did not file his motion for new trial until more than one year after the judgments were entered, and because his motion for new trial was untimely, his notice of appeal was also untimely; he also did not provide any explanation for the untimely filings, and the absence of the sentence hearing transcript from

the record precluded review of the sentence. The interest of justice did not require waiver of the timely notice of appeal requirement and the appeal was dismissed. State v. Cooke, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 460 (Tenn. Crim. App. July 2, 2020).

37. Instructions.

Defendant did not submit a written request to the trial court for a jury instruction on a missing witness and failed to submit a transcript of the jury instructions as part of the record on appeal, as the record submitted to the appellate court contained only the written jury instructions. Accordingly, the appellate court found that there was no plain error pertaining to the jury instruction as defendant pointed to no unequivocal rule of law that had been breached. State v. Buford, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 40 (Tenn. Crim. App. Jan. 27, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 345 (Tenn. June 3, 2020).

38. Excluding Documents from Record.

Rule makes clear that items not filed with the court are not properly includable in the record on appeal; defendants did not identify which documents in the designation were introduced in the trial court but excluded from the appellate record, as they were required to do, and thus they had not shown that extraordinary circumstances existed to assign error in this regard. Nesmith v. Clemmons, — S.W.3d —, 2019 Tenn. App. LEXIS 545 (Tenn. Ct. App. Nov. 7, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 137 (Tenn. Mar. 26, 2020).

Defendants' argument that the documents that were excluded from the record were essential to their arguments on appeal was without merit; two items of their statements of issues were not raised as issues in the appeal, and three other items were vague and did not state the issue that would be presented, as required. Defendants did not show that extraordinary circumstances existed that would cause the court not to defer to the judgment of the trial court. Nesmith v. Clemmons, — S.W.3d —, 2019 Tenn. App. LEXIS 545 (Tenn. Ct. App. Nov. 7, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 137 (Tenn. Mar. 26, 2020).

39. Waiver.

Dismissal of a pro se litigant's appeal was appropriate because the litigant's brief and reply brief contained several deficiencies and hindered the appellate court's ability to ascertain the gravamen of the litigant's arguments. The litigant repeatedly referred in briefs to matters that were not within the appellate record, failed to cite relevant authority in argument, raised issues that were not included in the statement of issues presented for review, and referenced the litigant's own arguments rather than the evidence at trial. Vazeen v. US Med, — S.W.3d —, 2020 Tenn. App. LEXIS 589 (Tenn. Ct. App. Dec. 22, 2020).

Although defendant argued on appeal that trial counsel was ineffective in failing to impeach a witness with recordings of the prior inconsistent statements by the witness, failed to provide the audio recordings on appeal. Accordingly, the issue was waived. McEwen v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 114 (Tenn. Crim. App. Feb. 19, 2020), appeal denied, McEwen v. State, — S.W.3d —, 2020 Tenn. LEXIS 372 (Tenn. July 23, 2020).

40. Presumption of Correctness.

Appellate court presumed that a trial court's findings were correct because appellant not filed any transcript or statement of the evidence to support that the evidence preponderated against the trial court's judgment. Harmon v. Gricunas, — S.W.3d —, 2020 Tenn. App. LEXIS 9 (Tenn. Ct. App. Jan. 9, 2020).

Court exercised its discretion to consider the merits of the appeal despite deficiencies in appellant's brief because review was limited to a technical record of less than 100 pages, plus there was another problem the court could not excuse, namely that appellant provided neither a transcript nor a statement of the evidence; his issues turned on the facts presented at trial, and in light of the presumption that the findings were supported by the evidence, the judgment was affirmed. Ray v. Willoughby, — S.W.3d —, 2020 Tenn. App. LEXIS 97 (Tenn. Ct. App. Mar. 5, 2020).

41. Extraordinary Cause.

Plaintiff did not show extraordinary circumstances that would allow the court to overturn the trial court's determination of the record because by plaintiff's own admission, the documents at issue were not before the trial court when it considered the property owner's motion for summary judgment and plaintiff waited until well after the fifteen-day time period allotted in this rule to seek correction of the record. Vaughn v. DMC-Memphis, LLC, — S.W.3d —, 2021 Tenn. App. LEXIS 28 (Tenn. Ct. App. Jan. 29, 2021).

Rule 25. Completion and Transmission of the Record. — (a) Time for Completion of the Record; Duty of the Parties. — The record on appeal shall be assembled, numbered and completed by the clerk of the trial court within 45 days after filing of the transcript or statement prepared in accordance with Rule 24(b) or 24(c) or, if no transcript or statement is to be filed, within 45 days after filing of appellant's notice under Rule 24(d) that no transcript or

statement is to be filed, unless the time is extended by an order entered under subdivision (d) of this rule. Unless the time has been extended by order, if the appellant fails to file within 60 days from the filing of the notice of appeal either the transcript or statement of evidence prepared pursuant to Rule 24(b) or 24(c) or the notice under Rule 24(d) that no transcript or statement is to be filed, the clerk of the trial court shall provide written notice within 10 days to the clerk of the appellate court of the appellant's failure to comply with Rule 24(b) or (c) or (d), with a copy provided to counsel and pro se parties. After the filing of the notice of appeal, the parties shall comply with the provisions of Rule 24 and shall take any other action necessary to enable the clerk to complete the record. The clerk of the trial court shall number the pages of the documents comprising the record and shall prepare for transmission with the record a list of the documents correspondingly numbered and identified with reasonable definiteness. Copies of all papers filed in the trial court, except the transcript or statement of the evidence or proceedings and exhibits, shall be bound together in chronological order; such bound volume (or, if more than one bound volume, the first such volume) shall contain a table of contents listing in chronological order all of the papers filed in the trial court with each document's corresponding page number.

Exhibits shall be compiled in numerical order and bound in a volume or volumes separate from the volume of papers filed in the trial court and separate from the transcript or statement of the evidence or proceedings. The volume of exhibits shall contain a table of contents listing all exhibits, whether or not they are included in the record. Each exhibit to be included in the record shall be securely stapled to a blank page, or placed in a durable envelope which shall be securely stapled to a blank page, or placed within a plastic sheet protector; each such page or plastic sheet protector then shall be bound within the volume of exhibits. If an exhibit is not included in the record pursuant to subdivision (b) of this rule, or if an exhibit is included in the record but cannot be bound into the volume of exhibits due to the nature of the exhibit, the trial court clerk shall include in numerical order in the volume of exhibits a page indicating the number of the exhibit, a description of the exhibit, and a statement of the reason the exhibit is not contained in the volume of exhibits. All exhibits which are to be included in the record but which cannot be bound in the volume of exhibits due to the nature of the exhibits shall be placed securely in a durable envelope or other suitable container, which shall be labeled with the style of the case, the docket number, and the exhibit number of the exhibit contained therein.

(b) Duty of Clerk to Transmit the Record. — When the record is complete for purposes of the appeal, the clerk of the trial court shall transmit the record to the clerk of the appellate court and shall transmit therewith the list identifying the documents required by subdivision (a) of this rule. Documents of unusual bulk or weight and physical exhibits, other than documents, shall not be transmitted by the clerk. The clerk of the trial court shall notify the parties if any documents or physical exhibits are not to be transmitted. The clerk of the trial court shall transmit any such documents or physical exhibits if directed to do so by a party or the clerk of the appellate court. A party must make advance arrangements with the clerks for the transportation and receipt of

exhibits or documents of unusual bulk or weight.

Transmission of the record is effected when the clerk of the trial court mails or otherwise forwards the record to the clerk of the appellate court. The clerk of the trial court shall indicate by endorsement on the face of the record or otherwise the date upon which it is transmitted to the appellate court.

(c) Duty of Clerk to Make Record Available to Prepare Appellate Papers. — An attorney may request the clerk of the appellate court to transmit the record for the purpose of preparing appellate papers. The clerk shall comply with the request by making the record available at the clerk's office or by sending the record to the attorney at the attorney's expense. Upon receiving the record, the attorney is responsible for its safekeeping and shall return the record to the clerk of the appellate court not later than the day upon which the party's brief is to be filed. The attorney shall return the record to the clerk in its entirety and in an organized manner, with all volumes of the record intact and with all exhibits accounted for. In the event the returned record is either incomplete or in disarray, the appellate court in its discretion may require the attorney to pay the cost of reconstructing the record and/or may suspend the attorney's privilege to check out records in the future. The clerk shall keep a written account of requests for and return of the record.

Pro se litigants shall be allowed to remove the record from the appellate clerk's office only upon order of the appellate court. However, pro se litigants may inspect the record at the appellate clerk's office pursuant to Supreme Court Rule 34.

(d) Extension of Time for Completion of the Record. — If the record cannot be completed within the time permitted by subdivision (a) of this rule, the clerk of the trial court shall request an extension of time from the appellate court to which the appeal has been taken. The request shall set forth the reason for the requested extension and must be made within the time originally prescribed for completing the record or within an extension previously granted. The time for completing the record shall not be extended to a day more than 60 days after the date of the filing of the transcript or statement prepared in accordance with Rule 24(b) or 24(c) or the appellant's notice filed in accordance with Rule 24(d). In the event of the failure of the clerk of the trial court to complete the record within the time allowed, the clerk of the appellate court shall notify the trial court and take such other steps as may be directed by the appellate court.

(e) Retention of the Record in the Trial Court by Order of the Court. — If the record or any part thereof is required in the trial court for use there pending the appeal, the trial court may make an order to that effect, and the clerk of the trial court shall retain the record or parts thereof subject to the request of the appellate court. The clerk of the trial court shall transmit a certified copy of the order together with such parts of the original record as the trial court shall allow and certified copies of any retained parts.

(f) Stipulation of Parties that Parts of the Record Be Retained in the Trial Court. — The parties may agree by written stipulation filed in the trial court that designated parts of the record shall be retained in the trial court unless thereafter the appellate court shall order or any party shall request their transmittal. The parts thus designated shall nevertheless be a part of the

record on appeal for all purposes.

(g) Record for Preliminary Hearing in the Appellate Court. — If prior to the time the record is transmitted a party desires to make in the appellate court a motion or application for an order appropriately granted by the appellate court, the clerk of the trial court shall transmit to the appellate court such parts of the record or certified copies thereof as any party shall designate.

(h) Return of Record to Trial Court for Non-Compliance. — If the clerk of the appellate court determines that the record transmitted to the appellate court fails to comply with the provisions of these rules governing the preparation, completion, and transmission of the record, the clerk is authorized to return the record to the trial court with a notification to the clerk of the trial court as to the specific lack of compliance with the rules. In such cases, the clerk of the trial court shall promptly remedy the lack of compliance and then promptly transmit the modified record to the clerk of the appellate court. [As amended effective July 1, 1980; by order entered January 26, 1999, effective July 1, 1999; by order entered January 31, 2003, effective July 1, 2003; by order entered January 6, 2005, effective July 1, 2005; by order filed January 2, 2007, effective July 1, 2007; by order entered December 16, 2013, as amended, March 14, 2014, effective July 1, 2014; and by order filed December 21, 2016, effective July 1, 2017.]

Advisory Commission Comments. After the transcript or statement prepared in accordance with Rule 24(b) or 24(c) has been filed with the clerk of the trial court, or after a notice is filed in accordance with Rule 24(d), the clerk must assemble, number and complete the record within 45 days after filing of the transcript or statement or notice. If unable to complete the record within 45 days, the clerk, not one of the parties, must request an extension from the appellate court to which the appeal has been taken. Under Rule 40(g), the clerk forfeits the clerk's entire cost of preparing and transmitting the record, or such portion thereof as appropriate, if the clerk fails to complete the record on appeal within the time specified in this rule. When the record is complete for purposes of appeal, the clerk of the trial court transmits the record to the clerk of the appellate court.

Advisory Commission Comments [1980]. *Subdivision (a).* Rule 25(a) makes clear that the clerk is not required to bind together the transcript of evidence with the other parts of the record.

Advisory Commission Comments [2003]. *Subdivision (a).* The new second sentence covers situations where lawyers take no action concerning the transcript of evidence after notice of appeal is filed.

Advisory Commission Comments [2004]. *Termination of Parental Rights Proceedings.* Rule 8A imposes special requirements governing the appeal of any termination of parental rights proceeding. In particular, Rules 8A(e) and 8A(f) impose special provisions regarding the completion and transmission of the record in such an appeal.

Advisory Commission Comments [2005]. *Subdivision (a).* The amendment to subdivision (a) changes the manner in which the exhibits included in the record are transmitted to the appellate court. Because individual exhibits occasionally are lost by attorneys who check out the record or by appellate court personnel, the rule is amended to require that the exhibits to the extent possible be compiled into bound volumes separate from the transcript of the evidence or proceedings. The Commission believes that having the original exhibits bound into volumes will reduce the possibility that an individual exhibit will be lost.

Because individual exhibits occasionally are lost after the record is transmitted to the appellate court, attorneys are well-advised to retain duplicates of all exhibits pending the final disposition in the case. If the parties have duplicates of the exhibits, a lost exhibit can be replaced with relative ease; on the other hand, if neither party has a copy of the missing exhibit, it might not be possible to replace the missing exhibit. In the latter case, appellate review of the case can be adversely affected.

Subdivision (c). The appellate court clerk's experience shows that some attorneys have returned records to the clerk with bound volumes of the record disassembled, with exhibits missing, or with the components of the record disorganized. The purpose of the amendment to the first paragraph of subdivision (c), requiring attorneys to return the record intact and in an organized manner, is two-fold: (1) to assist the

clerk's personnel in efficiently verifying that each record returned to the appellate clerk is complete; and (2) to assist the appellate court, which subsequently will be reviewing the record when deciding the appeal.

The second paragraph of subdivision (c) is amended to refer to Rule 34, Rules of the Tennessee Supreme Court, governing access to appellate judicial records.

Advisory Commission Comments [2007]. A transcript or statement of the evidence must be filed with the trial court clerk within 60 days after the filing of the notice of appeal unless extended by the court. The period was formerly 90 days.

Advisory Commission Comments [2014]. *Subdivision (a).* Tenn. R. App. P. 25(a) was amended to require that the bound volume(s) of the papers filed in the trial court include a table of contents listing those papers in the order in which the papers were filed in the trial court. Prior to the adoption of the amendment, the practice among trial court clerks varied, with some clerks preparing a table of contents in chronological order, while others prepared a table of contents in alphabetical order (by the clerk's description of each document). Having a table of contents arranged in chronological order greatly assists the appellate court in its efficient review of the record.

Subdivision (h). Tenn. R. App. P. 25 was amended to add subdivision (h), authorizing the clerk of the appellate court to return to the trial court any record that fails to comply with the provisions of the Rules of Appellate Procedure governing the preparation, completion, and transmission of the record. *See also* Tenn. R. App. P. 40(i) (providing that the trial court clerk's statutory fee shall be forfeited for failing to complete and transmit the record on appeal in the time and manner provided in these rules); *Aclin v. Speight*, 611 S.W.2d 54, 56 (Tenn. Ct. App. 1980), (disallowing trial court clerk's costs because of inclusion of extraneous documents in the record on appeal). Like the amendments to subdivision (a), this amendment was intended to promote the appellate court's efficient review of the record.

Advisory Commission Comments [2017]. The first sentence of subdivision (a) of this rule is amended by deleting the following obsolete text, formerly at the end of that sentence: "or if proof of service of the notice of appeal has not been filed[.]"

Compiler's Notes. T.R.A.P. 25 may affect Tenn. Code Ann. §§ 16-4-115, 40-30-120.

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 31, 2003, was ratified and approved by 2003 House Resolution 19 and Senate Resolution 9. The order promulgating the 2003 amendment of this rule provided that it take effect on July 1, 2003.

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 6, 2005, was ratified and approved by 2005 House Resolution 14 and Senate Resolution 10. The order promulgating the amendment of this rule provided that it take effect July 1, 2005.

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 2, 2007, was ratified and approved by 2007 House Resolution 19 and Senate Resolution 12. The order promulgating the 2007 amendment of this rule provided that it take effect July 1, 2007.

The amendment of Rule 25, which amended subdivision (a) and added subdivision (h) and the 2014 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 16, 2013, as amended, March 14, 2014, was ratified and approved by 2014 House Resolution 156 and Senate Resolution 75. The order promulgating the 2014 amendment of subdivision (a) and the additions of subdivision (h) and the 2014 Advisory Commission Comments provided that it take effect on July 1, 2014.

Supreme Court order No. ADM2013-02056, filed June 5, 2014, indefinitely suspends, pending further consideration, the effective date of certain amendments to Rule 25(a) made by the Supreme Court in its order dated December 16, 2013, as amended, March 14, 2014, and ratified and approved by 2014 House Resolution 156 and Senate Resolution 75, which were to take effect July 1, 2014. The suspension applies only to the addition of the following language in the first paragraph of (a), preceding "The clerk of the trial court shall number the pages of the documents...": "If a transcript is filed in accordance with Rule 24(b), the clerk shall include both the original transcript and the electronic copy of the transcript in the record." and the related 2014 Advisory Commission Comments, which read: "Subdivision (a). Tenn. R. App. P. 25(a) was amended to require the clerk to include both the original transcript and the electronic copy of the transcript in the record on appeal (in those cases in which a transcript is filed). This amendment corresponds to the simultaneous amendment to Tenn. R. App. P. 24(b), requiring the filing of an electronic copy of the transcript, along with the original transcript. The purpose of requiring the submission of an electronic copy of the transcript is to facilitate the appellate court's efficient review of the appeal." The remaining 2014 amendments to Rule 24(b) and (c) and to Rule 25(a) and (h) are unaffected by this order and will take effect, as scheduled, on July 1, 2014.

The amendment of Rule 25, which amended subdivision (a) and added the [2017] Advisory Comments, as promulgated and adopted by the Supreme Court in its order dated December 21, 2016, was ratified and approved by 2017 House

Resolution 19 and Senate Resolution 16. The order promulgating the amendment of subdivision (a) and the addition of the [2017] Advisory Comments, provided that it take effect July 1, 2017.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 643, 690.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 58, 59, 93; 6 Tenn. Juris., Clerks of Court, § 12.

Law Reviews. An Update of the New Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 727.

The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 1.

NOTES TO DECISIONS

1. Proprietary Interest in Records.

The transcript of the evidence, when it is filed with the clerk of the trial court, becomes a record of that court and when transmitted to the clerk of the criminal court of appeals becomes a record of the criminal court of appeals, the property of the State of Tennessee, and a defendant, even though he has paid for the transcript, has no proprietary interest in the records filed in a court. State v. Watts, 670 S.W.2d 246, 1984 Tenn. Crim. App. LEXIS 2332 (Tenn. Crim. App. 1984).

Rule 26. Filing of the Record. — (a) Filing and Notice of Filing of the Record. — Upon receipt of the record following transmittal, the clerk of the appellate court shall file the record. The clerk shall immediately serve notice on all parties of the date on which the record was filed.

(b) Dismissal for Failure of Appellant Timely to File the Transcript or Statement. — If the appellant shall fail to file the transcript or statement within the time specified in Rule 24(b) or (c), or if the appellant shall fail to follow the procedure in Rule 24(d) when no transcript or statement is to be filed, the appellate court may dismiss the appeal on its own initiative or any appellee may file a motion in the appellate court to dismiss the appeal. The motion shall be supported by a certificate of the clerk of the trial court showing the date and substance of the judgment or order from which the appeal was taken and the date on which the notice of appeal was filed. The appellant may respond within 14 days after the motion is filed. In lieu of granting the motion or at any time on its own initiative, the appellate court may order filing of the transcript or statement. Nothing in this subdivision shall be construed to authorize dismissal of an appeal due to the errors or omissions of the clerk of the trial court. [Amended by order effective July 1, 1997; and by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. *Subdivision (a).* The docketing of an appeal under these rules takes place when the clerk of the appellate court receives a copy of the notice of appeal from the trial court clerk. Under this subdivision the clerk of the appellate court files the record immediately upon its receipt and notifies all parties of the date on which the record was filed.

Subdivision (b). The failure of a party to file the transcript or statement within the time specified in Rule 24 may result in dismissal of the appeal on the appellate court's own initiative or upon motion. The motion should be in the form set forth in Rule 22 of these rules. Nothing in this rule permits the dismissal of an appeal due to the errors or omissions of the clerk of the trial court.

Advisory Commission Comments [1997]. *Subdivision (b).* The amendment to the first sentence fills a gap left in the original rule. If an appellant did not intend to file a transcript of evidence, but failed to follow the prescribed procedure in Rule 24(d), it was unclear where the appellee would file a motion to dismiss. The amended language makes it clear that the appellate court is the proper forum. The amendment to the third sentence keys response deadlines concerning a motion to dismiss to filing dates, not service dates.

Advisory Commission Comments [2016]. Rule 26(b) is amended to authorize the appellate court to dismiss an appeal on its own initiative if the appellant fails to file the transcript or statement of the evidence within the time specified in Rule 24(b) or (c), or if the appellant fails to follow the procedure in Rule 24(d) when no transcript or statement is to be

filed. The appellate courts have case-management procedures under which the appellate court can be notified when the transcript or statement of the evidence (or a notice that neither will be filed) has not been timely filed in the trial court. For that reason, the appellate court should be authorized to dismiss an appeal in such circumstances, even if no motion to dismiss has been filed by an appellee. The Rule, however, continues to authorize any appellee to file such a motion.

Prior to dismissing an appeal on the appellate court's own initiative pursuant to Rule 26(b), the court usually will issue a show-cause order and permit the parties an opportunity to file written responses to the order.

Consistent with the amendment to subdivision (b) of the Rule, the original Advisory Commission Comment to subdivision (b) is amended to indicate that the appellate court can dismiss the appeal on its own initiative for failure to timely file the transcript or statement of the evidence.

Compiler's Notes. T.R.A.P. 26 may affect Tenn. Code Ann. § 40-30-120.

T.R.A.P. 26(b) may supersede Tenn. Code Ann. § 27-6-107.

T.R.A.P. 26(b) may affect Tenn. Code Ann. § 40-26-101.

The amendment of Rule 26, which amended subdivision (b) and amended the Subdivision (b) Advisory Comments, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 144 and Senate Resolution 82. The order promulgating the amendment of subdivision (b) and the amendment of the Subdivision (b) Advisory Comments provided that it take effect July 1, 2016.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), § 673.

Tennessee Forms (Robinson, Ramsey and Harwell), No. 2-26-1.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 33, 53, 63, 94.

Law Reviews. Waiting for the Jury (George W. Jenkins III), 20 Tenn. B.J. 31 (1984).

NOTES TO DECISIONS

Analysis

1. Purpose.
2. Dismissal of Appeal.

1. Purpose.

The grant of authority in T.R.A.P. 26(b) is in keeping with the ultimate purpose of the rules, which is to ensure a determination of the case on its merits, a purpose which often cannot be accomplished without consideration of the evidence set forth in the transcript. Davis v. Sadler, 612 S.W.2d 160, 1981 Tenn. LEXIS 406 (Tenn. 1981).

2. Dismissal of Appeal.

The trial judge has no authority to dismiss an appeal as a means of settling any controversy over the designation of portions of the record. State v. Peak, 823 S.W.2d 228, 1991 Tenn. Crim. App. LEXIS 950 (Tenn. Crim. App. 1991).

Although the provisions of T.R.A.P. 24 regarding the designation, preparation and certification of the transcript are clear and unambiguous, dismissal of plaintiff's appeal for counsel's failure to comply was inconsistent with the general policy of the rules, which emphasizes reaching a just result and disregarding technicality in form. Johnson v. Hardin, 926 S.W.2d 236, 1996 Tenn. LEXIS 466 (Tenn. 1996).

G. BRIEFS

Rule 27. Content of Briefs. — (a) Brief of the Appellant. — The brief of the appellant shall contain under appropriate headings and in the order here indicated:

(1) A table of contents, with references to the pages in the brief;

(2) A table of authorities, including cases (alphabetically arranged), statutes and other authorities cited, with references to the pages in the brief where they are cited;

(3) A jurisdictional statement in cases appealed to the Supreme Court directly from the trial court indicating briefly the jurisdictional grounds for the appeal to the Supreme Court;

(4) A statement of the issues presented for review;

(5) A statement of the case, indicating briefly the nature of the case, the course of proceedings, and its disposition in the court below;

(6) A statement of facts, setting forth the facts relevant to the issues presented for review with appropriate references to the record;

(7) An argument, which may be preceded by a summary of argument, setting forth:

(A) the contentions of the appellant with respect to the issues presented, and the reasons therefor, including the reasons why the contentions require appellate relief, with citations to the authorities and appropriate references to the record (which may be quoted verbatim) relied on; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the discussion of the issues);

(8) A short conclusion, stating the precise relief sought.

(b) Brief of the Appellee. — The brief of appellee and all other parties shall conform to the foregoing requirements, except that items (3), (4), (5), (6) and 7(B) of subdivision (a) of this rule need not be included except to the extent that the presentation by the appellant is deemed unsatisfactory. If appellee is also requesting relief from the judgment, the brief of the appellee shall contain the issues and arguments involved in his request for relief as well as the answer to the brief of appellant.

(c) Reply Briefs. — The appellant may file a brief in reply to the brief of the appellee. If the appellee also is requesting relief from the judgment, the appellee may file a brief in reply to the response of the appellant to the issues presented by appellee's request for relief.

(d) Citation of Supplemental Authorities. — When pertinent and significant authorities come to the attention of a party after the party's brief has been filed, or after oral argument but before decision, a party may promptly advise the clerk of the court, by letter, extra copies to the clerk for each judge of the appellate court, and a copy to all other parties, setting forth the citations. There shall be a reference either to the page of the brief or to a point argued orally to which the citations pertain, but the letter shall without argument state the reasons for the supplemental citation. Any response shall be made promptly and shall be similarly limited.

(e) Reproduction of Constitutional Provisions, Statutes, Rules and Regulations. — If determination of the issues presented requires consideration of a constitutional provision, statute, rule, regulation or other similar matter, they shall be reproduced in pertinent part in the brief or in an addendum at the end of the brief, or they may be supplied to the court in pamphlet form.

(f) Reference in Briefs to the Parties. — In the briefs the parties shall be referred to as in the trial court or in the other proceedings under review, or by using the actual names of the parties or descriptive terms.

(g) Reference in Briefs to the Record. — Except as provided in Rule 28(c), reference in the briefs to the record shall be to the pages of the record involved. Intelligible abbreviations may be used. If reference is made to evidence, the admissibility of which is in controversy, reference shall be made to the pages in the record at which the evidence was identified, offered, and received or rejected.

(h) Citation of Authorities. — Citation of cases must be by title, to the page of the volume where the case begins, and to the pages upon which the pertinent matter appears in at least one of the reporters cited. It is not sufficient to use only *supra* or *infra* without referring to the page of the brief at which the complete citation may be found. Citation of Tennessee cases may be to the official or South Western Reporter or both. Citation of cases from other jurisdictions must be to the National Reporter System or both the official state reports and National Reporter System. If only the National Reporter System citation is used, the court rendering the decision must also be identified. All citations to cases shall include the year of decision. Citation of textbooks shall be to the section, if any, and page upon which the pertinent matter appears and shall include the year of publication and edition if not the first edition. Tennessee statutes shall generally be cited to the Tennessee Code Annotated, Official Edition, but citations to the session laws of Tennessee shall be made when appropriate. Citations of supplements to the Tennessee Code Annotated shall so indicate and shall include the year of publication of the supplement.

(i) Page Limitations. — Except by order of the appellate court or a judge thereof, arguments in principal briefs shall not exceed 50 pages, and arguments in reply briefs shall not exceed 25 pages.

(j) Briefs in Cases Involving Multiple Parties. — In cases involving multiple parties, including cases consolidated for purposes of the appeal, any number of parties may join in a single brief, and any party may adopt by reference any part of the brief of another party. Parties may similarly join in reply briefs. [As amended by order entered by December 14, 2009, effective July 1, 2010.]

Advisory Commission Comments. Briefs will be oriented toward a statement of the issues presented in a case and the arguments in support thereof.

Subdivision (g) envisions that the clerk of the trial court will have numbered the pages of the record consecutively from start to finish as provided in Rule 25(a) of these rules.

The page limitations on arguments in briefs are based on the expectation that most arguments need not extend beyond the 50 pages authorized under subdivision (i). It should be noted that the limitation relates to the argument. The full brief may exceed the 50 page limitation.

This rule should be read in connection with Rule 40(f), which provides that the cost of reproducing briefs cannot be taxable at rates higher than those generally charged for photocopying. The parties may have their briefs commercially printed only at their own expense.

Advisory Commission Comments [1994]. In addition to this rule, internal rules of the intermediate appellate courts state that no trial error will be considered on appeal if briefs do not cite pages of the trial record where the alleged error occurred. The advocate is directed to Rule 6 of the Court of Appeals and Rule 10 of the Court of Criminal Appeals.

Advisory Commission Comments [2010]. Rule 27(a) is amended to require that the appellant's brief include, for each issue presented, a statement of the applicable standard of review. Rule 27(b) is amended to add a cross-reference to amended Rule 27(a)(7)(B).

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated December 14, 2009, was ratified and approved by 2010 Senate Resolution 178 and 2010 House Resolution 238. The order promulgating the amendment of this rule provided that it take effect July 1, 2010.

Cross-References. Inadequate briefs, Tenn. Ct. Crim. App., Rule 10.

Textbooks. Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 20, 30, 86, 99, 114, 202; 9 Tenn. Juris., Damages, § 50.

Law Reviews. Seeking Justice on Appeal, 27 Tenn. B.J. 28 (1991).

Tennessee Rules of Citation (Lewis L. Laska), 12 Mem. St. U. L. Rev. 547 (1982).

NOTES TO DECISIONS

Analysis

1. In General.
2. Failure to Perfect Appeal.
3. Incorporation by Reference.
4. References in Briefs to the Record.
5. Statement of Issues.
6. Citation of Authority.
7. Waiver.
8. Requirements.
9. Dismissal Not Warranted.
10. Inadequate Brief.
11. Arguments Considered.
12. Attorney Fees on Appeal.
13. Dismissal.
14. Rebuttal.
15. Discretion of Court.

1. In General.

Court of appeals is not under a duty to minutely search a voluminous record to verify unsupported allegations in a brief. Airline Constr., Inc. v. Barr, 807 S.W.2d 247, 1990 Tenn. App. LEXIS 847 (Tenn. Ct. App. 1990); Duchow v. Whalen, 872 S.W. 2d 692, 1993 Tenn. App. LEXIS 689 (Tenn. Ct. App. 1993), appeal denied, — S.W.2d —, 1994 Tenn. LEXIS 57 (Tenn. Feb. 22, 1994); Alexander v. Tennessee Farmers Mut. Ins. Co., 905 S.W.2d 177, 1995 Tenn. App. LEXIS 156 (Tenn. Ct. App. 1995).

The appellate court has the discretion to suspend or relax the rules of appellate procedure and will do so to hear the appeal of a pro se litigant to afford her a hearing on the merits. Paehler v. Union Planters Nat'l Bank, 971 S.W.2d 393, 1997 Tenn. App. LEXIS 564 (Tenn. Ct. App. 1997).

The court of appeals is under no duty to verify unsupported allegations in a party's brief, or consider issues raised but not argued in the brief. Bean v. Bean, 40 S.W.3d 52, 2000 Tenn. App. LEXIS 460 (Tenn. Ct. App. 2000).

Where both parties to an appeal were seeking relief from a trial court's judgment, they were both allowed to file a reply brief; however, a second reply brief filed by appellants was stricken because it was not permitted under T.R.A.P. 27(c) or any other court rule. Killingsworth v. Ted Russell Ford, Inc., 104 S.W.3d 530, 2002 Tenn. App. LEXIS 852 (Tenn. Ct. App. 2002), rehearing denied, 104 S.W.3d 530, 2002 Tenn. App. LEXIS 957 (Tenn. Ct. App. 2002), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 395 (Tenn. May 5, 2003).

While a declaratory order of the Pennsylvania Secretary of Labor and Industry was supportive of the interpretation of the relevant statutes and regulations, the opinion of the Secretary was neither necessary to nor dispositive of the case because the opinion added little, if anything, to the arguments already made. Chartis Cas. Co. v. State, 475 S.W.3d 240, 2015 Tenn. LEXIS 813 (Tenn. Oct. 2, 2015).

2. Failure to Perfect Appeal.

Although appellee did not formally perfect an appeal, it could seek affirmative relief involving mixed questions of law and fact in its brief. Eller Bros., Inc. v. Home Federal Sav. & Loan Asso., 623 S.W.2d 624, 1981 Tenn. App. LEXIS 551 (Tenn. Ct. App. 1981), overruled, Guiliano v. Cleo, Inc., 995 S.W.2d 88, 1999 Tenn. LEXIS 339 (Tenn. 1999).

3. Incorporation by Reference.

Appellee's brief, a one page document stating to court of appeals that as its brief it adopted an opinion of the state attorney general and relied upon the decree of the chancellor below, was contrary to T.R.A.P. 27, yet was accepted by the court. Coble Systems, Inc. v. Armstrong, 660 S.W.2d 802, 1983 Tenn. App. LEXIS 628 (Tenn. Ct. App. 1983).

4. References in Briefs to the Record.

The purpose of T.R.A.P. 27(g) is to eliminate an appellate court's unnecessary review of the record. State v. Killebrew, 760 S.W.2d 228, 1988 Tenn. Crim. App. LEXIS 478 (Tenn. Crim. App. 1988).

Defendant's failure to adequately brief certain issues by failing to include appropriate references to the record resulted in waiver of such issues. State v. Killebrew, 760 S.W.2d 228, 1988 Tenn. Crim. App. LEXIS 478 (Tenn. Crim. App. 1988).

Constitutional objections to testimony were waived where defendants cited no authority. State v. Boling, 840 S.W.2d 944, 1992 Tenn. Crim. App. LEXIS 384 (Tenn. Crim. App. 1992), appeal denied, — S.W.2d —, 1992 Tenn. LEXIS 530 (Tenn. Aug. 31, 1992).

Where defendant failed to brief issues concerning discovery motions and changes of venue, these issues were waived. Taylor v. State, 875 S.W.2d 684, 1993 Tenn. Crim. App. LEXIS 810 (Tenn. Crim. App. 1993).

While the defendant contended that the verdict was a compromised verdict and erroneously accepted by the court, this issue was waived since the defendant failed to tell the court of appeals where the events in question occurred in the record. State v. Parker, 932 S.W.2d 945, 1996 Tenn. Crim. App. LEXIS 167 (Tenn. Crim. App. 1996), overruled in part, State v. King, — S.W.3d —, 2013 Tenn. Crim. App. LEXIS 192 (Tenn. Crim. App. Mar. 4, 2013), overruled in part, State v. King, 432 S.W.3d 316, 2014 Tenn. LEXIS 351 (Tenn. Apr. 23, 2014).

Although a brief contained just one citation to the record, a motion to dismiss the case as frivolous was denied based on a failure to comply with T.R.A.P. 27 because a review was

required based on the importance of the issue raised on review. Burks v. Elevation Outdoor Adver., LLC, 220 S.W.3d 478, 2006 Tenn. App. LEXIS 486 (Tenn. Ct. App. 2006), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 1176 (Tenn. Dec. 18, 2006).

Although appellant mother presented very sincere arguments, it was readily apparent that her brief was replete with facts that were not in the record. This was significant because the appellate court may not consider facts alleged in a brief that do not appear in the appellate record. Ferguson v. Ferguson, — S.W.3d —, 2021 Tenn. App. LEXIS 59 (Tenn. Ct. App. Feb. 16, 2021).

5. Statement of Issues.

Where appellant stated in his motion for a new trial as well as in his brief: "the court erred in overruling his motion to dismiss," the issue did not conform to T.R.A.P. 27(a)(4) and, as a result, was waived as too broad in scope. State v. Dykes, 803 S.W.2d 250, 1990 Tenn. Crim. App. LEXIS 642 (Tenn. Crim. App. 1990), appeal denied, — S.W.2d —, 1990 Tenn. LEXIS 480 (Tenn. Dec. 10, 1990), superseded by statute as stated in, Kuykendall v. State, — S.W.2d —, 1995 Tenn. Crim. App. LEXIS 142 (Tenn. Crim. App. Feb. 23, 1995), overruled, State v. Hooper, 29 S.W.3d 1, 2000 Tenn. LEXIS 535 (Tenn. 2000).

On appeal the portion of defendant's issue which contended that "the evidence was insufficient to sustain the verdict of the jury" was so general that it failed to comport with the requirements of T.R.A.P. 27(a)(4). State v. Matthews, 805 S.W.2d 776, 1990 Tenn. Crim. App. LEXIS 597 (Tenn. Crim. App. 1990).

State, as appellee, may raise a sentencing issue even though defendant was the only party to file a notice of appeal; however, the right to raise such issue without filing a notice of appeal does not end the state's obligation to delineate the issue as a separate issue for review, to submit supporting argument, and to identify the appropriate relief. State v. Hayes, 894 S.W.2d 298, 1994 Tenn. Crim. App. LEXIS 643 (Tenn. Crim. App. 1994).

Failure to articulate reasons for conclusionary statement will result in waiver of issue on appeal. State v. Gray, 960 S.W.2d 598, 1997 Tenn. Crim. App. LEXIS 544 (Tenn. Crim. App. 1997).

Appellate court would address only the issue properly raised in the husband's statement of the issue and not other potential issues because an issue not included in the statement presented for review are not properly before appellate court. Bunch v. Bunch, 281 S.W.3d 406, 2008 Tenn. App. LEXIS 374 (Tenn. Ct. App. June 30, 2008), appeal denied, — S.W.3d —, 2009 Tenn. LEXIS 171 (Tenn. Jan. 20, 2009).

Although appellees raised the issue that appellants waived any and all issues by failing to include a statement of the issues in their brief as required by T.R.A.P. 27(a)(4), the appellate court, in its discretion found that a single narrow issue was apparent from a reading of the appellant's brief, and considered the issue even though it was not listed as such under an appropriate heading in the brief. Ramirez v. Bridgestone/Firestone, Inc., 414 S.W.3d 707, 2013 Tenn. App. LEXIS 231 (Tenn. Ct. App. Apr. 4, 2013), appeal denied, — S.W.3d —, 2013 Tenn. LEXIS 710 (Tenn. Aug. 26, 2013).

When, in a trust dispute, a beneficiary stated as an issue whether a trial court erred in granting summary judgment "and related evidentiary rulings," the evidentiary rulings were not considered because the beneficiary did not specify which evidentiary rulings he contested. Cartwright v. Jackson Capital Partners, Ltd. P'ship, 478 S.W.3d 596, 2015 Tenn. App. LEXIS 361 (Tenn. Ct. App. May 21, 2015), appeal denied, — S.W.3d —, 2015 Tenn. LEXIS 884 (Tenn. Oct. 16, 2015).

Because neither properly raised the issue of the award by a trial court of attorney's fees to the appellee, nor the issue of the award of attorney's fees on appeal, the appellate court made no determination regarding the trial court's exercise of discretion in awarding what it considered reasonable attorney's fees to the appellee following a hearing, or regarding the appellee's request for attorney's fees on appeal. Gibson v. Bikas, 556 S.W.3d 796, 2018 Tenn. App. LEXIS 110 (Tenn. Ct. App. Feb. 28, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 421 (Tenn. July 18, 2018).

Father was not entitled to an award of attorney's fees and damages incurred as a result of a mother's allegedly frivolous appeal because the father's appellate brief's statement of issues did not properly raise the matter, waiving it. Blakney v. White, — S.W.3d —, 2019 Tenn. App. LEXIS 498 (Tenn. Ct. App. Oct. 8, 2019).

As a county clerk's request for fees incurred after the filing of the fee application was not identified as an issue in her statement of the issues, the court of appeals declined to consider it. Armstrong v. Morrison, — S.W.3d —, 2019 Tenn. App. LEXIS 540 (Tenn. Ct. App. Nov. 7, 2019).

Issue of attorney's fees had been waived by both parties as the issue was not included in either party's statement of the issues presented for review. Kautz v. Berberich, — S.W.3d —, 2021 Tenn. App. LEXIS 102 (Tenn. Ct. App. Mar. 18, 2021).

6. Citation of Authority.

When a defendant fails to cite any authority in support of his position, the issue is waived. State v. Dickerson, 885 S.W.2d 90, 1993 Tenn. Crim. App. LEXIS 643 (Tenn. Crim. App. 1993), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 421 (Tenn. Nov. 29, 1993).

Failure to make appropriate references to the record in the argument portion of the brief and

to cite relevant authority as required in T.R.A.P. 27(a)(7) will ordinarily constitute a waiver of the issue. State v. Schaller, 975 S.W.2d 313, 1997 Tenn. Crim. App. LEXIS 1130 (Tenn. Crim. App. 1997).

Appellants did not cite any supporting authority for their claim. As a result, the issue was technically waived pursuant to T.R.A.P. 27(a)(7). Morrison v. Allen, 338 S.W.3d 417, 2011 Tenn. LEXIS 89 (Tenn. Feb. 16, 2011), rehearing denied, — S.W.3d —, 2011 Tenn. LEXIS 601 (Tenn. Mar. 10, 2011).

7. Waiver.

Appellate consideration of issue was waived where defendant made only a cursory allegation that police report was admissible without including any citation to decisional authority in his brief and making no acknowledgment of the general inadmissibility of police reports or attempt to explain how the report might fall outside the general rule of exclusion. State v. Thompson, 36 S.W.3d 102, 2000 Tenn. Crim. App. LEXIS 256 (Tenn. Crim. App. 2000).

In an action where the executrix of the deceased's estate filed a partition action seeking partition of the deceased's and the partner's business, because the partner's brief dealing with his remaining issues contained nothing more than bare assertions that the trial court erred and contained no citations to the record or to case law or any other authority, the partner did not comply with T.R.A.P. 27(7) or Tenn. Ct. App. R. 6(b); thus, the partner waived those issues on appeal. Utter v. Sherrod, 132 S.W.3d 344, 2003 Tenn. App. LEXIS 458 (Tenn. Ct. App. 2003), rehearing denied, 132 S.W.3d 344, 2003 Tenn. App. LEXIS 974 (Tenn. Ct. App. 2003), appeal denied, — S.W.3d —, 2004 Tenn. LEXIS 231 (Tenn. Mar. 8, 2004).

Where defendant failed to support his claim that he was misled at trial due to the variance between the indictment and the evidence presented at trial with any argument or citation to authorities, the claim was waived. State v. McCary, 119 S.W.3d 226, 2003 Tenn. Crim. App. LEXIS 17 (Tenn. Crim. App. 2003), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 674 (Tenn. July 7, 2003).

Defendant waived his claim on appeal that the trial court erred in admitting an investigating officer's testimony regarding the consistency of a child victim's statements because the only authority cited in defendant's brief was Tenn. R. Evid. 801 and Tenn. R. Evid. 803 when, at trial, defendant objected on lay opinion grounds only pursuant to Tenn. R. Evid. 701, and defendant was bound on appeal to the basis of his objection at trial pursuant to Tenn. R. Evid. 103(a); furthermore, defendant failed to cite authority to support his claim based on Tenn. R. Evid. 701 in his appellate brief as required by T.R.A.P. 27(a)(7), and therefore the appellate court considered the issue waived under Tenn. Ct. Crim. App. R. 10(b). State v. Schiefelbein, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 138 (Tenn. Crim. App. Feb. 8, 2007), modified, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 213 (Tenn. Crim. App. Mar. 7, 2007).

Dismissal of the decedent's daughter's ex-husband's and grandchildren's action against the decedent's sole surviving child to invalidate the decedent's will was appropriate because there was no citation to any specific facts in the record supporting the argument that the trial court should have imposed a trust upon the assets of the decedent's estate; because the ex-husband and grandchildren failed to comply with the requirements of T.R.A.P. 27(a)(7), they waived that issue on appeal. In re Estate of Price, 273 S.W.3d 113, 2008 Tenn. App. LEXIS 163 (Tenn. Ct. App. Mar. 24, 2008), appeal denied, In re Estate of Price v. Price, — S.W.3d —, 2008 Tenn. LEXIS 739 (Tenn. Sept. 29, 2008).

In its notice of appeal, the subinvestor indicated that he appealed both orders of the trial court; in his brief, however, he addressed only the claims that were dismissed in the order granting the investment firm's motion for summary judgment. Therefore, any appeal by the subinvestor of the issues arising under the other order was waived. German v. Ford, 300 S.W.3d 692, 2009 Tenn. App. LEXIS 94 (Tenn. Ct. App. Mar. 10, 2009), appeal denied, — S.W.3d —, 2009 Tenn. LEXIS 643 (Tenn. Sept. 28, 2009).

As a judge failed to make any citation to the record or offer meaningful argument in support of an argument on appeal in a disciplinary action, the issue was waived pursuant to T.R.A.P. 27(a)(7). In re Bell, 344 S.W.3d 304, 2011 Tenn. LEXIS 577 (Tenn. June 10, 2011).

Pursuant to T.R.A.P. 13(b) and 27(a)(7), in parties' employment dispute, as the trial court found that exemptions under 29 U.S.C. § 213(a)(1) of the Fair Labor Standards Act, 29 U.S.C. § 201 et seq., did not apply to an employee, and neither the employer nor the president raised any argument or cited to any authority on the issue in their appellate brief or at oral argument, the issue of whether the employee was exempt from the provisions of the Act was waived. Edmunds v. Delta Partners, L.L.C., 403 S.W.3d 812, 2012 Tenn. App. LEXIS 884 (Tenn. Ct. App. Dec. 18, 2012), rehearing denied, — S.W.3d —, 2013 Tenn. App. LEXIS 28 (Tenn. Ct. App. Jan. 9, 2013), appeal denied, Edmunds v. Delta Partners, LLC, — S.W.3d —, 2013 Tenn. LEXIS 457 (Tenn. May 9, 2013).

In a vehicular assault case, a challenge to the sufficiency of the evidence was procedurally barred because defendant did not raise the issue in a reply brief in the state's initial appeal; under the law of the case doctrine, the decision of the appellate court established the law that had to be followed upon remand. The

issues to be resolved in the case were narrowed to the single issue of whether the imposition of the sentence complied with the terms of the Tennessee Sentencing Act, and the trial court was obligated to follow that order on remand. State v. Stewart, 439 S.W.3d 906, 2013 Tenn. Crim. App. LEXIS 994 (Tenn. Crim. App. Nov. 18, 2013), appeal denied, — S.W.3d —, 2014 Tenn. LEXIS 245 (Tenn. Mar. 5, 2014).

Issue of double jeopardy was waived because it was not listed as one of the issues presented for review in an attorney's brief. In re Brown, 470 S.W.3d 433, 2015 Tenn. App. LEXIS 137 (Tenn. Ct. App. Mar. 23, 2015), appeal denied, — S.W.3d —, 2015 Tenn. LEXIS 654 (Tenn. Aug. 14, 2015).

Motor vehicle accident victim waived any issue regarding the effective date of a certificate of self-insurance because the victim did not argue that a car rental company did not have a certificate of self-insurance in effect on the date of the accident. Martin v. Powers, 505 S.W.3d 512, 2016 Tenn. LEXIS 736 (Tenn. Oct. 24, 2016).

Guarantors failed to state an issue in their "Statement of Appellants' Issues," although they did address it in a subsection of one section of the argument portion of their brief, but that was insufficient to properly preserve the issue for appeal, and the issue was waived. Regions Bank v. Thomas, 532 S.W.3d 330, 2017 Tenn. LEXIS 699 (Tenn. Oct. 16, 2017).

Because a bank failed to state an issue in the "Statement of Issues" in its brief in the court of appeals, the issue was waived. Regions Bank v. Thomas, 532 S.W.3d 330, 2017 Tenn. LEXIS 699 (Tenn. Oct. 16, 2017).

Defendant did not waive the issue of double jeopardy because defendant's amended motion for new trial was sufficient to direct the trial court's and the state of Tennessee's attention to defendant's challenge to multiple convictions for employing a firearm during the commission of a dangerous felony when defendant fired a single weapon. Moreover, the intermediate appellate court construed defendant's argument as a challenge to defendant's firearm convictions based on double jeopardy grounds. State v. Harbison, 539 S.W.3d 149, 2018 Tenn. LEXIS 7 (Tenn. Jan. 9, 2018).

State properly pointed out the deficiencies in defendant's brief, and the difficulties in responding to it. Although defendant filed a reply brief, he did not remedy the errors or clarify the issues, and the court of criminal appeals agreed with the state that the sub-issues outlined in defendant's brief were waived. State v. Smith, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 645 (Tenn. Crim. App. Aug. 22, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 59 (Tenn. Jan. 17, 2019).

By failing to include the issue of attorney fees incurred on appeal in her brief in a divorce case, the wife waived the issue. Williams v. Williams, — S.W.3d —, 2019 Tenn. App. LEXIS 148 (Tenn. Ct. App. Mar. 26, 2019).

Health club member waived the issue of gross negligence on the part of a health club because the member's appellate brief did not provide citations to facts that supported the member's contention that the health club was grossly negligent. Boswell v. YMCA, — S.W.3d —, 2019 Tenn. App. LEXIS 160 (Tenn. Ct. App. Mar. 29, 2019).

Because a husband did not properly raise and argue an issue in accordance with the rule, it was waived. Pack v. Pack, — S.W.3d —, 2019 Tenn. App. LEXIS 206 (Tenn. Ct. App. Apr. 30, 2019).

Because a husband conceded that he waived the issue of alimony, and accordingly, the trial court did not address it, the court of appeals declined to address it. Pack v. Pack, — S.W.3d —, 2019 Tenn. App. LEXIS 206 (Tenn. Ct. App. Apr. 30, 2019).

In the conclusion section of appellee's brief, appellee requested that appellate attorney fees incurred by appellee be paid by appellant. However, the appellate court deemed the issue to be waived because appellee did not list this as an issue in appellee's brief or develop any argument with respect to this issue. In re Makinna B., — S.W.3d —, 2019 Tenn. App. LEXIS 285 (Tenn. Ct. App. June 6, 2019).

Dismissal of an appeal by a pro se appellant was appropriate because the appellant waived the appellant's right to an appeal due to the appellant's profound failure to comply with the basic requirements for an appellate brief as the appellant's appellate brief lacked a proper statement of the case, statement of facts, and argument. Doe v. Davis, — S.W.3d —, 2019 Tenn. App. LEXIS 444 (Tenn. Ct. App. Sept. 6, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 109 (Tenn. Feb. 20, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 86 (Tenn. Feb. 27, 2020).

Because a truck driver provided no argument or citation of authority in support of his argument, and there was nothing in the record indicating that the issue was raised in the trial court, the issue was waived. Riebsame v. Schemel, — S.W.3d —, 2019 Tenn. App. LEXIS 469 (Tenn. Ct. App. Sept. 24, 2019).

Issue was waived because a truck driver provided no argument or citation of authority in support of the issue. Riebsame v. Schemel, — S.W.3d —, 2019 Tenn. App. LEXIS 469 (Tenn. Ct. App. Sept. 24, 2019).

Although appellee asserted in the argument section of appellee's appellate brief that the appeal was frivolous and that appellee was entitled to an award of attorney's fees incurred on appeal, appellee failed to raise this as an issue in the statement of the issues in appellee's brief. Therefore, the appellate court deemed appellee's request for attorney's fees on appeal to have been waived. In re Estate of

Baker, — S.W.3d —, 2019 Tenn. App. LEXIS 565 (Tenn. Ct. App. Nov. 22, 2019).

Although defendant weaved various issues throughout the argument section of defendant's appellate brief, these issues were waived for failure to raise them below and/or support them with argument or citation to the record. State v. Boykin, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 124 (Tenn. Crim. App. Feb. 21, 2019).

Defendant waived her claim that the trial court erred in allowing the state to cross-examine her regarding the conditions of her home because defendant did not support the issue with any argument or authority. State v. Ray, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 263 (Tenn. Crim. App. Apr. 24, 2019).

Because defendant did not support defendant's claims of ineffective assistance of trial counsel and appellate counsel with any argument or citations to the record or appropriate authorities in defendant's brief, the claims were waived. McMath v. State, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 345 (Tenn. Crim. App. June 10, 2019).

Court of criminal appeals agreed with the state that defendant waived two additional issues by failing to include them in his statement of the issues and by failing to support them with argument, citation to authority, or references to the record. State v. Ailey, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 499 (Tenn. Crim. App. Aug. 19, 2019).

Although defendant made a one-sentence contention in defendant's brief that the trial court's exclusion of the recording of defendant's 911 call violated defendant's constitutional right to present a defense, the issue was waived because defendant failed to present any argument in defendant's brief to support defendant's claim. State v. Waggoner, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 595 (Tenn. Crim. App. Sept. 24, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 126 (Tenn. Feb. 19, 2020).

Exercising its discretion to deem issues waived pursuant to Tenn. R. App. P. 27, the appellate court considered the mortgagor's Tenn. R. Civ. P. 60.02 issues waived where the mortgagor had not made any argument or provided any explanation as to how subject matter jurisdiction or personal jurisdiction was lacking in the case or how the elements of fraud were present, and the record did not contain a transcript of the hearings. Kondaur Capital Corp. v. Finley, — S.W.3d —, 2019 Tenn. App. LEXIS 500 (Tenn. Ct. App. Oct. 9, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 222 (Tenn. Feb. 26, 2020).

Although the mortgagor listed a due process issue under his statement of the issues, he provided no argument or citation of authority in support of the issue in the argument section of his brief, and as a result the issue was waived. Kondaur Capital Corp. v. Finley, — S.W.3d —, 2019 Tenn. App. LEXIS 500 (Tenn. Ct. App. Oct. 9, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 222 (Tenn. Feb. 26, 2020).

Because defendant failed to support his assertion that his two-year sentence was illegal with argument, references to the record, or citations to legal authorities, the issue had been waived. State v. Chouinard, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 680 (Tenn. Crim. App. Oct. 21, 2019).

Lot owner had waived an issue concerning the trial court's taxing of costs by failing to present supportive argument in his appellate brief. Phillips v. Hatfield, — S.W.3d —, 2019 Tenn. App. LEXIS 612 (Tenn. Ct. App. Dec. 18, 2019).

Whereas appellant's brief generally, albeit summarily, contended that the trial court should have been recused due to improper bias, no explanation or citation to the record was proffered regarding this concern. Given appellant's failure to develop an argument in appellant's brief and failure to cite to the trial court record or any relevant legal authorities, the recusal issue was waived. Alan O. v. Tenn. Dep't of Children's Servs., — S.W.3d —, 2019 Tenn. App. LEXIS 618 (Tenn. Ct. App. Dec. 19, 2019), appeal denied, Overton v. Tenn. Dep't of Children's Servs., — S.W.3d —, 2020 Tenn. LEXIS 190 (Tenn. Mar. 26, 2020).

When a trial court in a health care liability action granted summary judgment to a hospital on two alternative, independent grounds, because no argument was made on appeal by a surviving spouse to challenge one of the distinct grounds for summary judgment, the appellate court considered the argument waived and affirmed without reaching the substantive merits of the grounds relied upon by the trial court. Lovelace v. Baptist Mem. Hospital-Memphis, — S.W.3d —, 2020 Tenn. App. LEXIS 15 (Tenn. Ct. App. Jan. 16, 2020).

Although appellants stated in their brief that the trial court erred by dismissing their claims of fraud and misrepresentation, they identified no facts to support this contention and cited no authority to support the contention. Accordingly, the issue was waived by the failure to make appropriate references to the record and to cite relevant authority in the argument section of the brief. Swindle v. Goodlow, — S.W.3d —, 2020 Tenn. App. LEXIS 72 (Tenn. Ct. App. Feb. 20, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 441 (Tenn. June 10, 2020).

Although the husband in a divorce proceeding appealed to an appellate court raising a host of issues, the husband's brief was noncompliant with the Rules of the Tennessee Court of Appeals and the Tennessee Rules of Appellate Procedure to such a degree that the husband's issues were waived. The deficiencies in the husband's brief were wide-ranging and included citing very little legal authority, citing

to the record only scarcely, and containing no citations to the record in the statement of facts. Rawls v. Rawls, — S.W.3d —, 2020 Tenn. App. LEXIS 158 (Tenn. Ct. App. Apr. 16, 2020).

Circuit court properly dismissed a pro se injured customer's action against a grocery store because he waived any issues he might have attempted to raise on appeal where his brief significantly failed to comply with the appellate rules since it lacked a statement of the issues, statement of the case, and statement of facts, it vaguely referred to the trial court's actions, but did not cite to any alleged error of the trial court in the record or any legal authority whatsoever, and did not provide any citations to the record. Payne, — S.W.3d —, 2020 Tenn. App. LEXIS 196 (Tenn. Ct. App. Apr. 29, 2020).

Although in the concluding sentence of appellee's responsive brief, appellee requested that the appellate court award attorney's fees to appellee, appellee did not raise an issue concerning attorney's fees on appeal in appellee's statement of the issues. Therefore, the appellate court deemed appellee's request for attorney's fees on appeal to have been waived. Adams v. Adams, — S.W.3d —, 2020 Tenn. App. LEXIS 199 (Tenn. Ct. App. Apr. 29, 2020).

Wife had not waived arguments by failing to include designate additional issues in her statement of issues where she restated and responded to the husband's issues and asked the appellate court to affirm the trial court's rulings. Sima Khayatt Kholghi v. Aliabadi, — S.W.3d —, 2020 Tenn. App. LEXIS 417 (Tenn. Ct. App. Sept. 18, 2020).

While parents stated the parents' issue as whether the evidence preponderated against a claims commissioner's finding regarding proximate cause of an injury to the parents' child, generally, the parents did not make any arguments with respect to the commissioner's determination that a deficient balcony railing was not the proximate cause of the injury. Therefore, the appellate court declined to address the matter. Heun Kim v. State, — S.W.3d —, 2020 Tenn. App. LEXIS 484 (Tenn. Ct. App. Oct. 30, 2020).

Inasmuch as a lessor failed to raise the award of attorney's fees as an issue in its statement of the issues, the appellate court deemed the lessor's request for an award of attorney's fees to be waived. Southeast Diamond Jubilee Invs., LLC v. Uma Shiv, Inc., — S.W.3d —, 2020 Tenn. App. LEXIS 539 (Tenn. Ct. App. Nov. 30, 2020).

Appellant's brief did not contain a table of authorities as required, nor did her brief cite to legal authority, plus she also failed to cite to the record on appeal, which contained no transcript; appellant's failure to comply with the rule was reason enough to find her issues waived. Rei Nation LLC v. Tennial, — S.W.3d —, 2020 Tenn. App. LEXIS 546 (Tenn. Ct. App. Dec. 1, 2020).

It is not acceptable on appeal merely to provide citations to the record of various responsive motions or others filings from the proceedings below where your position was presented to the trial court without developing an argument on appeal as to how the trial court erred in its ruling concerning those motions; here, in addition to a headnote in their brief, plaintiffs included four sentences of argument and a footnote directing the court to the record below for their arguments, and no supporting authority was provided. Plaintiffs' issues were waived. Story v. Meadows, — S.W.3d —, 2020 Tenn. App. LEXIS 591 (Tenn. Ct. App. Dec. 22, 2020).

Petitioner did not question counsel about his decision not to object during the post-conviction proceedings, which could have been a strategic one, plus he waived the issue by failing to include the appropriate references to the record; he was not entitled to post-conviction relief. Winters v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 7 (Tenn. Crim. App. Jan. 9, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 383 (Tenn. June 4, 2020).

Issues raised by defendant in defendant's brief were waived for failure to cite to the record, cite to authority, or include any argument to support the issues. State v. Buford, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 40 (Tenn. Crim. App. Jan. 27, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 345 (Tenn. June 3, 2020).

Because petitioner's only claim of ineffective assistance of counsel on appeal was trial counsel's failure to make a motion for a change of venue, all other claims that were raised in petitioner's post-conviction petition and asserted by petitioner at the post-conviction hearing were waived. Logan v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 139 (Tenn. Crim. App. Feb. 26, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 397 (Tenn. July 20, 2020).

Because defendant on appeal provided no argument or references to the record for the issues that trial] counsel did not properly investigate the case, that defendant received no jail visits from trial counsel, and that trial counsel only talked to defendant twice, the issues were waived. Mitchell v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 682 (Tenn. Crim. App. Oct. 16, 2020).

Petitioner did not properly raise the issue of ineffective assistance of counsel, as he failed to list ineffective assistance of counsel in his issues presented for review, plus he did not present any argument, citation to authority, or appropriate references to the record regarding this issue. Harris v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 710 (Tenn. Crim. App. Nov. 3, 2020).

Issues in defendant's brief under the heading "Additional Claims of Petitioner to Be Considered" were waived because defendant cut and pasted verbatim from pages of briefs in support of prior post-conviction petitions and in these pages of defendant's brief, there were no citations to the post-conviction record. Wicks v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 749 (Tenn. Crim. App. Nov. 20, 2020).

Issue of appellee's allegedly contemptuous acts was deemed waived when it was argued in appellant's brief but was not designated as an issue. Appellant also did not reference with proper citation to authority the legal framework for civil contempt claims. Nelson v. Justice, — S.W.3d —, 2021 Tenn. App. LEXIS 91 (Tenn. Ct. App. Mar. 9, 2021).

8. Requirements.

In divorce case, husband's brief failed to satisfy the requirements of T.R.A.P. 27(a)(5) which must indicate briefly the nature of the case, the course of proceedings and its disposition in the court below, and was woefully deficient in meeting the requirements of T.R.A.P. 27(a)(7) and Tenn. Ct. App. Rule 8(a) regarding written argument. Bean v. Bean, 40 S.W.3d 52, 2000 Tenn. App. LEXIS 460 (Tenn. Ct. App. 2000).

When consumers sought attorney's fees in their suit against a car dealership for alleged violations of the Tennessee Consumer Protection Act, T.C.A. § 47-18-101 et seq., appellate attorney's fees could be awarded, but the consumers were required to provide notice that they would be seeking attorney's fees in their appellate pleadings. Killingsworth v. Ted Russell Ford, Inc., 205 S.W.3d 406, 2006 Tenn. LEXIS 900 (Tenn. 2006).

In a breach of contract case, where one party failed to comply with T.R.A.P. 27 and Tenn. Ct. App. R. 6(b) relating to certain issues, they were waived on appeal, as the brief contained nothing more than bare assertions of error since there were no citations to the record, arguments, citations to case law, or any other authority indicating why the trial court's decision was erroneous; moreover, this was not a proper case for suspension of the rules. Bailey v. Champion Window Co. Tri-Cities, LLC, 236 S.W.3d 168, 2007 Tenn. App. LEXIS 249 (Tenn. Ct. App. Apr. 24, 2007), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 859 (Tenn. Sept. 17, 2007).

Father's appeal of an order modifying a permanent parenting plan to include payment for children's private school tuition was dismissed because the father's brief failed to comport with T.R.A.P. 27 and Tenn. Ct. App. R. 6 when the brief listed only one case that was not actually cited in the brief, which was a violation of T.R.A.P. 27(a)(2), and the "statement of the facts" section of the brief did not set forth all facts relevant to the issues presented and did not contain the necessary citations to the record; the father failed to include any facts regarding the costs of the children's private school tuition or the parties' respective incomes, and the argument section of the brief contained no citations to legal authority in support of the father's allegations in contravention of the requirements set out in T.R.A.P. 27(a)(7) and Tenn. Ct. App. R. 6(a) and (b). Chiozza v. Chiozza, 315 S.W.3d 482, 2009 Tenn. App. LEXIS 793 (Tenn. Ct. App. Nov. 20, 2009), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 540 (Tenn. May 20, 2010).

Although an appellant's brief came dangerously close to waiver of the issues which the appellant attempted to raise on appeal regarding the appellant's proposed amendment of the appellant's complaint and additional discovery on a motion for summary judgment, because the appellate court was able to determine the substance of the issues without need of scouring the record on appeal, the appellate court addressed the issues. Stratienko v. Chattanooga-Hamilton County Hosp. Auth., 435 S.W.3d 189, 2013 Tenn. App. LEXIS 755 (Tenn. Ct. App. Nov. 21, 2013), appeal denied, Stratienko v. Chattanooga-Hamilton County Hosp. Auth., — S.W.3d —, 2014 Tenn. LEXIS 296 (Tenn. Apr. 10, 2014).

Instead of presenting the judgment notwithstanding the verdict (JNOV) issues in its appellate brief, defendant attempted to raise the issues for the first time in a petition to rehear, which was not timely; because the opportunity to grant a JNOV was considered and rejected by the trial court, a determination that had not been appealed on its merits, defendant was not entitled to relief on these issues. Payne v. CSX Transp., Inc., 467 S.W.3d 413, 2015 Tenn. LEXIS 547 (Tenn. July 1, 2015).

9. Dismissal Not Warranted.

Although appellant, who was living in India and acting pro se in an attempt to set aside an order granting a divorce, failed to provide the appellate court with a transcript or statement of the evidence and further failed to comply with the rules concerning the content of the appellate brief, the issues raised sounded in law and not in fact. As such, the court's review was de novo with no presumption of correctness. Singh v. Singh, — S.W.3d —, 2019 Tenn. App. LEXIS 334 (Tenn. Ct. App. July 3, 2019).

Construction project administrator had not failed to comply with Tenn. R. App. P. 27 so substantially as to waive the dispositive issues where the argument section of his brief essentially cited to controlling or persuasive authority and set forth a proper standard of review. Ski Chalet Vill. Owners Club, Inc. v. Pate, — S.W.3d —, 2020 Tenn. App. LEXIS 283 (Tenn. Ct. App. June 19, 2020).

10. Inadequate Brief.

Although a husband challenged a trial court's determination that a note was marital property

and the remittance of 20 percent of funds paid to the wife in 2010 in his appellate brief, the husband's arguments were waived because the husband failed to include the issues in his statement of the issues on appeal, in accordance with T.R.A.P. 27(b). Forbess v. Forbess, 370 S.W.3d 347, 2011 Tenn. App. LEXIS 654 (Tenn. Ct. App. Dec. 9, 2011), rehearing denied, 370 S.W.3d 347, 2012 Tenn. App. LEXIS 927 (Tenn. Ct. App. Jan. 10, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 245 (Tenn. Apr. 12, 2012).

Wife's challenge to a trial court's division of marital property was waived because the wife failed to include a chart regarding property values in her appellate brief, as required by Tenn. Ct. App. R. 7; even if the appellate court excused the wife's failure to comply with Rule 7, the issue was waived because the wife failed to cite any applicable law in her brief supporting her arguments regarding the division of marital property, as required by T.R.A.P. 27(a). Forbess v. Forbess, 370 S.W.3d 347, 2011 Tenn. App. LEXIS 654 (Tenn. Ct. App. Dec. 9, 2011), rehearing denied, 370 S.W.3d 347, 2012 Tenn. App. LEXIS 927 (Tenn. Ct. App. Jan. 10, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 245 (Tenn. Apr. 12, 2012).

Although there were profound deficiencies in a pro se mortgagor's appellate brief, T.R.A.P. 27(a) and Tenn. Ct. App. R. 6(a) and (b), the appellate court exercised its authority under T.R.A.P. 2 to consider the appeal because there was only one dispositive issue: whether the trial court erred in dismissing the mortgagor's complaint without prejudice based on his failure to plead fraud with particularity. Diggs v. Lasalle Nat'l Bank Ass'n, 387 S.W.3d 559, 2012 Tenn. App. LEXIS 347 (Tenn. Ct. App. May 30, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 763 (Tenn. Oct. 17, 2012).

Defendants were entitled to damages because the plaintiffs' appeal was deemed frivolous and they waived any issues they might have attempted to raise on appeal where their brief did not contain a statement of the issues, the purported authorities listed in the table of authorities were not cited anywhere else within the brief, and the purported argument section of the brief contained no references whatsoever to the record and no citations to authorities. Murray v. Miracle, 457 S.W.3d 399, 2014 Tenn. App. LEXIS 583 (Tenn. Ct. App. Sept. 23, 2014), appeal denied, — S.W.3d —, 2015 Tenn. LEXIS 132 (Tenn. Feb. 19, 2015).

Defendant's brief was meager and almost inadequate to allow a meaningful review of the issue that defendant raised because her statement of the facts did not contain any reference to the record nor did it contain sufficient facts relevant to the issue defendant raised; additionally, defendant's argument did not contain any references to the record or the reasons why her contentions required appellate relief. State v. McCullough, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 268 (Tenn. Crim. App. Apr. 9, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 501 (Tenn. Aug. 9, 2018), overruled in part, State v. Jones, 589 S.W.3d 747, 2019 Tenn. LEXIS 505 (Tenn. Nov. 13, 2019).

Insured's appeal of the dismissal of the insured's suit against an insurer was dismissed because the insured's appellate brief wholly failed to comply with the applicable rules, as (1) there was no table of contents, table of authorities, or jurisdictional statement, (2) the brief did not specifically state the issues presented for review or contain any argument, (3) the brief included no reference to the appellate record and did not properly cite applicable law, and (4) the brief raised no issues to suggest the trial court erred in dismissing the case, and (5) the insured's attempt to cure these deficiencies in a reply brief by reciting the insurer's position was insufficient. Currie v. Farmers Ins. Co., — S.W.3d —, 2019 Tenn. App. LEXIS 308 (Tenn. Ct. App. June 24, 2019).

Debtor was not entitled to relief on appeal because (1) the debtor's complaint's general reference to the Tennessee Uniform Electronic Transactions Act did not identify statutes allegedly violated, and (2) the debtor's appellate brief did not contain a statement of the issues presented for review and the debtor's minimal substantive appellate argument did not entitle the debtor to relief. Brock v. Fed Loan Servicing, — S.W.3d —, 2020 Tenn. App. LEXIS 139 (Tenn. Ct. App. Mar. 26, 2020).

Although there were deficiencies in appellants' brief, the appellate court concluded that the court's review of the matter was not hindered by the deficiencies. Accordingly, the court proceeded to address appellants' issues on appeal in spite of the deficiencies in appellants' brief. Kirby Parkway Prof'l Condo. Ass'n v. Cindy-Jarvis Ltd. L.P., — S.W.3d —, 2020 Tenn. App. LEXIS 598 (Tenn. Ct. App. Dec. 30, 2020).

Appellant did not properly appeal the dispositive issue in the appeal because appellant's brief contained, as best, only a skeletal argument actually addressing the very foundation of the trial court's ruling against appellant. In the absence of any proper argument to show that the trial court erred in its decision, the appellate court had to affirm the trial court's decision that the parties' contract omitted an essential term and could not be enforced. Payne v. Bradley, — S.W.3d —, 2021 Tenn. App. LEXIS 73 (Tenn. Ct. App. Mar. 01, 2021).

In an action for negligence per se and invasion of privacy through the unauthorized access and disclosure of confidential medical records, plaintiff waived her argument related to the statute of limitations and misapplication of the discovery rule because plaintiff's brief failed to comply with the procedural rules for briefs by, inter alia, failing to set forth an argument or facts relevant to the trial court's dismissal of

her complaint under Tenn. R. Civ. P. 8.01, which was an independent basis for dismissal. Prewitt v. St. Thomas Health, — S.W.3d —, 2021 Tenn. App. LEXIS 157 (Tenn. Ct. App. Apr. 14, 2021).

11. Arguments Considered.

With respect to the issue of personal jurisdiction, the court of appeals exercised discretion to waive the rule, particularly in light of a truck driver's pro se status, the abbreviated record, and the clarity of the issue presented. Riebsame v. Schemel, — S.W.3d —, 2019 Tenn. App. LEXIS 469 (Tenn. Ct. App. Sept. 24, 2019).

Arrestee's initial brief contained no properly supported argument responsive to the trial court's dispositive ruling in the case because it did not contain a table of contents or a table of authorities or a statement of the issue respresented for review, and the arrestee's argument on the dispositive issue in the case was largely deficient; however, since the case involved only a single legal issue, the court of appeals exercised its discretion to consider the merits of the appeal. Augustin v. Bradley Cty. Sheriff's Office, 598 S.W.3d 220, 2019 Tenn. App. LEXIS 481 (Tenn. Ct. App. Oct. 2, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 125 (Tenn. Feb. 19, 2020).

Despite the deficiencies in the grandmother's brief, the court exercised its discretion under the rule and considered the substance of her appeal because public policy preferred courts to resolve cases on their merits rather than dismiss them due to procedural deficiencies, especially in cases involving the interests of children like this one. In re Cassi J., — S.W.3d —, 2020 Tenn. App. LEXIS 258 (Tenn. Ct. App. June 2, 2020).

Although there was no separate "Issues Presented" section in appellant's brief, as the issues apparently sought to be raised were referenced in the table of contents of the brief and were respectively interspersed throughout the brief's denominated "Legal Analyses" section, the appellate court found it appropriate to address the issues on their merits and to overlook appellant's non-adherence to the applicable briefing requirements. Dial v. Klemis, — S.W.3d —, 2020 Tenn. App. LEXIS 489 (Tenn. Ct. App. Nov. 2, 2020).

Because this was not the first time that appellants, proceeding pro se, had been litigants in the court, and the court was less inclined to excuse their failure to comply with the briefing rules; however, as their brief did somewhat comply with the rules, the court declined to waive the appeal in toto and instead considered each argument individually to determine if adequate review was possible. Reliant Bank v. Bush, — S.W.3d —, 2021 Tenn. App. LEXIS 44 (Tenn. Ct. App. Feb. 9, 2021).

12. Attorney Fees on Appeal.

Although a parent requested that the parent was to be awarded the parent's attorney's fees incurred on appeal in a child custody and support case, the parent did not identify a request for attorney's fees incurred on appeal as a distinct issue in the parent's statement of issues presented for review. Accordingly, the appellate court exercised its discretion and declined to award the parent attorney's fees incurred on appeal. Iveson v. Iveson, — S.W.3d —, 2019 Tenn. App. LEXIS 130 (Tenn. Ct. App. Mar. 18, 2019).

Because a wife did not raise the issue of attorney's fees on appeal in her statement of the issues, the issue was waived. Pierce v. Pierce, — S.W.3d —, 2019 Tenn. App. LEXIS 306 (Tenn. Ct. App. June 21, 2019).

13. Dismissal.

Because a patient, who appealed pro se, failed to comply with the basic briefing requirements set out in the appellate rules, in that the patient's appellate brief was largely incoherent as the patient neither developed the patient's arguments, nor cited authority to support the patient's positions, the appellate court could not ascertain the gravamen of the patient's arguments. Accordingly, due to the court's inability to reach the substantive issues, dismissal of the patient's appeal was appropriate. Lacy v. Vanderbilt Univ. Med. Ctr., — S.W.3d —, 2019 Tenn. App. LEXIS 164 (Tenn. Ct. App. Apr. 1, 2019).

Dismissal of an appeal by a pro se appellant was appropriate because the appellant waived the appellant's right to an appeal due to the appellant's profound failure to comply with the basic requirements for an appellate brief as the appellant's appellate brief lacked a proper statement of the case, statement of facts, and argument. Doe v. Davis, — S.W.3d —, 2019 Tenn. App. LEXIS 444 (Tenn. Ct. App. Sept. 6, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 109 (Tenn. Feb. 20, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 86 (Tenn. Feb. 27, 2020).

Dismissal of a pro se litigant's appeal was appropriate because the litigant's brief and reply brief contained several deficiencies and hindered the appellate court's ability to ascertain the gravamen of the litigant's arguments. The litigant repeatedly referred in briefs to matters that were not within the appellate record, failed to cite relevant authority in argument, raised issues that were not included in the statement of issues presented for review, and referenced the litigant's own arguments rather than the evidence at trial. Vazeen v. US Med, — S.W.3d —, 2020 Tenn. App. LEXIS 589 (Tenn. Ct. App. Dec. 22, 2020).

14. Rebuttal.

Bank did not abandon any arguments the arbitrator properly exercised his authority, nor did the bank offer any additional reasons why the arbitrator properly exercised his authority; instead, the bank responded to the additional

issue raised by the trustee regarding the bank's standing to proceed with the appeal in light of the bankruptcy discharge injunction, and the bank's brief was limited in scope to a rebuttal of the argument advanced in the trustee's brief and thus fully complied with the rule. Khan v. Regions Bank, 584 S.W.3d 418, 2019 Tenn. App. LEXIS 70 (Tenn. Ct. App. Feb. 6, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 417 (Tenn. Aug. 14, 2019).

15. Discretion of Court.

Arrestee's initial brief contained no properly supported argument responsive to the trial court's dispositive ruling in the case because it did not contain a table of contents or a table of authorities or a statement of the issue represented for review, and the arrestee's argument on the dispositive issue in the case was largely deficient; however, since the case involved only a single legal issue, the court of appeals exercised its discretion to consider the merits of the appeal. Augustin v. Bradley Cty. Sheriff's Office, 598 S.W.3d 220, 2019 Tenn. App. LEXIS 481 (Tenn. Ct. App. Oct. 2, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 125 (Tenn. Feb. 19, 2020).

Court exercised its discretion to consider the merits of the appeal despite deficiencies in appellant's brief because review was limited to a technical record of less than 100 pages, plus there was another problem the court could not excuse, namely that appellant provided neither a transcript nor a statement of the evidence; his issues turned on the facts presented at trial, and in light of the presumption that the findings were supported by the evidence, the judgment was affirmed. Ray v. Willoughby, — S.W.3d —, 2020 Tenn. App. LEXIS 97 (Tenn. Ct. App. Mar. 5, 2020).

Pro se appellant's brief did not comply with the Tennessee Rules of Appellate Procedure, as the brief, for example, contained no statement of facts. However, although the appellant's brief left much to be desired in places and was not a model of clarity, the appellate court exercised its discretion to review the substance of each issue the appellant raised notwithstanding the brief's deficiencies. Weakley v. Franklin Woods Cmty. Hosp., — S.W.3d —, 2020 Tenn. App. LEXIS 588 (Tenn. Ct. App. Dec. 22, 2020).

Rule 28. Optional Appendix to the Briefs. — (a) Option of Appellant to Prepare and File Appendix; Contents; Time for Filing; Number of Copies. — The appellant may prepare and file an appendix to the briefs that shall contain: (1) any relevant portions of the pleadings, charge, findings or opinion; (2) the judgment, order or decision in question; and (3) any other parts of the record as the appellant deems essential for the judges to read in order to determine the issues presented. The appellant shall accurately reproduce in the appendix all parts of the record that must be studied in order to determine the issues presented; the appellant may not reproduce only those parts that support the appellant's argument. If in the judgment of the appellee the parts of the record reproduced by the appellant are inadequate for the determination of the issues presented, the appellee may reproduce in an appendix to the appellee's brief such other parts of the record as the appellee deems essential for the judges to read. The parties are encouraged to agree as to the contents of the appendix. The fact that parts of the record are not included in the appendix shall not prevent the parties from relying on such parts. The appendix shall be served and filed with the brief. A sufficient number of copies of the appendix shall be filed to provide the clerk and each judge of the appellate court with one copy, and one copy thereof shall be served on each party in the manner provided in Rule 20 for the service of papers unless the appellate court shall by order direct the filing or service of a greater or lesser number.

(b) Unnecessary Reproduction of Record To Be Avoided. — In determining the parts of the record to be reproduced in an appendix, the parties shall have regard for the fact that the entire record is always available to the court for reference and examination and shall avoid reproduction of parts that need not be read by the judges in determining the issues presented.

(c) Reference in Briefs to the Record. — References in the briefs to parts of the record reproduced in an appendix shall be to the pages of the appendix at which those parts appear. If references are made to parts of the record not reproduced, the reference shall be to the pages of the record involved.

(d) Arrangement of the Appendix. — At the beginning of the appendix there shall be inserted a list of the parts of the record that it contains, in the order in which the parts are set out therein, with references to the pages of the appendix at which each part begins. The parts of the record shall be set out in chronological order. The pages of the appendix shall be numbered consecutively at the bottom thereof. When matter contained in a transcript of the evidence or proceedings is set out in the appendix, the page of the transcript at which such matter may be found shall be indicated in brackets immediately before the matter that is set out. Omissions in the text of papers or of the transcript must be indicated by asterisks. Immaterial formal matters (*e. g.*, captions, subscriptions, acknowledgments) shall be omitted. A question and its answer may be contained in a single paragraph.

(e) Reproduction of Exhibits. — Exhibits or parts thereof designated for inclusion in the appendix may be contained in a separate volume, or volumes, suitably indexed. If contained in a separate volume, the appellant shall prepare, file and serve the same number of copies of such volume as are required for the appendix.

Advisory Commission Comments. Perhaps the most notable feature of this rule is the fact that preparation of an appendix is not required but is an option afforded the parties if they care to take advantage of this rule. Each party is free to reproduce as an appendix to that party's brief those portions of the record that party deems essential for the judges to read. If an appendix is prepared, it is important to keep in mind that the full record always remains available to the court for reference and examination. It should also be noted that under Rule 40(c) the cost of preparing an appendix is not a recoverable cost on appeal.

Textbooks. Gibson's Suits in Chancery (6th ed., Inman), § 698.

Law Reviews. The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 1.

NOTES TO DECISIONS

1. In General.

T.R.A.P. 28 does not contemplate attaching a transcript of proceedings to a brief when the transcript has not been made a part of the record. State v. Matthews, 805 S.W.2d 776, 1990 Tenn. Crim. App. LEXIS 597 (Tenn. Crim. App. 1990).

Rule 29. Filing and Service of Briefs. — (a) Time for Serving and Filing Briefs. — The appellant shall serve and file a brief within 30 days after the date on which the record is filed with the clerk. The appellee shall serve and file a brief within 30 days after the appellant's brief is filed with the clerk. Reply briefs shall be served and filed within 14 days after filing of the preceding brief. If separate briefs are filed on behalf of multiple appellants or multiple appellees, the time for filing and serving a responsive brief shall not commence to run until all briefs on behalf of all appellants or appellees have been filed.

(b) Number of Copies to Be Filed and Served. — A sufficient number of copies of each brief shall be filed with the clerk of the appellate court to provide the clerk and each judge of the appellate court with one copy, and one copy

shall be served on each party in the manner provided in Rule 20 for the service of papers unless the appellate court shall by order direct the filing or service of a greater or lesser number.

(c) Consequence of Failure to File Briefs. — If an appellant fails to file his or her brief within the time provided by this rule or within the time as extended, any appellee may file a motion in the appellate court to dismiss the appeal. The appellant may respond within 14 days after filing of the motion. In lieu of granting the motion or at any time on its own motion, the appellate court may order service and filing of any brief. If an appellee fails to file a brief within the time provided by this rule or within the time as extended, any appellant may file a motion in the appellate court to have the case submitted for decision on the record and appellant's brief. The appellee may respond within 14 days after filing of the motion. [As amended effective July 1, 1980; and by order filed February 1, 1995, effective July 1, 1995; and by order effective July 1, 1997.]

Advisory Commission Comments. The time for filing briefs is measured from the date on which the record is filed in the appellate court.

Under subdivision (c) an appellee may move for dismissal of an appeal if the appellant does not timely file a brief. Similarly, an appellant may move to have a case determined on the appellant's brief alone if the appellee fails timely to file a brief. In addition, under Rule 35(a) of these rules a party who has not filed a brief may not argue orally.

Advisory Commission Comments [1980]. The sentence added to Rule 29(a) deals with situations in which there are multiple appellants or multiple appellees. It allows a party to wait to respond until all of the briefs have been served by all adverse parties.

Advisory Commission Comments [1995]. Amended Rule 29(a) substitutes court filing dates for service dates, making more precise the running of time periods.

Advisory Commission Comments [1997]. The response time runs from the *filing* date rather than the *service* date of a motion.

Advisory Commission Comments [2004]. *Termination of Parental Rights Proceedings.* Rule 8A imposes special requirements governing the appeal of any termination of parental rights proceeding. In particular, Rule 8A(g) imposes a special provision regarding the filing of briefs in such an appeal.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 2-29-1, 2-29-2.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, § 114.

Law Reviews. The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 1.

NOTES TO DECISIONS

ANALYSIS

1. Failure to File Within Time Limit.
2. Suspension of Rules.

1. Failure to File Within Time Limit.

Commencing bankruptcy proceedings did not excuse party from its past failure to comply with the requirements of this rule. Dominion Bank of Middle Tenn. v. Crane, 843 S.W.2d 14, 1992 Tenn. App. LEXIS 655 (Tenn. Ct. App. 1992).

2. Suspension of Rules.

Court declined to dismiss defendant's appeal for failure to file his brief within the time provided by this rule, preferring to suspend the rules in accordance with T.R.A.P. 2 in order that the appeal might be disposed of in the most expeditious manner possible and brought to its proper conclusion. State v. Reeves, 610 S.W.2d 730, 1980 Tenn. Crim. App. LEXIS 337 (Tenn. Crim. App. 1980).

Rule 30. Form of Briefs and Other Papers. — (a) Production Methods; Paper. — Briefs, transcripts or statements, applications, answers in opposition, petitions, motions, supporting papers, and objections should be produced on opaque, unglazed white paper by any printing, duplicating, or copying process that provides a clear black image. The use of recycled paper with the

highest feasible percentage of postconsumer waste content is recommended and encouraged. Original typewritten pages may be used, but not carbon copies except on behalf of parties allowed to proceed as indigent persons. All printed matters should be on paper 6⅛ by 9¼ inches in type not smaller than 11 point and type matter 4¼ by 7¼ inches. If not printed, copies should be on paper 8½ by 11 inches, double spaced, except for quoted matter, which may be single spaced, with the text (1) when typewriter generated not smaller than standard elite type or (2) when computer generated not smaller than times new roman 12 point font and, in either event, not to exceed 6½ by 9½ inches on the page. Papers should be numbered on the bottom and fastened on the left.

(b) Content of Front Covers of the Briefs. — The front covers of the briefs shall contain: (1) the number of the case in the appellate court and the name of that court; (2) the title of the case as it appeared in the trial court, except that the status of each party in the appellate court shall also be indicated; (3) the nature of the proceeding in the appellate court and the name of the court, agency or board below; (4) the title of the document; and (5) the name and address of counsel or, if unrepresented by counsel, the party filing the brief.

(c) Colors of Covers of the Briefs. — If available, the colors of the covers shall be: the brief of the appellant, blue; the brief of the appellee, red; reply briefs, gray; briefs of amicus curiae, green.

(d) Caption on Other Papers. — Papers other than briefs addressed to the appellate court shall contain a caption setting forth: (1) the number of the case in the appellate court and the name of that court, (2) the title of the case as it appeared in the trial court, (3) a brief descriptive title indicating the purpose of the paper. [As amended by order entered May 25, 1993, effective July 1, 1993; by order filed January 13, 2012, effective July 1, 2012; and by order filed December 18, 2012, effective July 1, 2013.]

Advisory Commission Comments. This rule adopts a uniform system of page size for briefs, transcripts, applications, answers in opposition, petitions, motions, supporting papers, and objections. This rule permits, in effect, the use of any process, other than the carbon copy process, that produces a clean, readable page. It should be noted that while appellate papers may be commercially printed, under Rule 40(f) of these rules the cost of reproducing appellate papers is taxable at a rate not higher than that generally charged for photocopying.

Court and Advisory Commission Comments [1993]. — It is the public policy of the state of Tennessee to encourage recycling and the use of recycled products and materials. This policy is reflected in the Tennessee Solid Waste Planning and Recovery Act (title 68, ch. 211, part 6) and in the Solid Waste Management Act of 1991 (title 68, ch. 211, part 8). The underlined portion of Rule 30(a) denotes the addition to Rule 30(a) effective July 1, 1993, in which the Court recommends and encourages that all papers filed in the Tennessee courts be submitted on recycled paper.

Advisory Commission Comments [2012]. Paragraph (a) is amended to specify the minimum font size for non-printed papers generated by a computer.

Advisory Commission Comments [2013]. Paragraph (a) of the rule was amended to replace the term "poor persons" with the term "indigent persons." The amendment was not intended to change the meaning or application of the rule.

Compiler's Notes. The amendment of Rule 30, as promulgated and adopted by the Supreme Court in its order dated January 13, 2012, was ratified and approved by 2012 House Resolution 194 and Senate Resolution 80. The order promulgating the 2012 amendment of Rule 30 provided that it take effect on July 1, 2012.

The amendment of Rule 30, which substituted "indigent persons" for "poor persons" in the third sentence of (a) and added the 2013 Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 18, 2012, was ratified and approved by House Resolution 35 and Senate Resolution 13. The order promulgating the amendment of Rule 30(a) and the addition of the 2013 Advisory Commission Comments provided that it take effect July 1, 2013.

Law Reviews. The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 1.

NOTES TO DECISIONS

1. Title of the Case.
It is the policy of the criminal appeals court to include the name of the accused appearing in the indictment in the opinion title. Thus, the court titled its opinion "State of Tennessee vs. Shelby Ross Bridgeforth" notwithstanding the fact that the parties used a different name in the title of their respective pleadings. State v. Bridgeforth, 836 S.W.2d 591, 1992 Tenn. Crim. App. LEXIS 309 (Tenn. Crim. App. 1992).

Rule 31. Brief and Oral Argument of an Amicus Curiae. — (a) Leave or Request of Court Necessary. — A brief of an amicus curiae may be filed only by leave of court granted on motion or at the request of the appellate court. A brief may be conditionally filed with the motion for leave. A motion for leave shall identify the interest of the applicant and shall state how a brief of an amicus curiae will assist the appellate court.

(b) Form; Time; Conditions. — A brief of an amicus curiae shall follow the form prescribed for the brief of an appellee. The court shall fix the time and conditions for the filing of the amicus curiae brief.

(c) Oral Argument. — An amicus curiae may participate in oral argument only by leave of court granted on motion or at the request of the appellate court.

(d) Costs of Amicus Curiae Filing. — The court in its discretion may assess the costs of filing the motion for leave to file an amicus curiae brief and all relating filings against the amicus curiae, to be paid to the Appellate Court Clerk at the time of entry of the order granting or denying the motion. [Amended by order filed January 2, 2007, effective July 1, 2007.]

Advisory Commission Comments. This rule follows the practice of requiring leave of court before an amicus brief may be filed. In addition, this rule permits the appellate court on its own motion to request the filing of an amicus brief. Unlike Federal Rule of Appellate Procedure 29, this rule does not permit the filing of an amicus brief by consent of all of the parties, since generally such consent is so rarely granted as to make the provision meaningless. Moreover, most amicus briefs are in fact a type of adversary intervention rather than objective assistance to the court. Accordingly, subdivision (a) requires an amicus to identify the amicus's interest as well as to state how the amicus brief will assist the appellate court. However, if the court requests an amicus brief, it may obtain the outside objective assistance that an amicus in theory renders. This rule also needs to be construed in conjunction with Rule 32 of these rules, which permits the Attorney General of this state to participate by brief and argument in certain specified circumstances.

Advisory Commission Comments [2007]. New Rule 31(d) provides a procedure for assessing court costs against amici curiae.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 2, 2007, was ratified and approved by 2007 House Resolution 19 and Senate Resolution 12. The order promulgating the 2007 amendment of this rule provided that it take effect July 1, 2007.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), No. 2-31-1.

Law Reviews. The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 1.

NOTES TO DECISIONS

1. Rule for Appointment.
The rule applicable to the court appointment of an amicus curiae in civil actions was that there had to exist a necessity for the services of a member of the bar to serve the court in reaching a proper resolution of questions or issues presented and pending before the court, in which case the court could award compensa-

tion to be paid by the party or parties responsible for the situation that prompted the court to make the appointment. The rule excludes the appointment of counsel to serve the interests of litigants, witnesses, or any other private parties. Ferguson v. Paycheck, 672 S.W.2d 746, 1984 Tenn. LEXIS 797 (Tenn. 1984).

Rule 32. Notice to Attorney General When Validity of Statute, Rule or Regulation Is Questioned. — (a) Service; When Required. — When the validity of a statute of this state or an administrative rule or regulation of this state is drawn in question in any appeal to which the state or an officer or agency is not a party, the party raising such question shall serve a copy of the party's brief on the Attorney General.

(b) Proof of Service. — Proof that service has been made on the Attorney General shall be filed with the brief of the party raising such question.

(c) Right to Respond. — The Attorney General is entitled, within the time allowed for the filing of a responsive brief by a party, to file a brief. The Attorney General is also entitled to be heard orally, regardless of whether he or she files a brief.

(d) Consequence of Failure to Comply. — Except by order of the court, in the absence of notice, the appellate court will not dispose of an appeal until notice has been given and the Attorney General has been given such opportunity to respond as shall be set by the court.

Advisory Commission Comments. Under this rule the Attorney General is entitled to file a brief whenever the validity of a statute of this state or an administrative rule or regulation is drawn in question in any appeal to which the state or an officer or agency of this state is not a party. The Attorney General may be heard orally even if he or she decides not to file a brief. Subdivision (d) ensures that in the absence of notice to the Attorney General the appellate court will not dispose of the appeal.

The provisions of this rule are supplementary to, and do not affect the provisions of Tenn. Code Ann. § 29-14-107 and Rule 24.04 of the Tennessee Rules of Civil Procedure, with respect to notice to the Attorney General in trial court proceedings.

Textbooks. Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, § 27.

Law Reviews. The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 1.

NOTES TO DECISIONS

1. Waiver.

Incarcerated mother's constitutional challenge to the termination of her parental rights to her three-year-old child was waived as she did not raise any constitutional questions at the termination hearing; nor did she give notice to the attorney general. In re C.A.F., 114 S.W.3d 524, 2003 Tenn. App. LEXIS 134 (Tenn. Ct. App. 2003).

Constitutional validity of the statutes creating the Workers' Compensation Appeals Board was not drawn in question until the claimant had the opportunity to present his constitutional challenge before a judicial court because the Appeals Board, as an administrative tribunal, did not have the authority to determine the facial constitutionality of a statute; thus, the claimant satisfied the notice requirement for his constitutional challenges, and did not waive his right to bring those constitutional challenges. Pope v. Nebco of Cleveland, Inc., 585 S.W.3d 874, 2018 Tenn. LEXIS 146 (Tenn. Jan. 16, 2018), aff'd, 585 S.W.3d 874, 2018 Tenn. LEXIS 145 (Tenn. Jan. 16, 2018).

H. HEARING OF APPEALS

Rule 33. Prehearing Conference. — The Supreme Court, Court of Appeals, or Court of Criminal Appeals may direct counsel for the parties to appear before the court or a judge thereof for a prehearing conference to consider the simplification of the issues and such other matters as may aid in

the disposition of the proceeding by the court. The court or judge shall make an order that recites the action taken at the conference and the agreements made by the parties as to any of the matters considered and that limits the issues to those not disposed of by admissions or agreements of counsel, and such order when entered controls the subsequent course of the proceeding unless modified. Modification shall be freely granted to permit determination of the proceeding on its merits if no prejudice results.

Advisory Commission Comments. The provisions of this rule for a pretrial conference were considered to be a potentially valuable tool to the appellate court for simplifying complex appeals in a manner similar to the pretrial conference used at the trial level. In this connection, Tennessee Rule of Civil Procedure 16 should be consulted. While this rule will not be used in routine cases, it is expected to be helpful in protracted and complex litigation. Although designated as a "prehearing conference," it is contemplated that the conference could be convened by the appellate court at any stage of the proceedings when the court concludes that a conference would be of value. As is the case with pretrial conferences, those matters agreed upon or admitted by counsel at the conference are binding upon the parties, though modification should be freely granted to permit determination of the proceeding on its merits if no prejudice results.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), No. 2-33-1.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, § 27.

Law Reviews. The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 1.

Rule 34. Voluntary Mediation. — (a) Within five days following receipt of the notice of appeal in all cases appealed to the Court of Appeals, the Clerk of the Appellate Courts shall notify the parties or their counsel that, consistent with the requirements of this rule, they may jointly request a suspension of the processing of the appeal for the purpose of engaging in voluntary mediation.

(b) Parties desiring to engage in voluntary mediation shall file a joint stipulation requesting suspension of the appeal with the Clerk of the Appellate Courts within fifteen days after the date of the notice provided for in Section (a). Upon the filing of a timely joint stipulation, the time for preparing the transcript or statement of the evidence, the record on appeal, and the briefs shall be suspended for no more than sixty days to enable the parties to mediate their dispute. The Clerk of the Appellate Courts shall notify the trial court clerk of the filing of the stipulation of suspension of the appeal. However, the provisions of this rule providing for the suspension of the processing of the appeal pending voluntary mediation shall not apply to (1) appeals required to be expedited by statute, rule, or order of a court, (2) appeals in which the constitutionality of a statute, or rule or the constitutionality of an application of a statute, ordinance or rule is an issue, or (3) appeals involving the imposition of criminal contempt sanctions.

(c) If the voluntary mediation is successful, the parties shall file a notice of voluntary dismissal of the appeal in accordance with Tenn. R. App. P. 15(a) within five days following the conclusion of the mediation. The Clerk of the Appellate Courts shall notify the trial court clerk of the filing of the notice of voluntary dismissal of the appeal. The notice of voluntary dismissal shall provide for the taxation of costs. If the voluntary mediation is not successful as to all issues, the parties shall file a notice with the Clerk of the Appellate Courts within five days requesting the resumption of the appeal. If the voluntary mediation is successful as to some but not all issues, the parties shall file a notice with the Clerk of the Appellate Courts within five days

identifying the remaining issues requesting a resumption of the appeal as to those issues only. The Clerk of the Appellate Courts shall notify the trial court clerk of the notice of resumption of the appeal. If no notice of voluntary dismissal has been filed with the Court of Appeals within sixty days after the filing of the joint stipulation, the appeal shall be returned to the active docket, and the applicable appellate deadlines shall be reactivated. If, within sixty days after the filing of the joint stipulation, the parties and the mediator jointly file a notice of an extension of up to an additional thirty days to complete the mediation process, the Clerk of the Appellate Courts shall return the case to the active docket after the expiration of the extended period if no notice of voluntary dismissal has been filed. The Clerk of the Appellate Courts shall notify the trial court clerk when the appeal has been returned to the active docket.

(d) The parties may voluntarily resolve their disputes in any appeal filed in the Court of Appeals without requesting the suspension of the processing of the appeal.

(e) Evaluation of Voluntary Appellate Mediation by the Parties.

(1) In those appeals in which the parties invoke voluntary appellate mediation under this rule, each party shall complete an evaluation form supplied by the Clerk of the Appellate Courts and shall forward the evaluation to the Clerk's office in the grand division in which the case is filed within ten (10) days of the completion of mediation. The evaluation shall be maintained as confidential and shall not be entered into the case file.

(2) The completed evaluation form shall be placed in an evaluation envelope supplied with the evaluation form, and the evaluation envelope shall be sealed. The sealed evaluation envelope shall then be placed in a cover envelope and mailed to the Clerk of the Appellate Courts in the grand division in which the case is filed. The case name and number shall be noted on the cover envelope ONLY.

(3) Upon receipt of the cover envelope, the Clerk of the Appellate Courts shall note the receipt of the evaluation envelope in the case file, open the cover envelope, remove the sealed evaluation envelope, and forward the unopened evaluation envelope to the Programs Manager of the Administrative Office of the Courts for processing.

(4) The Programs Manager of the Administrative Office of the Courts shall receive the evaluation envelopes, remove the evaluations, and compile the results of the evaluations; the Programs Manager shall provide information to the Supreme Court and/or Court of Appeals on the results of the evaluations on a periodic basis set by the Supreme Court and/or Court of Appeals. [Added by order entered January 8, 2009, effective July 1, 2009.]

Advisory Commission Comments [2009]. Rule 34 introduces a new procedure to appellate practice in civil cases. If the parties voluntarily decide to mediate their dispute, pursuant to the provisions of section (b) of this Rule, various deadlines are suspended. There is also an evaluation process for voluntary appellate mediation.

One should note that Rule 34(a) provides that this rule applies to "all cases appealed to the Court of Appeals." Consequently, the rule does *not* apply to workers' compensation cases, which are appealed to the Supreme Court. See Tenn. Sup. Ct. R. 37 for provisions governing appellate mediation in workers' compensation cases.

Compiler's Notes. The adoption of this rule, as promulgated and adopted by the Supreme Court in its order dated January 8, 2009, was ratified and approved by 2009 House Resolu-

tion 19 and Senate Resolution 15. The order promulgating the adoption of this rule provided that it take effect on July 1, 2009.

Rule 35. Conduct of Oral Argument. — (a) Request; Waiver. — Any party to an appeal who desires oral argument shall so request by stating at the bottom of the cover page of the party's brief that oral argument is requested. If any party to an appeal requests oral argument it is unnecessary for any other party to do so except as otherwise provided in this subdivision. No party may argue unless the party has filed a brief as required by these rules. A party who has requested oral argument and who thereafter determines to waive oral argument shall notify the clerk of the appellate court and all other parties. Any other party who has not previously requested oral argument may then request oral argument by notifying the clerk of the appellate court and all other parties.

(b) Notice of Argument; Postponement. — The clerk of the appellate court shall give the parties advance notice of the time and place a case is to be argued and the amount of time for oral argument. A request for postponement of the argument must be made by motion filed reasonably in advance of the date fixed for hearing.

(c) Time Allowed for Argument. — Unless the appellate court otherwise orders, each side requesting the same relief shall be allowed 30 minutes for argument. If a party is of the opinion that additional time is necessary for the adequate presentation of the case, the party may request additional time by motion filed reasonably in advance of the date fixed for hearing. A party is not obligated to use all of the time allowed, and the court may terminate the argument whenever in its judgment further argument is unnecessary.

(d) Order; Reading Prohibited. — The party initiating review of the judgment below is entitled to open and conclude the argument. Reading at length from the record, briefs or authorities cited will not be permitted.

(e) Multiple Parties Requesting Relief. — If more than one party is requesting relief from the judgment, the sequence of oral argument shall be as the parties agree or the appellate court otherwise directs.

(f) Divided Argument. — No more than two counsel or parties will be heard from each side requesting the same relief except by leave of the appellate court, which will be granted when there are parties on the same side with diverse interests. Divided arguments are not favored and care shall be taken to avoid duplication of arguments.

(g) Nonappearance of Parties. — If a party fails to appear for argument, the appellate court will hear argument on behalf of the parties present. If no party appears, the case will be decided upon the record and briefs unless the court shall otherwise order. If the party who requested oral argument fails to appear to present argument, the court may assess against that party the reasonable costs incurred by the party who does appear for argument. In its discretion, the court may include a reasonable attorney's fee as a part of such costs.

(h) When Oral Argument Not Requested. — If no party requests oral argument, the clerk, when the briefs from all the parties are filed, shall submit the case for decision on the record and briefs. If no party has requested oral argument, the appellate court may nevertheless direct that the case be argued.

Advisory Commission Comments. Under subdivision (a) a party to an appeal desiring oral argument must request argument. If a party inadvertently fails to request oral argument, the appellate court may relieve the party of this omission.

The rule allows 30 minutes for each side to argue a case on appeal. As the Advisory Committee note to Federal Rule of Appellate Procedure 35 points out, "[t]he term 'side' is used to indicate that the time allowed by the rule is afforded to opposing interests rather than to individual parties. Thus if multiple appellants or appellees have a common interest, they constitute only a single side. If counsel for multiple parties who constitute a single side feel that additional time is necessary, they may request it." It is in the spirit of this rule that the appellate court grant additional time if there is a reasonable basis for the requested additional time.

Subdivision (g) of this rule also provides that a party who appears for oral argument shall be heard even if the opponent does not appear. Sanctions are provided for failure of a party to appear when that party has requested oral argument. In the discretion of the appellate court, such a sanction may include the reasonable attorney's fees of the party who did appear.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), § 690.

Tennessee Forms (Robinson, Ramsey and Harwell), Nos. 2-35-1, 2-35-2.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 115, 217; 5 Tenn. Juris., Carriers, § 31.

Law Reviews. Seeking Justice on Appeal, 27 No. 4 Tenn. B.J. 28 (1991).

The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 1.

I. DISPOSITION OF APPEALS

Rule 36. Relief; Effect of Error. — (a) Relief To Be Granted; Relief Available. — The Supreme Court, Court of Appeals, and Court of Criminal Appeals shall grant the relief on the law and facts to which the party is entitled or the proceeding otherwise requires and may grant any relief, including the giving of any judgment and making of any order; provided, however, relief may not be granted in contravention of the province of the trier of fact. Nothing in this rule shall be construed as requiring relief be granted to a party responsible for an error or who failed to take whatever action was reasonably available to prevent or nullify the harmful effect of an error.

(b) Effect of Error. — A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process. When necessary to do substantial justice, an appellate court may consider an error that has affected the substantial rights of a party at any time, even though the error was not raised in the motion for a new trial or assigned as error on appeal. [As amended by order filed January 8, 2009, effective July 1, 2009.]

Advisory Commission Comments. *Subdivision (a).* This subdivision makes clear that the appellate courts are empowered to grant whatever relief an appellate proceeding requires. In addition, this subdivision states that the appellate court should grant the relief to which a party is entitled. The last sentence of this rule is a statement of the accepted principle that a party is not entitled to relief if the party invited error, waived an error, or failed to take whatever steps were reasonably available to cure an error. This subdivision also makes clear that an appellate court should not grant relief if in so doing it would contravene the province of the trier of fact.

Subdivision (b). This subdivision deals with the very difficult question of determining whether an error is harmless or prejudicial. The principal thrust of this subdivision is that the harmful effect of an error is measured by the effect the error had on the judgment entered. Under this rule an error is prejudicial if it "more probably than not" affected the judgment. This rule also requires reversal of a judgment when affirmance would be prejudicial to the judicial process. Although this concept cannot be fully defined, it certainly would include situations in which, for example, an accused was denied the effective assistance of counsel, or the decisionmaker was obviously biased, or there was improper discrimination in jury selection.

Advisory Commission Comments [2009]. A second sentence is added to Rule 36(b) incorporating the plain error doctrine. The initial sentence states the harmless error doctrine.

See Tenn. R. App. P. 13(b) on consideration of issues not presented for review.

Compiler's Notes. T.R.A.P. 36(b) may affect Tenn. Code Ann. § 40-19-101.

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 8, 2009, was ratified and approved by 2009 House Resolution 19 and Senate Resolution 15. The order promulgating the amendment of this rule provided that it take effect July 1, 2009.

Cross-References. Harmless error and plain error, Tenn. R. Crim. P. 52.

Textbooks. Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 30-37, 50-134, 138, 142, 145, 151, 175, 205, 212, 225, 232, 237-249, 251, 255; 4 Tenn. Juris., Bail and Recognizance, § 15; 5 Tenn. Juris., Carriers, § 31; 6 Tenn. Juris., Constitutional Law, § 45; 8 Tenn. Juris., Criminal Procedure, §§ 30, 33; 12 Tenn. Juris., Exceptions, Bill of, § 4; 16 Tenn. Juris., Judgments and Decrees, § 13; 19 Tenn. Juris., Negligence, § 38; 20 Tenn. Juris., New Trials, § 29.

Law Reviews. A Meta-Analysis of the Tennessee Rules of Evidence (Neil P. Cohen), 57 Tenn. L. Rev. 1 (1989).

Tangible Evidence in Tennessee (Ronald L. Gilman), 22 No. 3 Tenn. B.J. 19 (1986).

Waiting for the Jury (George W. Jenkins III), 20 Tenn. B.J. 31 (1984).

NOTES TO DECISIONS

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1. In General.

In reviewing trial court's decision, court of appeals has the responsibility to apply the controlling law, whether or not cited or relied upon by either party. McClain v. Kimbrough Constr. Co., 806 S.W.2d 194, 1990 Tenn. App. LEXIS 886 (Tenn. Ct. App. 1990); In re Ellis, 822 S.W.2d 602, 1991 Tenn. App. LEXIS 490 (Tenn. Ct. App. 1991), rehearing denied, In re Conservatorship for Ellis, — S.W.2d —, 1991 Tenn. App. LEXIS 517 (Tenn. Ct. App. June 28, 1991).

It is probable that T.C.A. § 27-3-125 has now been superseded by the First Tennessee Bank Nat'l Ass'n v. Hurd Lock & Mfg. Co., 816 S.W.2d 38, 1991 Tenn. App. LEXIS 302 (Tenn. Ct. App. 1991), appeal denied, — S.W.2d —, 1991 Tenn. LEXIS 345 (Tenn. Sept. 3, 1991).

If no errors occurred during trial, or if any errors occurred but were harmless, judgment based on the verdict should stand. Doochin v. United States Fidelity & Guar. Co., 854 S.W.2d 109, 1993 Tenn. App. LEXIS 25 (Tenn. Ct. App. 1993).

Where error in jury instructions results in damages being awarded on behalf of decedent without evidence being adduced as to pecuniary value of that life, the award will not be overturned where there is ample evidence at trial of other grounds for jury's verdict. Scott v. Jones Bros. Constr., 960 S.W.2d 589, 1997 Tenn. App. LEXIS 438 (Tenn. Ct. App. 1997).

T.R.A.P. 36 and T.R.A.P. 1 contemplate that allegations of error should be evaluated in light of the entire record. State v. Henning, 975 S.W.2d 290, 1998 Tenn. LEXIS 370 (Tenn. 1998).

A very limited class of errors have been found to be "structural" and subject to automatic reversal, where there was a defect in the structure of the trial mechanism that would necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence. State v. Garrison, 40 S.W.3d 426, 2000 Tenn. LEXIS 652 (Tenn. 2000)

The court of appeals must affirm the trial court if it reached the correct result even if it disagrees with the reasoning employed by the court to arrive at that result. Denton v. Denton, 33 S.W.3d 229, 2000 Tenn. App. LEXIS 343 (Tenn. Ct. App. 2000).

Where a constitutional issue was never raised or considered at the trial court level, the appellate court declined to consider the issue because it was raised for the first time on appeal; merely pointing out to the trial court over a year after the judgment appealed from had been entered that the constitutional issue had been raised on appeal was altogether in-

sufficient. In re Adoption of D.P.M., 90 S.W.3d 263, 2002 Tenn. App. LEXIS 468 (Tenn. Ct. App. 2002).

Fact that the relatives properly pursued their rights and the scant record available to the supreme court meant that the case was an appropriate case to invoke the supreme court's authority pursuant to T.R.A.P. 36(a). State Dep't of Children's Servs. v. Owens, 129 S.W.3d 50, 2004 Tenn. LEXIS 182 (Tenn. 2004).

Tennessee Court of Criminal Appeals erred by noticing plain error because the records did not contain transcripts of the guilty plea proceedings, and therefore, the first factor under the plain error test, that the record must clearly establish what occurred in the trial court, was not met; even if it were present, the plain error review appeared to be limited to only jurisdictional errors because the test was limited to issues not waived for tactical reasons, and a defendant who pleaded guilty waived all non-jurisdictional defects and constitutional irregularities. State v. Yoreck, 133 S.W.3d 606, 2004 Tenn. LEXIS 330 (Tenn. 2004).

Regardless of whether the trial court erred in not submitting the dispute to arbitration, the contractor's failure to file a timely notice of appeal was a failure to prevent the harmful effect of a potential error; therefore, the contractor was not entitled to relief. Mitchell v. Owens, 185 S.W.3d 837, 2005 Tenn. App. LEXIS 648 (Tenn. Ct. App. 2005), appeal denied, — S.W.3d —, 2006 Tenn. LEXIS 215 (Tenn. Mar. 20, 2006).

Trial judge did not err in communication with the Board of Professional Responsibility hearing panel chair because there was no showing that the communication more probably than not affected the final judgment of the trial court or that the attorney was prejudiced. Bd. of Prof'l Responsibility v. Reguli, 489 S.W.3d 408, 2015 Tenn. LEXIS 1058 (Tenn. Dec. 28, 2015).

2. Constitutional Questions.

The rule that constitutional questions may be raised at any time applies only to fundamental constitutional defects in the convicting process not waived or not subject to waiver. To apply the rule to questions of evidence admissibility would undercut the very function of the trial process, for it would become a tactical matter of defense to allow a bit of constitutionally inadmissible evidence into the record, in the hope for an acquittal but secure in the knowledge that a new trial would result. State v. Simerly, 612 S.W.2d 196, 1980 Tenn. Crim. App. LEXIS 344 (Tenn. Crim. App. 1980).

Any errors affecting the constitutional right to trial by jury will result in such prejudice to the judicial process that automatic reversal is required. State v. Bobo, 814 S.W.2d 353, 1991 Tenn. LEXIS 291 (Tenn. 1991).

Notion that a prosecutor's closing argument can "cure" a failure to elect offenses or even provide an "effective substitute" is problematic because the failure to elect an offense is a constitutional error, even if that error is later deemed to be harmless beyond a reasonable doubt; rather, a reviewing court may consider a prosecutor's statements in closing argument solely as part of its constitutional harmless error analysis. State v. Smith, 492 S.W.3d 224, 2016 Tenn. LEXIS 383 (Tenn. June 24, 2016).

3. Harmless Error.

Witness's testimony before the jury that she had assured her dying brother that she would see "that justice was done" had marginal value except to inflame the jury against the defendant; however, in view of the overwhelming proof of defendant's complicity in the homicide, the court could not say that the outcome of the trial would have been different had the testimony not been presented to the jury, and thus any error in this regard was harmless. Floyd v. State, 596 S.W.2d 836, 1979 Tenn. Crim. App. LEXIS 315 (Tenn. Crim. App. 1979).

Although not all of the information mandated by Tenn. R. Crim. P. 24(g) was turned over to defense counsel until the day of trial, where the court gave the defendant's attorneys adequate time to review the jury list and permitted them to conduct wide-ranging voir dire and where, in addition, the defendant's appellate counsel conceded in his brief that no substantial injury was incurred by his client as a result of the procedure followed by the trial judge, any technical error under Tenn. R. Crim. P. 24(g) was at most harmless. Floyd v. State, 596 S.W.2d 836, 1979 Tenn. Crim. App. LEXIS 315 (Tenn. Crim. App. 1979).

Although trial judge probably erred in denying defendant's motion for a bill of particulars where the state could have furnished at least some of the particulars, nonetheless any error was harmless in view of the defendant's apparent lack of surprise and his thorough alibi presentation. State v. Gautney, 607 S.W.2d 907, 1980 Tenn. Crim. App. LEXIS 326 (Tenn. Crim. App. 1980).

Harmless error was found in (questioning witness as to prior conduct). State v. Bledsoe, 626 S.W.2d 468, 1981 Tenn. Crim. App. LEXIS 393 (Tenn. Crim. App. 1981); (jury permitted to view exhibits introduced for identification, never moved into evidence). State v. Gilmore, 823 S.W.2d 566, 1991 Tenn. Crim. App. LEXIS 581 (Tenn. Crim. App. 1991).

Unconstitutional search of defendant's home was harmless beyond a reasonable doubt where one of the victims who had known defendant almost all of his life and lived next door to him positively and unequivocally identified him as one of the robbers and as the one who hit him. State v. McMahan, 650 S.W.2d 383, 1983 Tenn. Crim. App. LEXIS 385 (Tenn. Crim. App. 1983).

Where trial court erred in permitting plaintiff to introduce testimony concerning an unre-

lated transaction for purposes of showing defendant's fraudulent conduct, error was harmless because jury heard other competent and substantial evidence of defendant's fraudulent conduct and improper testimony was only a small portion of aggregate proof. Keith v. Murfreesboro Livestock Market, Inc., 780 S.W.2d 751, 1989 Tenn. App. LEXIS 576 (Tenn. Ct. App. 1989).

Although the trial court refused defendant's request for, and did not make, oral or written findings of facts, where the issues in the case were sufficiently clear to enable defendant to determine which version of the facts the court believed from the content of the court's final judgment and the comments by the court from the bench at the conclusion of the evidentiary hearing, the court's failure to make oral or written findings of fact was harmless error. Bruce v. Bruce, 801 S.W.2d 102, 1990 Tenn. App. LEXIS 618 (Tenn. Ct. App. 1990).

The harmless error provisions encompassed in T.R.A.P. 36(b) and Tenn. R. Crim. P. 52(a) mandate that any variance from the procedures concerning the right against compulsory self-incrimination required by State v. Mackey, 553 S.W.2d 337, 1977 Tenn. LEXIS 579 (Tenn. 1977), superseded by statute as stated in, State v. Chastain, 871 S.W.2d 661, 1994 Tenn. LEXIS 26 (Tenn. 1994), superseded by statute as stated in, State v. Wilson, 31 S.W.3d 189, 2000 Tenn. LEXIS 519 (Tenn. 2000), which do not affect a substantial right, be disregarded. Stagnolia v. State, 792 S.W.2d 450, 1990 Tenn. Crim. App. LEXIS 5 (Tenn. Crim. App. 1990), appeal denied, — S.W.2d —, 1990 Tenn. LEXIS 291 (Tenn. June 11, 1990).

Failure to determine that the leg irons were the least drastic security measure reasonably available and the failure to instruct the jury to disregard the leg irons were harmless beyond a reasonable doubt. State v. Thompson, 832 S.W.2d 577, 1991 Tenn. Crim. App. LEXIS 656 (Tenn. Crim. App. 1991).

In a murder prosecution, admission of evidence that a few days before the killings defendant and codefendant stole credit cards and jewelry, and that on the day of the murders the two men took clothing and a radio was harmless error under T.R.A.P. 36(b). State v. Harris, 839 S.W.2d 54, 1992 Tenn. LEXIS 348 (Tenn. 1992), rehearing denied, — S.W.2d —, 1992 Tenn. LEXIS 557 (Tenn. Sept. 8, 1992), cert. denied, Harris v. Tennessee, 507 U.S. 954, 113 S. Ct. 1368, 122 L. Ed. 2d 746, 1993 U.S. LEXIS 1703 (1993).

Not permitting into evidence conversations with the deceased concerning agreements and contracts, made in the presence of third parties present and prepared to testify, was harmless error under T.R.A.P. 36(b). Hulsey v. Bush, 839 S.W.2d 411, 1992 Tenn. App. LEXIS 340 (Tenn. Ct. App. 1992).

Although victim's testimony about defendant's prior attempts of sexual battery lacked any significant probative value as to the crime alleged, and showed only a propensity on the part of the defendant to have committed the crime, where the testimony was first elicited by the defense, and no objection was made, the error in allowing the state to elicit further testimony as to the prior incident was harmless in the context of the entire trial. State v. Williams, 851 S.W.2d 828, 1992 Tenn. Crim. App. LEXIS 548 (Tenn. Crim. App. 1992), appeal denied, — S.W.2d —, 1992 Tenn. LEXIS 594 (Tenn. Oct. 26, 1992).

Objection to prosecution's question to defendant regarding drug purchases unconnected to murder case should have been sustained and curative instructions given, but, considering the record as a whole, the state's error was harmless. State v. Gaylor, 862 S.W.2d 546, 1992 Tenn. Crim. App. LEXIS 748 (Tenn. Crim. App. 1992), appeal denied, — S.W.2d —, 1993 Tenn. LEXIS 234 (Tenn. June 7, 1993).

Where defendant's employee offered direct testimony as to the discipline of the driver of defendant's truck, to which no objection was recorded, the admission of a report to the same effect was not prejudicial. Brown v. Null, 863 S.W.2d 425, 1993 Tenn. App. LEXIS 454 (Tenn. Ct. App. 1993).

State's argument to the jury that the homicide was a "terrible, heinous, atrocious, brutal, senseless killing of one of ours," while perhaps imprudently spoken, did not rise to the level of reversible error. State v. Gregory, 862 S.W.2d 574, 1993 Tenn. Crim. App. LEXIS 295 (Tenn. Crim. App. 1993).

Trial court's grant of plaintiffs' motions for an extension of time and for substitution of estate of defendant as a party was a valid exercise of procedural judicial discretion; the defendant had failed to establish prejudice as a result of plaintiffs' delay in moving for the substitution of parties within 90 days of the suggestion of death, and the defense was well aware of the plaintiffs' suit, an answer had been filed and discovery between the parties had begun, and at trial liability was admitted. Douglas v. Estate of Robertson, 876 S.W.2d 95, 1994 Tenn. LEXIS 91 (Tenn. 1994).

Testimony of an officer that could implicitly be interpreted as showing that defendant had a prior record was harmless since defendant's record was revealed during his own testimony. State v. Seay, 945 S.W.2d 755, 1996 Tenn. Crim. App. LEXIS 119 (Tenn. Crim. App. 1996), appeal dismissed, — S.W.2d —, 1998 Tenn. Crim. App. LEXIS 1251 (1998 Tenn. Crim. App. LEXIS 1251).

Where error in jury instructions regarding applicability of statute more probably than not had no effect on judgment of jury, and where no harm was caused to complaining party by such error, reversal of jury's verdict is not required.

Scott v. Jones Bros. Constr., 960 S.W.2d 589, 1997 Tenn. App. LEXIS 438 (Tenn. Ct. App. 1997).

Where court's instructions to jury sufficiently explains jury's duties, any error in failing to provide further explanations is harmless and not sufficient to form basis for new trial. United Brake Sys. v. American Envtl. Protection, 963 S.W.2d 749, 1997 Tenn. App. LEXIS 289 (Tenn. Ct. App. 1997).

Finding in favor of the insured in a bad faith action was appropriate because an improper characterization of the evidence made by the trial court was brief; additionally, after the comment concerning an offset provision, testimony was offered concerning the actual existence and applicability of the provision, and therefore the comment did not more probably than not affect the judgment or result in prejudice to the judicial process, T.R.A.P. 36(b). Johnson v. Tenn. Farmers Mut. Ins. Co., 205 S.W.3d 365, 2006 Tenn. LEXIS 756 (Tenn. 2006).

Although the chancellor erred by failing to grant a motion to amend before entering judgment to add an alternative theory of defensive adverse possession under T.C.A. § 28-2-102 and T.C.A. § 28-2-103, the error was harmless because the Tennessee supreme court held that the neighboring land owner had acquired title by common law adverse possession. Cumulus Broadcasting, Inc. v. Shim, 226 S.W.3d 366, 2007 Tenn. LEXIS 371 (Tenn. Apr. 27, 2007).

Even though the trial court erred by allowing an officer to testify under Tenn. R. Evid. 803(19) that he knew through a family member that defendant and his accomplice were cousins, the error was harmless because the cellmate testified that defendant confessed to the crimes and the victim's wife placed defendant at the scene of the crimes. State v. Taylor, 240 S.W.3d 789, 2007 Tenn. LEXIS 1083 (Tenn. Dec. 19, 2007).

Although discovery restrictions adopted by the trial court were contrary to the requirements of Tenn. R. Crim. P. 16(a)(1)(F), defendant failed to demonstrate per se reversible error; no evidence in the trial record showed that defendant attempted to mitigate the harmful effect of the restrictions as required by T.R.A.P. 36(a) by seeking a continuance to afford additional time to complete his review of videotapes seized from his apartment by police, and he did not show prejudice ensuing from the alleged "waste" of his attorney's time. State v. Schiefelbein, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 138 (Tenn. Crim. App. Feb. 8, 2007), modified, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 213 (Tenn. Crim. App. Mar. 7, 2007).

In a child sexual abuse case, defendant's statement that he told the child-victim that she could not move to the next gymnastic level unless she could perform a back handspring was not offered for its truth, but was offered to show circumstantially that friction developed between the child and defendant regarding gymnastic skills, and thus the statement was important in the fact that it was made, not its truth; however, the error in not admitting the statement was harmless because, in light of other testimony that was essentially the same, the error did not prejudice defendant. State v. Schiefelbein, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 138 (Tenn. Crim. App. Feb. 8, 2007), modified, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 213 (Tenn. Crim. App. Mar. 7, 2007).

Admission of a child victim's testimony regarding her knowledge of her mother's suspicions about defendant's sexual abuse of the child was irrelevant, pursuant to Tenn. R. Evid. 401, as to whether defendant sexually abused to child and therefore was inadmissible under Tenn. R. Evid. 402; however, because the statement was not central to the case and damaging to defendant, the error in admitting the evidence was harmless pursuant to Tenn. R. Crim. P. 52(a) and T.R.A.P. 36(b). State v. Schiefelbein, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 138 (Tenn. Crim. App. Feb. 8, 2007), modified, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 213 (Tenn. Crim. App. Mar. 7, 2007).

Defendant was not entitled to the raw data upon which the state's expert under Tenn. R. Crim. P. 16 and Tenn. R. Crim. P. 26.2 nor Tenn. R. Evid. 705 because the expert was not a person defendant knew to be a law enforcement officer, and the statement was not a statement of the expert, but defendant's own statement; moreover, any error in not disclosing the raw data was harmless pursuant to Tenn. R. Crim. P. 52(a) and T.R.A.P. 36(b). State v. Schiefelbein, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 138 (Tenn. Crim. App. Feb. 8, 2007), modified, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 213 (Tenn. Crim. App. Mar. 7, 2007).

In defendant's murder case, although the prosecutor's comments during closing argument were improper, inflammatory, and utterly indefensible as they violated nearly every rule established for proper closing argument, the unpreserved error was harmless; the evidence of defendant's guilt was more than sufficient, and the trial court instructed the jury that the arguments of counsel were not evidence. State v. Gann, 251 S.W.3d 446, 2007 Tenn. Crim. App. LEXIS 813 (Tenn. Crim. App. Oct. 16, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 243 (Tenn. Apr. 7, 2008), dismissed, Gann v. Lester, — F. Supp. 2d —, 2016 U.S. Dist. LEXIS 120372 (E.D. Tenn. Sept. 7, 2016).

Defendant's conviction for premeditated first-degree murder was appropriate although testimony from a witness about bruises that she noticed on the victim even though she did not see the events that caused the bruises should not have been admitted; testimony was actually harmless in the context of other eyewitness testimony of defendant's abuse of the

victim. State v. Gilley, 297 S.W.3d 739, 2008 Tenn. Crim. App. LEXIS 660 (Tenn. Crim. App. Aug. 13, 2008).

Trial court erred in permitting a police officer to testify that, because defendant suffered the greater injury of the two vehicle occupants and because that injury was to the left side of defendant's body, he concluded that defendant was the driver of the vehicle; because the jury could have easily drawn this conclusion itself based upon the officer's testimony regarding defendant's injuries and the condition of the vehicle, the trial court should not have allowed the officer to offer a lay opinion that defendant was the driver of the vehicle. Because the conclusion was so readily apparent from the evidence and because there was other direct evidence that defendant had been driving at the time of the accident, the erroneous admission of the officer's opinion as a lay witness was harmless. State v. McCloud, 310 S.W.3d 851, 2009 Tenn. Crim. App. LEXIS 437 (Tenn. Crim. App. June 12, 2009).

In a medical malpractice case, any error in admitting expert opinions that a hospital's nursing staff was responsible for the injury alleged, rather than the physician being sued, was harmless because ample evidence, other than the testimony of the experts, allowed a jury to so find. Stanfield v. Neblett, 339 S.W.3d 22, 2010 Tenn. App. LEXIS 373 (Tenn. Ct. App. June 4, 2010), appeal denied, — S.W.3d —, 2011 Tenn. LEXIS 39 (Tenn. Jan. 13, 2011).

Finding that the claimant was not entitled to recover benefits after her fiancé committed suicide while incarcerated was proper because, even assuming that the Tennessee Claims Commission (Commission) erred when it excluded instant message and electronic mail correspondence between the claimant and a correctional officer, the Commission ruled in favor of the state because the claimant failed to offer expert testimony on the standards of care, not because it disbelieved the testimony of the correctional officer on the question of notice; admission of that correspondence would only serve to bolster unimpeached evidence already in the record. Assuming for the sake of argument that the Commission erred when it excluded the evidence, the decision did not affect its judgment or prejudice the judicial process and therefore, the alleged error was harmless, T.R.A.P. 36(b). Atkinson v. State, 337 S.W.3d 199, 2010 Tenn. App. LEXIS 440 (Tenn. Ct. App. July 9, 2010), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 1120 (Tenn. Nov. 16, 2010).

On appeal from his convictions for first-degree premeditated murder and abuse of a corpse, the fact that the state did not utilize the convictions to impeach the defendant's testimony lessened their impact on the defendant's credibility, Tenn. R. Evid. 609(a); further, the convictions were mentioned only briefly at the beginning of defendant's very lengthy testimony, and no certified copies of the convictions were entered into the record. Under those circumstances, it could not have been said that defendant was prejudiced by the trial court's decision, even if it was erroneous, T.R.A.P. 36(b). State v. Hill, 333 S.W.3d 106, 2010 Tenn. Crim. App. LEXIS 371 (Tenn. Crim. App. May 12, 2010), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 953 (Tenn. Oct. 12, 2010).

Defendant's conviction for carjacking was proper because the evidence of his guilt was overwhelming enough to have been basis for the jury's verdict. Thus, although statement were not relevant and not admissible, any error was harmless since the erroneously admitted evidence had minimal, if any, impact on the jury's decision to have found him guilty, T.R.A.P. 36(b). State v. Moore, 376 S.W.3d 108, 2011 Tenn. Crim. App. LEXIS 839 (Tenn. Crim. App. Nov. 16, 2011).

In a felony murder case, the trial court erred in excluding evidence that, two days after a witness testified against defendant, the state dismissed forgery and theft charges against that witness, as this evidence was relevant to show his bias, but the error was harmless in view of defendant's admission to shooting the victim. State v. Echols, 382 S.W.3d 266, 2012 Tenn. LEXIS 738 (Tenn. Oct. 10, 2012).

In a driver's personal injury action, a trial court did not err in denying an insurer's motion for a new trial because any error in admitting testimony about the reason stated by the driver's employer for the driver's termination was harmless, T.R.A.P. 36(b); even without the testimony regarding the employer's statements, the jury could have reasonably inferred that the driver's employment was terminated for reasons related to the injuries she sustained in the crash. Johnson v. Beverly Nunis & Farmer's Ins. Exch., 383 S.W.3d 122, 2012 Tenn. App. LEXIS 277 (Tenn. Ct. App. Apr. 27, 2012).

Trial court erred when it refused to allow the defense to cross-examine the murder victim's spouse about the spouse's affair with the spouse's paramour, because this evidence was part of the defense by defendant to show a motive by the spouse to have murdered the victim. However, given the strength of the evidence against defendant, the error was harmless as the appellate court found that the jury would have convicted defendant of murdering the victim even had the jury been informed about the spouse's affair. State v. Bell, 480 S.W.3d 486, 2015 Tenn. LEXIS 720 (Tenn. Sept. 10, 2015), cert. denied, Bell v. Tennessee, 195 L. Ed. 2d 221, 136 S. Ct. 2006, — U.S. —, 2016 U.S. LEXIS 3192 (U.S. 2016).

Because defendant failed to adequately demonstrate prejudice, the trial court's error in denying his request to sit at counsel table was harmless; defendant was seated behind his attorney during trial, the seating arrangement did not impair his presumption of innocence,

the seating arrangement did not interfere with defendant's ability to communicate with his attorney. State v. Smith, 492 S.W.3d 224, 2016 Tenn. LEXIS 383 (Tenn. June 24, 2016).

Although the Chancellor stated that he deferred to the credibility findings of the hearing officer, this error did not entitle plaintiff to relief, as the chancellor made his own, independent determinations regarding the persuasiveness of evidence or credibility of other witnesses based on the record before him, and the error did not affect the judgment or result in prejudice to plaintiff. Finney v. Franklin Special Sch. Dist. Bd. of Educ., 576 S.W.3d 663, 2018 Tenn. App. LEXIS 571 (Tenn. Ct. App. Sept. 28, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 118 (Tenn. Feb. 20, 2019).

Although defendant contended that a CD of convenience store surveillance videos contained additional videos of angles that were not authenticated and placed into evidence, the issue was waived because defendant made no offer of proof, the issues were only tentatively suggested, and the record was only partially and incompletely developed. Moreover, any error in the admission of the evidence was harmless because the evidence of defendant's guilt in colluding with co-defendant was overwhelming. State v. Bingham, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 760 (Tenn. Crim. App. Oct. 8, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 61 (Tenn. Jan. 17, 2019).

Trial court never made a determination that fairness demanded that the various portions be considered at the same time, but while defendant should not have been prohibited from introducing the subsequent portion of the witness's deposition testimony on re-direct, as this did not affect the judgment, the error was harmless. Boyd v. BNSF Ry. Co., 596 S.W.3d 712, 2018 Tenn. App. LEXIS 736 (Tenn. Ct. App. Sept. 12, 2018), appeal denied, Boyd v. BNSF Ry. Co., — S.W.3d —, 2019 Tenn. LEXIS 235 (Tenn. May 20, 2019).

Appellate court did not consider whether the admission of an exhibit previously marked for identification purposes only to impeach a party's credibility was reversible error because it could not be said that the exhibit probably affected the trial court's judgment, as the court independently concluded the party was not credible. Innerimages, Inc. v. Newman, 579 S.W.3d 29, 2019 Tenn. App. LEXIS 153 (Tenn. Ct. App. Mar. 26, 2019).

Even if a trial court erred by allowing a witness to testify about specific acts to the extent that the witness did, that alone did not require reversal because such error was harmless. The trial court had significant other evidence, the admissibility of which was undisputed on appeal, on which to base its decision. Chorazghiazad v. Chorazghiazad, — S.W.3d —, 2019 Tenn. App. LEXIS 215 (Tenn. Ct. App. May 3, 2019).

In a rape of a child case, the trial court erred by allowing a nurse to read the victim's mother's statement to the jury because the record did not establish that the victim made a statement to her mother for purposes of medical diagnosis and treatment; the victim made a trustworthy statement to the nurse; and the victim's mother's statement did not add any additional information that would have been necessary for the nurse to diagnose and treat the victim; however, the error was harmless because defendant failed to demonstrate that the trial court's error affected the outcome of his trial as the evidence showed that he admitted that he had the victim fellate him, and that his semen was on the victim's underwear. State v. Rimmer, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 52 (Tenn. Crim. App. Jan. 24, 2019).

Even if the admission via the victim's parent of multiple photographs of the victim taken during the victims' life was error in defendants' trial for first degree premeditated murder and aggravated assault, the error was harmless. State v. Ponder, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 504 (Tenn. Crim. App. Aug. 21, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 559 (Tenn. Dec. 5, 2019).

Defendants did not show admitting testimony that defendants previously broke into a witness's house violated Tenn. R. Evid. 404(b) because (1) Rule 404(b) did not apply, as Tenn. R. Evid. 613 governed and allowed the witness to explain a prior inconsistent statement, and (2) any error was harmless, as defendants were not prejudiced, since the witness admitted not knowing if defendants broke into the witness's house. State v. Williams, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 518 (Tenn. Crim. App. Aug. 23, 2019), appeal denied, State v. Johnson, — S.W.3d —, 2019 Tenn. LEXIS 573 (Tenn. Dec. 9, 2019).

Although the trial court made a misstatement concerning the tax consequences of an alimony award, the trial court did not abuse its discretion in failing to award one spouse additional alimony to take into account the spouse's full expenses and the tax consequences because such misstatement was harmless under the circumstances as the spouse was awarded significant assets in the divorce to make up a shortfall for the short period of time that it would take the spouse to earn a Bachelor's degree and begin earning income. Patel v. Patel, — S.W.3d —, 2019 Tenn. App. LEXIS 560 (Tenn. Ct. App. Sept. 17, 2019).

Any error in the exclusion of evidence regarding the murder victim's prior yelling and threats toward defendant was harmless in light of the other evidence presented at trial regarding the victim's aggressive behavior and threats directed toward defendant and defendant's family. State v. Waggoner, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 595 (Tenn. Crim. App. Sept. 24, 2019), appeal denied, — S.W.3d

—, 2020 Tenn. LEXIS 126 (Tenn. Feb. 19, 2020).

Given the lack of evidence presented by a parent as to a material change in circumstances, any error in the application of the legal standard would have been harmless, as an error would not have changed the outcome. In re Caroline U., — S.W.3d —, 2019 Tenn. App. LEXIS 489 (Tenn. Ct. App. Oct. 4, 2019).

Whether the mother was admitted to a mental health institute had no bearing on her failure to remedy the conditions that led to removal when the statute did not require that the parent's failure be willful; therefore, exclusion of the evidence, even if admissible, was harmless. In re Benjamin P., — S.W.3d —, 2020 Tenn. App. LEXIS 54 (Tenn. Ct. App. Feb. 4, 2020).

Admission of the relevant portion of the 911 call, while error, did not undermine the fundamental fairness of the trial; the only contested issue was the level of defendant's culpability, and thus the probative value of the call was far outweighed by the danger of unfair prejudice and needless presentation of cumulative evidence, and the error was harmless as there was overwhelming evidence of defendant's guilt. State v. Wooten, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 12 (Tenn. Crim. App. Jan. 13, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 320 (Tenn. June 3, 2020).

Trial court's error in denying defendant's motion to suppress a pre-arrest statement which defendant made to police officers was harmless, as it did not more probably than not affect the judgment or result in prejudice to the judicial process, in that the State of Tennessee introduced ample evidence of defendant's guilt at trial. State v. Moran, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 701 (Tenn. Crim. App. Oct. 29, 2020).

4. Not Harmless Error.

Trial judge's failure to submit "every word" of his charge to the jury in written form as required by Tenn. R. Crim. P. 30(c) was not harmless error. State v. Gorman, 628 S.W.2d 739, 1982 Tenn. LEXIS 388 (Tenn. 1982).

Where trial court permitted prosecutor, over objection of defendant, to state to prospective jurors that judge of city court and grand jury had already determined that there was probable cause to believe that crime charged had been committed and that defendant had committed it, such error resulted in prejudice to the judicial process, requiring reversal under T.R.A.P. 36. State v. Onidas, 635 S.W.2d 516, 1982 Tenn. LEXIS 417 (Tenn. 1982).

Erroneous admission of evidence in a slip and fall case of the current condition of the accident site three years after the accident required reversal of verdict for plaintiff where the evidence of negligence was slight and the plaintiff's original award was excessive. Moon v. Scoa Industries, Inc., 764 S.W.2d 550, 1988 Tenn. App. LEXIS 554 (Tenn. Ct. App. 1988).

Plain error existed in the trial court's conducting the trial into the late night and early morning hours of the next day. State v. Parton, 817 S.W.2d 28, 1991 Tenn. Crim. App. LEXIS 406 (Tenn. Crim. App. 1991).

Appellant was entitled to a new trial due to error in admitting certain evidence of past acts; considering the entire record, this error more probably than not affected the judgment. State v. Ford, 861 S.W.2d 846, 1992 Tenn. Crim. App. LEXIS 583 (Tenn. Crim. App. 1992).

In a prosecution for aggravated rape, the trial court's admission of testimony as to prior sex acts between defendant and the victim was harmful error. State v. Dutton, 896 S.W.2d 114, 1995 Tenn. LEXIS 96 (Tenn. 1995).

In a prosecution for possession of cocaine with intent to sell, the trial court committed reversible error in admitting testimony of police officer that a confidential informant had told him that defendant was in black car with an eight-ball of cocaine with him; the prejudicial effect of the testimony far outweighed its probative value. State v. Brown, 915 S.W.2d 3, 1995 Tenn. Crim. App. LEXIS 621 (Tenn. Crim. App. 1995).

In a death penalty case, a court erred by prohibiting expert testimony on the issue of the reliability of eyewitness identification because the facts, especially on the question of identification, were contested at trial, there were conflicts in the testimony, there were significant challenges to the credibility of practically every state witness other than the law enforcement officers, and some witnesses had prior felony convictions and were evasive, perhaps even untruthful, as to collateral matters. State v. Copeland, 226 S.W.3d 287, 2007 Tenn. LEXIS 502 (Tenn. May 23, 2007).

Appellate court was correct when it determined that the trial court erred by admitting evidence of defendant's possession of child pornography under Tenn. R. Evid. 404(b) because a jury could infer from this evidence that defendant had a propensity to commit child rape; however, the appellate court erred when it determined that the error was harmless under T.R.A.P. 36(b) because the evidence undermined the fairness of defendant's trial and more probably than not affected the jury's assessment of the credibility of the witnesses and affected the verdict. State v. Rodriguez, 254 S.W.3d 361, 2008 Tenn. LEXIS 274 (Tenn. Apr. 24, 2008).

Where defendant was charged in connection with four robberies, trial court improperly consolidated the four charges for trial under Tenn. R. Crim. P. 8(b), as the multiple charges and testimony inevitably hung in the backdrop as each particular offense was presented to the jury and it was unlikely that the jury examined each charge on its own proof; the error could not

be classified as harmless under T.R.A.P. 36(b). State v. Dotson, 254 S.W.3d 378, 2008 Tenn. LEXIS 277 (Tenn. Apr. 28, 2008).

Because there was a reasonable probability under federal law that the error of the trial court in refusing to give the railroad's requested instructions affected the judgment, a new trial on the issue of damages was necessary, T.R.A.P. 36(b). The railroad had requested a instruction that the employee's fear of cancer must have been genuine and serious to have been compensable. Hensley v. CSX Transp., Inc., 310 S.W.3d 824, 2009 Tenn. App. LEXIS 568 (Tenn. Ct. App. Aug. 26, 2009), appeal denied, Hensley v. CSX Transp., Inc., — S.W.3d —, 2010 Tenn. LEXIS 126 (Tenn. Mar. 1, 2010).

Trial court's error in admitting into evidence the prior acquittals of two men defendant claimed were the individuals responsible for a murder was not harmless because the evidence of a prior acquittal of an individual for the crime for which defendant was on trial was not relevant under Tenn. R. Evid. 401, 608, or 609 as context evidence, relevant to the credibility of the witness, or relevant to rebut a defense theory that the other individual committed the crime. State v. Turner, 352 S.W.3d 425, 2011 Tenn. LEXIS 960 (Tenn. Oct. 12, 2011).

In a prosecution for aggravated child abuse under former T.C.A. § 39-15-402, as defendant mother's knowledge that defendant father had a propensity for violence was not an element of the crime, her testimony about his prior assaults against her was irrelevant and its admission was not harmless error in view of the weakness of the state's case against her. State v. Gomez, 367 S.W.3d 237, 2012 Tenn. LEXIS 291 (Tenn. Apr. 24, 2012).

Non-structural constitutional error in admitting defedndant's statements obtained in violation of his *Miranda* rights was not harmless, as the issue was not whether the remaining admissible evidence presented at trial was sufficient to support defendant's convictions, but whether it appeared beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained; the state failed to prove that the erroneous introduction of the statements did not contribute to the verdict convicting defendant of murder and abuse of a corpse as defendant's confession was the foundation upon which the remaining circumstantial evidence rested. State v. Climer, 400 S.W.3d 537, 2013 Tenn. LEXIS 354 (Tenn. Apr. 19, 2013).

In defendant's death penalty case, because an out-of-state murder did not qualify as a signature crime the court erred by allowing the proof of the third murder; while there were similarities between the murders, those similarities failed to establish a modus operandi that was comparable to a signature. The erroneous admission of the evidence surrounding the other murder more probably than not affected the outcome of the trial and therefore, it was not harmless. State v. Jones, 450 S.W.3d 866, 2014 Tenn. LEXIS 669 (Tenn. Sept. 25, 2014).

In a case in which defendant was charged with first degree premeditated murder, but convicted of the lesser-included offense of voluntary manslaughter, any link between threats against the victim's sister and the victim's death was speculative and too far removed to be relevant; although that error alone might have been harmless, when viewed in conjunction with the erroneous admission of the prior alleged 2013 assault, the error in admitting the prior threats against the victim's sister was not harmless. State v. Jarman, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 832 (Tenn. Crim. App. Nov. 8, 2018), rev'd, 604 S.W.3d 24, 2020 Tenn. LEXIS 267 (Tenn. July 6, 2020).

In a case in which defendant was charged with first degree premeditated murder, but convicted of the lesser-included offense of voluntary manslaughter, the evidence regarding the assault of which defendant was previously acquitted was admitted in error, and the error was not harmless as the evidence admitted essentially turned into another trial on defendant's alleged assault, for which he had already been acquitted. State v. Jarman, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 832 (Tenn. Crim. App. Nov. 8, 2018), rev'd, 604 S.W.3d 24, 2020 Tenn. LEXIS 267 (Tenn. July 6, 2020).

Because the deficiency in the election of offenses for a count in the indictment charging defendant with aggravated child abuse was not harmless beyond a reasonable doubt, defendant's conviction was reverse and the case was remanded for a new trial. State v. Harris, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 708 (Tenn. Crim. App. Nov. 5, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 236 (Tenn. Mar. 26, 2020).

5. Error Cured by Trial Judge.

The prompt instruction of a trial judge to a jury directing them not to consider improper evidence generally cures any error, unless such evidence is so far prejudicial that it was more probable that it affected the judgment than not. State v. Tyler, 598 S.W.2d 798, 1980 Tenn. Crim. App. LEXIS 306 (Tenn. Crim. App. 1980).

Where the trial court's limiting instructions regarding the admission of improper evidence were partially incorrect, they were not considered in the appellate court's analysis of whether the error in admission of the evidence was harmless. State v. Dutton, 896 S.W.2d 114, 1995 Tenn. LEXIS 96 (Tenn. 1995).

6. Specificity of Grounds.

The grounds relied upon in a motion for new trial must be specified with reasonable certainty so as to advise the trial court and opposing counsel of the alleged error or irregularity relied upon and to enable the appellate courts to see that the alleged error was presented to

the trial court for correction as required by T.R.A.P. 36(a); otherwise, the matter cannot be considered by the trial court on the motion for a new trial or by an appellate court on appeal. State v. King, 622 S.W.2d 77, 1981 Tenn. Crim. App. LEXIS 373 (Tenn. Crim. App. 1981).

Although the issues which a pro se prisoner sought to argue would have been more clearly raised had the prisoner been represented by counsel in the proceedings below, the appellate court found that the prisoner sufficiently raised to the lower courts the multiple procedural deficiencies in the forfeiture proceedings, so that the court exercised its discretion to address the important due process issues raised regarding the procedural deficiencies in the forfeiture proceedings. State v. Sprunger, 458 S.W.3d 482, 2015 Tenn. LEXIS 177 (Tenn. Mar. 9, 2015), rehearing denied, — S.W.3d —, 2015 Tenn. LEXIS 258 (Tenn. Mar. 16, 2015).

7. Discretion of Appellate Court.

Defendant's failure to take any action to call issue of trial court's instruction to the trial court's attention and his active procurement of an instruction he now claims was erroneous would preclude review on appeal; however, if defendant was tried under law inapplicable to his case, his substantial rights may have been affected, and under these circumstances supreme court will exercise its discretion to review issue in order to insure substantial justice is done. State v. Brimmer, 876 S.W.2d 75, 1994 Tenn. LEXIS 15 (Tenn. 1994), rehearing denied, 876 S.W.2d 75, 1994 Tenn. LEXIS 136 (1994), cert. denied, Brimmer v. Tennessee, 513 U.S. 1020, 115 S. Ct. 585, 130 L. Ed. 2d 499, 1994 U.S. LEXIS 8413 (1994).

Where the criminal court failed to act on a habeas corpus petition in a timely manner and, as a result, the defendant was deprived of a remedy, the supreme court had authority under T.R.A.P. 36 to allow defendant to file a petition for a writ of certiorari. Norton v. Everhart, 895 S.W.2d 317, 1995 Tenn. LEXIS 27 (Tenn. 1995).

Whether or not an appellate court should recognize a trial error as plain error and grant relief in the absence of an objection in the trial court must depend upon the facts and circumstances of the particular case. State v. Smith, 24 S.W.3d 274, 2000 Tenn. LEXIS 374 (Tenn. 2000).

As a general matter, appellate courts will decline to consider issues raised for the first time on appeal that were not raised and considered in the trial court; however, T.R.A.P. 36(a) and T.R.A.P. 3(b) give appellate courts considerable discretion to consider issues that have not been properly presented in order to achieve fairness and justice. Heatherly v. Merrimack Mut. Fire Ins. Co., 43 S.W.3d 911, 2000 Tenn. App. LEXIS 751 (Tenn. Ct. App. 2000).

In a first degree murder case, the trial court properly dismissed defendant's motion to reopen his post-conviction petition as the state's alleged suppression of exculpatory evidence was not a proper ground to reopen; the appellate court erred in sua sponte treating defendant's motion to reopen as a petition for writ of error coram nobis as it could not independently examine the motion to determine whether defendant should have pursued a completely different avenue of relief in the trial court. Harris v. State, 102 S.W.3d 587, 2003 Tenn. LEXIS 313 (Tenn. 2003), overruled in part, Nunley v. State, 552 S.W.3d 800, 2018 Tenn. LEXIS 382 (Tenn. July 19, 2018).

Court of appeals considered the applicability of the Transfer Statute, T.C.A. § 16-1-116, in plaintiff's appeal of an order dismissing his claim under the Government Tort Liability Act as time barred pursuant to T.C.A. § 29-20-305(b) because the questions before the court of appeals, whether the general sessions court had authority to transfer plaintiff's case to the circuit court and whether plaintiff's claim was time barred, were the central issues before the circuit court; the Transfer Statute was not discussed in the circuit court, but the questions, the issues of subject matter jurisdiction and whether the claim was time barred, were raised. Haynes v. Rutherford County, 359 S.W.3d 585, 2011 Tenn. App. LEXIS 350 (Tenn. Ct. App. June 27, 2011), appeal denied, — S.W.3d —, 2011 Tenn. LEXIS 915 (Tenn. Sept. 21, 2011).

In a wrongful death and survivor action arising from care and treatment of a nursing home resident, where defendants did not object to the medical malpractice jury instruction under Tenn. R. Civ. P. 51.02, and review of the issue was not necessary to achieve fairness and justice in the circumstances under T.R.A.P. 13(b) and 36(a), review thereof was declined. McLemore v. Elizabethton Med. Investors, Ltd. P'ship, 389 S.W.3d 764, 2012 Tenn. App. LEXIS 415 (Tenn. Ct. App. June 22, 2012), appeal denied, McLemore v. Elizabethton Med. Investors LP, — S.W.3d —, 2012 Tenn. LEXIS 892 (Tenn. Nov. 27, 2012).

While not raised by either party, as a matter of plain error, the appellate court concluded that defendant's conviction for theft was to be modified from a Class D felony to a Class E felony because of an amendment to the relevant statute. Accordingly, the appellate court remanded the matter to the trial court for the entry of a new judgment and imposition of a sentence. State v. Cole-Pugh, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 176 (Tenn. Crim. App. Mar. 18, 2019), appeal denied, State v. Cole-Pugh, — S.W.3d —, 2019 Tenn. LEXIS 538 (Tenn. Dec. 10, 2019).

8. Guilty Pleas.

Trial judges, in accepting pleas of guilty in criminal cases, are required to comply substantially to the procedure prescribed. State v. New-

some, 778 S.W.2d 34, 1989 Tenn. LEXIS 452 (Tenn. 1989).

The failure of trial judge to comply with the procedure prescribed for accepting pleas of guilty in criminal cases will be reviewed under the harmless error standard, which, applied, is whether the noncompliance was or was not harmless to the defendant beyond a reasonable doubt. State v. Newsome, 778 S.W.2d 34, 1989 Tenn. LEXIS 452 (Tenn. 1989).

Any court accepting a plea of guilty is required to make it clear to the defendant that the resulting judgment of conviction may be used in a subsequent proceeding to enhance the punishment for subsequent offenses. State v. Newsome, 778 S.W.2d 34, 1989 Tenn. LEXIS 452 (Tenn. 1989).

Where court, in accepting a plea of guilty, has failed to make it clear to the defendant that the resulting judgment of conviction may be used in a subsequent proceeding to enhance the punishment for subsequent offenses, the standard of review is whether the trial court's omission was or was not harmless to this defendant beyond a reasonable doubt. State v. Newsome, 778 S.W.2d 34, 1989 Tenn. LEXIS 452 (Tenn. 1989).

Where defendant enters a plea of guilty and the trial judge fails to advise the defendant in accordance with the fifth requirement of State v. Mackey, 553 S.W.2d 337, 1977 Tenn. LEXIS 579 (Tenn. 1977), superseded by statute as stated in, State v. Chastain, 871 S.W.2d 661, 1994 Tenn. LEXIS 26 (Tenn. 1994), superseded by statute as stated in, State v. Wilson, 31 S.W.3d 189, 2000 Tenn. LEXIS 519 (Tenn. 2000) that his responses to the court or the attorney general at his guilty plea submission may be used against him later in a prosecution for perjury or false statement, the standard of appellate review is whether the trial court's omission was or was not harmless to the defendant beyond a reasonable doubt. State v. Newsome, 778 S.W.2d 34, 1989 Tenn. LEXIS 452 (Tenn. 1989).

Where the attorneys who represented the defendant explained to the defendant in detail the evidence the state would introduce if he opted to go to trial, and his constitutional rights to a jury trial, confront and cross-examine the state's witnesses, and the privilege against self-incrimination, it was clear beyond a shadow of a doubt that defendant understood and appreciated his constitutional rights, and that he was aware entry of a plea of guilty would result in a waiver of these rights; consequently, the trial court's failure to explain his rights was harmless beyond a reasonable doubt. Villars v. State, 833 S.W.2d 98, 1991 Tenn. Crim. App. LEXIS 956 (Tenn. Crim. App. 1991), rehearing denied, Villers v. State, — S.W.2d —, 1992 Tenn. Crim. App. LEXIS 81 (Tenn. Crim. App. 1992).

9. Waiver.

Counsel's failure to insure that the matter of competency was settled before murder trial amounted to a waiver of that issue. State v. Estes, 655 S.W.2d 179, 1983 Tenn. Crim. App. LEXIS 397 (Tenn. Crim. App. 1983).

Defendant's failure to make contemporaneous objection to admission of letter into evidence on any ground resulted in waiver of issue of whether admission was proper. State v. Killebrew, 760 S.W.2d 228, 1988 Tenn. Crim. App. LEXIS 478 (Tenn. Crim. App. 1988).

When the petitioner failed to interpose a contemporaneous objection when the argument was advanced by the assistant district attorney general, this procedural default prevented the petitioner from litigating the issue in a post-conviction proceeding. Teague v. State, 772 S.W.2d 915, 1988 Tenn. Crim. App. LEXIS 765 (Tenn. Crim. App. 1988), rehearing denied, — S.W.2d —, 1989 Tenn. Crim. App. LEXIS 45 (1989), appeal denied, — S.W.2d —, 1989 Tenn. LEXIS 292 (Tenn. June 5, 1989), overruled, Owens v. State, 908 S.W.2d 923, 1995 Tenn. LEXIS 614 (Tenn. 1995), overruled, State v. Mixon, 983 S.W.2d 661, 1999 Tenn. LEXIS 33 (Tenn. 1999); State v. Mixon, 983 S.W.2d 661, 1999 Tenn. LEXIS 33 (Tenn. 1999).

Because defendant failed to take available action to prevent or nullify the alleged harmful effect of argument by objecting at trial, he was, therefore, not entitled to relief. State v. Gregory, 862 S.W.2d 574, 1993 Tenn. Crim. App. LEXIS 295 (Tenn. Crim. App. 1993).

Where defendant failed to raise the issue of the trial court's failure to sequester the jury at trial when any prejudicial effect of the error could have been prevented, she waived the issue as a ground for relief. Jones v. State, 915 S.W.2d 1, 1995 Tenn. Crim. App. LEXIS 342 (Tenn. Crim. App. 1995), rehearing denied, — S.W.2d —, 1995 Tenn. Crim. App. LEXIS 479 (Tenn. Crim. App. June 13, 1995).

Where no objection is raised to content of evidence, appeal on issues of cumulative nature of evidence and whether it should have been passed to jury is waived. State v. Gray, 960 S.W.2d 598, 1997 Tenn. Crim. App. LEXIS 544 (Tenn. Crim. App. 1997).

By stating that there was no objection to the admission into evidence of the transcript of the victim's statements, the defendant waived any right to complain about the admissibility of that evidence. State v. Schaller, 975 S.W.2d 313, 1997 Tenn. Crim. App. LEXIS 1130 (Tenn. Crim. App. 1997).

Failure to object to evidence in a timely and specific fashion precludes taking issue on appeal with the admission of the evidence. Grandstaff v. Hawks, 36 S.W.3d 482, 2000 Tenn. App. LEXIS 355 (Tenn. Ct. App. 2000).

By failing to make a contemporaneous objection to the substance of witness' testimony, the defendant waived appellate consideration of the issue. State v. Thompson, 36 S.W.3d 102, 2000 Tenn. Crim. App. LEXIS 256 (Tenn. Crim. App. 2000).

By failing to make a contemporaneous objection, defendant waived any complaint about prosecutor's comments during closing argument. State v. Smith, 42 S.W.3d 101, 2000 Tenn. Crim. App. LEXIS 398 (Tenn. Crim. App. 2000), review or rehearing denied, — S.W.3d —, 2001 Tenn. LEXIS 39 (Tenn. Jan. 8, 2001).

In a criminal appeal, the court rejected defendant's argument that the trial court erred by refusing to allow courtroom officers to be questioned as to whether they saw defendant flash a gang sign. There was no showing as to what the testimony of the other courtroom deputies would have been, and defendant failed to raise the argument at trial. T.R.A.P. 36(a). State v. Mickens, 123 S.W.3d 355, 2003 Tenn. Crim. App. LEXIS 107 (Tenn. Crim. App. 2003), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 805 (Tenn. Sept. 2, 2003).

Defendants' arguments in opposition to the admission of certain evidence at a criminal trial were waived because the claims were not argued at trial. State v. Mickens, 123 S.W.3d 355, 2003 Tenn. Crim. App. LEXIS 107 (Tenn. Crim. App. 2003), review or rehearing denied, — S.W.3d —, 2003 Tenn. LEXIS 805 (Tenn. Sept. 2, 2003).

At no time during an action involving the wrongful interference with an easement did the developer proffer any evidence as to the equity that he held in his property or otherwise raise that issue to the trial court; therefore, the developer's argument that the trial court erred in not considering proof of equity was considered waived under T.R.A.P. 36(a). Memphis Light, Gas & Water Div. v. Starkey, 244 S.W.3d 344, 2007 Tenn. App. LEXIS 439 (Tenn. Ct. App. July 17, 2007), appeal denied, — S.W.3d —, 2007 Tenn. LEXIS 1039 (Tenn. Nov. 19, 2007).

Defendant waived his procedural objection to the severance of three child rape counts against him on the morning that his trial began because, from the record, it did not appear that defendant objected to the motion as untimely. State v. Schiefelbein, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 138 (Tenn. Crim. App. Feb. 8, 2007), modified, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 213 (Tenn. Crim. App. Mar. 7, 2007).

Finding against a college professor in his breach-of-contract action against a college was appropriate, in part, because the professor pointed to no place in the record in which he argued to the trial court that the division chairperson had interfered with his at-will employment; he alleged only that the chairperson interfered with his contract with the college. Therefore, the professor had waived that issue, T.R.A.P. 36(a). Jones v. Lemoyne-Owen College, 308 S.W.3d 894, 2009 Tenn. App. LEXIS 425 (Tenn. Ct. App. July 8, 2009), appeal denied, Jones v. Lemoyne-Owen College, — S.W.3d —, 2010 Tenn. LEXIS 318 (Tenn. Mar. 1, 2010).

Client waived any argument that the trial court failed to allow adequate time for discovery by stating that it could proceed "based on what they've relied on." Cardiac Anesthesia Servs., PLLC v. Jones, 385 S.W.3d 530, 2012 Tenn. App. LEXIS 217 (Tenn. Ct. App. Mar. 30, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 598 (Tenn. Aug. 16, 2012).

Patient waived the issue of whether she had demonstrated extraordinary cause from which compliance with the notice requirement and the good faith certificate requirement relevant to a medical malpractice suit should be excused because the patient never raised the issue to the trial court. Moses v. Dirghangi, 430 S.W.3d 371, 2013 Tenn. App. LEXIS 661 (Tenn. Ct. App. Oct. 3, 2013), appeal denied, — S.W.3d —, 2014 Tenn. LEXIS 178 (Tenn. Feb. 11, 2014).

Trial court did not err in a foreclosure proceeding by admitting a bank's exhibits and the testimony of the bank's loan verification consultant into evidence, and the appellate court considered the issue waived because the borrower failed to object to the introduction of the evidence. Starkey v. Wells Fargo Bank, N.A., — S.W.3d —, 2019 Tenn. App. LEXIS 190 (Tenn. Ct. App. Apr. 23, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 408 (Tenn. Aug. 14, 2019).

Parent waived the issue of whether a downward deviation in child support for long distance travel expenses was warranted because, although the parent raised the issue in the parent's pleadings, at trial the parent agreed to the entry of a new support order based on the guidelines, and the trial court set child support consistent with the parent's position at trial. The parent belatedly requested reinstatement of the deviation in a post-trial motion. Carmen v. Murray, — S.W.3d —, 2019 Tenn. App. LEXIS 474 (Tenn. Ct. App. Sept. 25, 2019).

Although defendant argued that the trial court erred by permitting the state of Tennessee to refer to defendant as the leader of a crime family and by allowing the state to elicit testimony regarding the criminal acts of other people affiliated with the crime family, appellate review of the issue was waived because the defense did not object contemporaneously to the admission of the evidence. State v. Frazier, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 385 (Tenn. Crim. App. July 1, 2019).

Defendant waived his challenge to offender classification because he pleaded guilty and failed to raise the issue at sentencing; defendant's offender classification was never in dispute before the trial court, and defendant never presented the trial court with the argument that he should be sentenced as an especially mitigated offender. State v. Ward, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 437 (Tenn. Crim. App. July 19, 2019).

Defendant waived the issue of the state of Tennessee's use of defendant's statements and

defendant's adult child's statement to law enforcement on the basis that the investigator did not electronically record the interviews and the statements because defendant did not file a motion to suppress the statements prior to trial or object to the state's use of the statements on this basis at trial. Because defendant did not allege that the use of the statements amounted to plain error, the appellate court declined to review the issue for plain error. State v. Waggoner, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 595 (Tenn. Crim. App. Sept. 24, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 126 (Tenn. Feb. 19, 2020).

Because defendant failed to object to the testimony that defendant challenged on appeal, defendant waived the issue. Furthermore, the appellate court declined to review the issue for plain error because defendant did not allege that the admission of the testimony amounted to plain error. State v. Waggoner, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 595 (Tenn. Crim. App. Sept. 24, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 126 (Tenn. Feb. 19, 2020).

As to defendant's claim that the trial court was biased against defendant, defendant made no argument to support the issue. Therefore, the issue was waived. Ghormley v. State, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 739 (Tenn. Crim. App. Nov. 15, 2019).

Although defendant claimed in defendant's motion to suppress that an unreasonable delay occurred between defendant's arrest and defendant's probable cause hearing before a judge or magistrate, the issue was not sufficiently raised in the motion to suppress or otherwise. Therefore, defendant waived appellate review for failure to present the issue to the trial court. State v. Taylor, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 147 (Tenn. Crim. App. Feb. 26, 2020).

Defendant's argument that defendant's right to an impartial jury was violated due to the racial composition of the jury was waived because defendant did not timely assert the argument. Defendant first raised the issue regarding the racial composition of the jury in a motion for a new trial, while the hearing on motion for a new trial consisted only of oral argument, and no proof, including proof regarding the racial composition of the community or jury, was introduced. State v. Rollins, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 180 (Tenn. Crim. App. Mar. 12, 2020).

Because there was no contemporaneous objection to what trial counsel characterized during the post-conviction hearing as "objectionable" remarks made by the prosecutor during opening statement and closing argument, counsel waived plenary review of the improper remarks during on direct appeal; the transcripts of the opening statement and closing argument were not included in the record, and no claim was raised that the improper remarks constituted "plain error." Whitehead v. State, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 299 (Tenn. Crim. App. Apr. 27, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 460 (Tenn. Aug. 7, 2020).

Although the trial court before defendant's trial stated that the court would revisit the issue of redacting defendant's statement to the police if presented with evidence of how the statement could have been redacted so as not to confuse the jury, the record was silent as to whether defense counsel ever raised the issue of redacting the statement again. Accordingly, defendant waived consideration of the issue by the appellate court because it did not appear from the record that the issue was revisited. State v. Mendenhall, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 343 (Tenn. Crim. App. May 14, 2020).

Defendant waived consideration of additional claims regarding the admission of evidence which defendant raised on appeal because defendant did not raise those claims in defendant's motion for new trial Moreover, defendant did not argue that defendant was entitled to plain error relief on those claims. State v. Jackson, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 353 (Tenn. Crim. App. May 14, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 454 (Tenn. Aug. 5, 2020).

Because defendant did not pursue a ruling on defendant's pretrial motion or object at trial to the jury instruction on self-defense, defendant waived plenary review of the issue. State v. Manis, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 375 (Tenn. Crim. App. May 27, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 513 (Tenn. Oct. 7, 2020).

Defendant did not object at trial to the jury verdict forms, request a special verdict form addressing self-defense, or raise the issue in defendant's motion for a new trial. Therefore, defendant waived the issue of whether defendant's constitutional right to a unanimous verdict was violated by the lack of a special jury verdict form addressing self-defense. State v. Manis, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 375 (Tenn. Crim. App. May 27, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 513 (Tenn. Oct. 7, 2020).

Defendant never requested interviews to be redacted for the purposes of trial, and he never offered redacted versions of the interviews to be put into evidence; thus, he waived any objection to the interviews being made exhibits in their entirety. State v. Haven, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 431 (Tenn. Crim. App. June 19, 2020).

Defendant received a favorable ruling on other acts issue and any other challenge on these grounds was waived; he requested the trial court to only consider the acts pertinent to the charged crimes, he acquiesced in the trial

court's determination that it would only consider allegations in Obion County, and the defense submitted transcripts of the interviews that included the inadmissible material. State v. Haven, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 431 (Tenn. Crim. App. June 19, 2020).

Defendant did not request a redaction of the videos at trial, which were admitted as exhibits in their entirety; he could not claim on appeal that the video evidence was not part of the record. State v. Haven, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 431 (Tenn. Crim. App. June 19, 2020).

Issue of whether the trial court properly excluded testimony regarding prior inconsistent statements made by the victim and contained within an officer's police report was waived because defendant declined to testify, the officer did not testify as the contents of the police report, and defendant marked the police report for identification in an effort to preserve the issue. Because the record was incomplete as to the issue, the appellate court could not review the trial court's ruling regarding the admissibility of the proposed evidence. State v. Brown, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 690 (Tenn. Crim. App. Oct. 23, 2020).

Insofar as defendant's argument was an objection to the lack of documentation in the presentencereport for an order of restitution, defendant could not claim error on appeal when defendant affirmatively waived preparation of the pre-sentence report at the guilty plea hearing.Moreover, in defendant's reply brief and during oral argument, defendant emphasized merely a lack of documentation by the victim at the restitution hearing, and not an affirmation that documentation in the presentence report was required to support a restitution award. State v. Thomas, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 31 (Tenn. Crim. App. Jan. 28, 2021).

Defendant waived on appeal the issue of whether the procedures employed by the drug court in removing defendant from the program violated defendant's due process rights as defendant failed to raise any claim of due process violations in the courts below. State v. Roy, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 155 (Tenn. Crim. App. Apr. 16, 2021).

10. Jurors.

The failure of the trial judge to follow the explicit instructions with respect to individual voir dire of jurors in certain situations amounted to prejudice to the judicial process. State v. Claybrook, 736 S.W.2d 95, 1987 Tenn. LEXIS 972 (Tenn. 1987).

Conduct of juror and juror's spouse resulted in prejudice to the judicial process, requiring a new trial even though the misconduct probably did not alter the result of the trial. State v. Perry, 740 S.W.2d 723, 1987 Tenn. Crim. App. LEXIS 2308 (Tenn. Crim. App. 1987).

There was no showing that plaintiffs were prejudiced by juror's statement of "Keep it up boys. You've got the edge," made to defense counsel. Arcata Graphics Co. v. Heidelberg Harris, 874 S.W.2d 15, 1993 Tenn. App. LEXIS 445 (Tenn. Ct. App. 1993), rehearing denied, Arcata Graphics Co. v. Heidelberg Harris, Inc., — S.W.2d —, 1993 Tenn. App. LEXIS 569 (Tenn. Ct. App. Aug. 26, 1993), appeal denied, Arcata Graphics Co. v. Heidelberg Harris, Inc., — S.W.2d —, 1994 Tenn. LEXIS 85 (Tenn. Mar. 7, 1994).

11. Remand.

Judgment could and perhaps should, under ordinary circumstances, be granted in the appellate courts when the judgment of the trial court, sitting without the intervention of a jury, is reversed; however, the rule is not mandatory. The better view is that a remand for further proceedings is within the purview of judicial discretion, especially when issues have been left undecided by the trial court. First Tennessee Bank Nat'l Ass'n v. Hurd Lock & Mfg. Co., 816 S.W.2d 38, 1991 Tenn. App. LEXIS 302 (Tenn. Ct. App. 1991), appeal denied, — S.W.2d —, 1991 Tenn. LEXIS 345 (Tenn. Sept. 3, 1991).

12. Denial of Statutory Rights.

The general assembly, in its wisdom, certainly has the right and power to direct the judicial process. They have said that where a defendant wants his trial jury to know the range of possible punishments resulting from convictions that he is entitled to have that information conveyed to the jury. To deny this defendant that statutory right constitutes prejudice to the judicial process, rendering the error reversible under T.R.A.P. 36(b). State v. Cook, 816 S.W.2d 322, 1991 Tenn. LEXIS 319 (Tenn. 1991), modified, — S.W.2d —, 1991 Tenn. LEXIS 415 (Tenn. Sept. 30, 1991), rehearing denied, — S.W.2d —, 1991 Tenn. LEXIS 451 (Tenn. Nov. 12, 1991).

Where defendant's offer of proof conveyed a completely different version of the events surrounding his alleged escape from that presented by the state, the trial court's failure to allow the defendant to make his claims deprived the jury of the theory of defense, and such error harmed the defendant. State v. Wingard, 891 S.W.2d 628, 1994 Tenn. Crim. App. LEXIS 595 (Tenn. Crim. App. 1994).

When there are two plaintiffs in one lawsuit, T.C.A. § 22-3-104 requires that each be afforded four peremptory challenges and failure to allow the statutorily mandated number of challenges was reversible error. Tuggle v. Allright Parking Sys., 922 S.W.2d 105, 1996 Tenn. LEXIS 302 (Tenn. 1996).

13. Argument of Counsel.

Generally the appellate courts will not interfere with the discretionary action of the trial court in refusing a mistrial or a new trial for

misconduct of counsel in argument unless the argument is clearly unwarranted and made purely for the purpose of appealing to passion, prejudice and sentiment which has not or cannot be removed by sustaining objection of opposing counsel. Perkins v. Sadler, 826 S.W.2d 439, 1991 Tenn. App. LEXIS 56 (Tenn. Ct. App. 1991).

There is nothing wrong with reminding the jury in closing argument of the testimony of various witnesses, and, if testimony was adduced by way of deposition, the easiest way to make this reminder is by reading the deposition. Perkins v. Sadler, 826 S.W.2d 439, 1991 Tenn. App. LEXIS 56 (Tenn. Ct. App. 1991).

State did not make an improper "golden rule argument" and defendants were not entitled to plain error relief because the state never asked the jurors to put themselves in the victim's position; the state never insinuated that jurors should place themselves in the position of a victim of an aggravated robbery or aggravated assault; instead, the state argued that the law protected all victims equally, even victims who were methamphetamine addicts and who were incarcerated. State v. Carter, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 496 (Tenn. Crim. App. Aug. 16, 2019).

While the prosecutor made multiple improper comments during the prosecutor's closing and rebuttal arguments, the comments were not so inflammatory or improper that they affected the outcome of the trial to defendant's detriment. In light of the evidence presented at trial, which included a detailed confession by defendant, defendant has failed to establish plain error as the prosecutor's improper comments did not adversely affect a substantial right of defendant. State v. Toomes, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 700 (Tenn. Crim. App. Oct. 29, 2020).

14. New Trial.

New trial may be granted on appeal in circumstances in which the trial court absolved itself of its responsibility to consider the evidence as a thirteenth juror. State v. Burlison, 868 S.W.2d 713, 1993 Tenn. Crim. App. LEXIS 282 (Tenn. Crim. App. 1993).

On appeal, where record reflected that trial court considered evidence in its role as thirteenth juror and denied request for new trial, and where defendant's sole contention was that weight of evidence was contrary to verdict of first degree murder, appellate court could not overturn decision of trial court. State v. Burlison, 868 S.W.2d 713, 1993 Tenn. Crim. App. LEXIS 282 (Tenn. Crim. App. 1993).

15. Failure to File Post-trial Motion.

Failure of defendants to file a post-trial motion to have the judgment set aside, in accordance with their motion for a directed verdict, precluded appellate review of the matter. Cortez v. Alutech, Inc., 941 S.W.2d 891, 1996 Tenn. App. LEXIS 463 (Tenn. Ct. App. 1996), rehearing denied, — S.W.2d —, 1996 Tenn. App. LEXIS 579 (Tenn. Ct. App. Sept. 13, 1996).

Because defendants did not raise the defense of equitable estoppel in their respective motions for a new trial, the issue was waived and the court of appeals should not have considered the defense. Alexander v. Armentrout, 24 S.W.3d 267, 2000 Tenn. LEXIS 305 (Tenn. 2000).

16. Jury Instructions.

Where the integrity of the jury as a fact-finding body is not disturbed, harmless error analysis is appropriate when evaluating omissions of an essential element of an offense from the jury charge. State v. Garrison, 40 S.W.3d 426, 2000 Tenn. LEXIS 652 (Tenn. 2000).

The chief exception to this rule involves jury instructions as trial courts have a duty to give accurate jury instructions; accordingly, Tenn. R. Civ. P. 51.02 provides that a party may seek a new trial because of an inaccurate instruction, even if it did not object to the instruction at trial. Grandstaff v. Hawks, 36 S.W.3d 482, 2000 Tenn. App. LEXIS 355 (Tenn. Ct. App. 2000).

Because the inmate affirmatively requested a jury instruction on the offense of aggravated assault, even though he was in error in believing that it was a lesser-included offense of attempted first-degree murder, he effectively agreed to amend the indictment to include aggravated assault; therefore, the trial court had jurisdiction to convict the inmate of aggravated assault, his conviction was not void, and he was not entitled to habeas corpus relief. Demonbreun v. Bell, 226 S.W.3d 321, 2007 Tenn. LEXIS 452 (Tenn. May 8, 2007), rehearing denied, — S.W.3d —, 2007 Tenn. LEXIS 529 (Tenn. May 25, 2007).

Defendant was not entitled to relief on his claim the trial court curative instruction regarding defendant's testimony concerning the alleged denial of access to tapes by the police because defendant failed to object at the appropriate time, and he invited the court to do the very thing of which he complained; the issue was waived on appeal. State v. Schiefelbein, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 138 (Tenn. Crim. App. Feb. 8, 2007), modified, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 213 (Tenn. Crim. App. Mar. 7, 2007).

Erroneous jury instructions concerning the ability of the decedent's adult stepchild to sign a will or deed on behalf the decedent were harmless errors because the appellate court, considering the jury instruction in its entirety, was unable to conclude that the errors more probably than not affected the outcome of the verdict. Johnson-Murray v. Burns, 525 S.W.3d 625, 2017 Tenn. App. LEXIS 168 (Tenn. Ct. App. Mar. 14, 2017).

Trial court did not plainly err in instructing the jury as to intent, knowledge and reckless-

ness when it laid out the elements of unlawful possession of a firearm by a convicted felon as the statute did not contain a specific mental state; and, when a statute does not contain a specific mental state, intent, knowledge or recklessness sufficed to establish the culpable mental state. State v. Hunt, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 181 (Tenn. Crim. App. Mar. 21, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 348 (Tenn. July 18, 2019).

Trial court did not plainly err in failing to charge the jury regarding corroboration of accomplice testimony because defendant testified and admitted that he was present during the robbery of the decedent and his brother; and the brother testified and substantially corroborated the testimony of co-defendant¢complice. State v. Ware, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 710 (Tenn. Crim. App. Nov. 7, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 233 (Tenn. Mar. 26, 2020).

Defendant's failure to raise a timely objection to the trial court's alleged omissions in the jury instructions precluded an appellate court's review of the issue because the error complained of was an omission and not an inaccuracy in the jury instruction. State v. Taylor, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 147 (Tenn. Crim. App. Feb. 26, 2020).

17. Reversible Error.

Trial court's instruction to the jury in a medical malpractice case that the plaintiffs were required to prove causation to a medical certainty resulted not in harmless error, but reversible error. Bara v. Clarksville Mem. Health Sys., Inc., 104 S.W.3d 1, 2002 Tenn. App. LEXIS 657 (Tenn. Ct. App. 2002), rehearing denied, Bara v. Clarksville Mem'l Health Sys., — S.W.3d —, 2002 Tenn. App. LEXIS 795 (Tenn. Ct. App. Nov. 1, 2002), appeal denied, Bara v. Clarksville Mem. Health Sys., — S.W.3d —, 2003 Tenn. LEXIS 279 (Tenn. Mar. 17, 2003).

Where two defendants were convicted of first degree murder, both counsels' failure to object to the erroneous jury instructions regarding the release eligibility date for a person convicted of first degree murder was deficient and prejudicial, thus denying each defendant of his constitutional right to effective counsel; under T.C.A. § 40-35-201(b), the defendants had a statutory right to have the jury know the range of punishment applicable to the charges, and the denial of this right was reversible error under T.R.A.P. 36(b). Vaughn v. State, 202 S.W.3d 106, 2006 Tenn. LEXIS 843 (Tenn. 2006), overruled in part, Brown v. Jordan, 563 S.W.3d 196, 2018 Tenn. LEXIS 728 (Tenn. Dec. 6, 2018).

Although the trial court abused its discretion in allowing cross-examination by the state regarding voice stress analysis because the cross-examination was misleading, factually incorrect, and irrelevant, the allowance of the improper cross examination did not constitute reversible error because it did not affirmatively appear to have affected the result of the trial on the merits, pursuant to Tenn. R. Crim. P. 52(a), nor involves a substantial right of defendant, pursuant to T.R.A.P. 36(b). State v. Schiefelbein, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 138 (Tenn. Crim. App. Feb. 8, 2007), modified, 230 S.W.3d 88, 2007 Tenn. Crim. App. LEXIS 213 (Tenn. Crim. App. Mar. 7, 2007).

Trial court erred in dismissing claimant's suit against insurer because delays in prosecution of the case were not egregious and were not entirely the claimant's fault; longest delay was the four and 1/2 years it took trial court to render a judgment, and delays of this duration could not be condoned and resulted in prejudice to the judicial process. Berke v. Chubb Group of Ins. Cos., 278 S.W.3d 743, 2008 Tenn. App. LEXIS 472 (Tenn. Ct. App. Aug. 14, 2008).

In a rape of a child case, the court committed reversible error by admitting evidence of other, non-charged, sexual encounters between defendant and the victim because it was not needed to provide the jury the "complete story"; the victim testified in graphic detail about each of the charged offenses, and the state presented evidence that defendant sought a romantic relationship with the victim. State v. Montgomery, 350 S.W.3d 573, 2011 Tenn. Crim. App. LEXIS 233 (Tenn. Crim. App. Mar. 31, 2011).

Court erred in allowing testimony regarding defendant's witness's involvement in chop shops and misdemeanor convictions because defendant's witness played a critical role in the defense theory—he was the only witness who corroborated defendant's account that he had authority to borrow the tractor, and the multiple errors sent a message to the jury that the witness was a shady character who had attracted the continuing attention of the police for at least thirty years, and the trial court itself connected the witness to a notorious criminal and convicted murderer. State v. Seaton, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 63 (Tenn. Crim. App. Feb. 28, 2021).

18. Failure to Object.

Because the husband's family did not object to when the trial court allowed the wife's mother to state her opinion as to the value of many of the items of personal property that the husband removed from the house he shared with his wife, the court did not review their claim on appeal; even if the court considered the claim, it would have concluded that it was meritless as the conservator of an absent or deceased party's property stood in the shoes of the absent or deceased party, and therefore could testify with regard to the value of the property under Tenn. R. Evid. 701(b). Levine v. March, 266 S.W.3d 426, 2007 Tenn. App. LEXIS 728 (Tenn. Ct. App. Nov. 27, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 352 (Tenn. Apr. 28, 2008).

Defendant's conviction for premeditated first-degree murder was appropriate because his argument that admission of testimony that the victim told a witness that she was trying to get away from defendant because she was afraid of him was not objected to at trial; moreover, appellate court saw no basis for noticing the error despite waiver. State v. Gilley, 297 S.W.3d 739, 2008 Tenn. Crim. App. LEXIS 660 (Tenn. Crim. App. Aug. 13, 2008).

Defense waived its argument that a juvenile summons was hearsay because it failed to make an objection at trial. State v. Collins, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 295 (Tenn. Crim. App. Apr. 18, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 489 (Tenn. Aug. 8, 2018), cert. denied, Collins v. Tennessee, 139 S. Ct. 649, 202 L. Ed. 2d 498, -- U.S. --, 2018 U.S. LEXIS 7182 (U.S. Dec. 10, 2018).

Court of criminal appeals reviewed defendant's claim that the state made an improper closing argument under the plain error doctrine as defendant failed to object to the same at trial. State v. Winters, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 611 (Tenn. Crim. App. Sept. 30, 2019).

19. Invited Error.

In a modification of child custody case where the father complained on appeal that it was error for trial court not to appoint a guardian ad litem, the issue was without merit as it was the father's actions which resulted in the alleged error, and the father failed to establish any prejudicial effect of the trial court's refusal to appoint a guardian ad litem; in addition, it was not appropriate for the father to take entirely inconsistent positions at trial court level and then on appeal. Pippin v. Pippin, 277 S.W.3d 398, 2008 Tenn. App. LEXIS 339 (Tenn. Ct. App. June 4, 2008), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 954 (Tenn. Dec. 15, 2008).

Under T.R.A.P. 36(a), a mortician waived his claim of error in allowing the parents' attorney to read questions and answers to the jury from the mortician's deposition to which no negative inference applied due to the mortician's invocation of the Fifth Amendment, U.S. Const. amend. V, by withdrawing his objection and approving the trial court's jury instructions as curing the problem. Akers v. Prime Succession of Tenn., Inc., 387 S.W.3d 495, 2012 Tenn. LEXIS 644 (Tenn. Sept. 21, 2012), cert. denied, Marsh v. Akers, 185 L. Ed. 2d 364, 133 S. Ct. 1464, 568 U.S. 1194, 2013 U.S. LEXIS 1728 (U.S. 2013).

In a trust case, a decedent's son was unable to complain on appeal about an award of attorney fees because he invited the error; the son declined the opportunity to have a hearing before the trial court on the issue of attorney's fees and/or expenses. Glass v. Suntrust Bank, 523 S.W.3d 61, 2016 Tenn. App. LEXIS 305 (Tenn. Ct. App. May 4, 2016), appeal denied, — S.W.3d —, 2016 Tenn. LEXIS 710 (Tenn. Sept. 26, 2016).

In a termination of parental rights proceeding, a mother's waiver of the presence of the guardian ad litem (GAL) did not prevent appellate review of whether the absence of the GAL was reversible error because the issue had to be considered in the interest of justice. In re Aliyah C., 604 S.W.3d 417, 2019 Tenn. App. LEXIS 319 (Tenn. Ct. App. June 26, 2019).

Because the record indicated that defense counsel expressed counsel's satisfaction with the procedure implemented by the trial court in a jury-out hearing of a state witness who was under oath to determine whether the late disclosed convictions of the witness would be admissible, defendant could not be heard to complain of the procedure on appeal. State v. Ponder, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 504 (Tenn. Crim. App. Aug. 21, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 559 (Tenn. Dec. 5, 2019).

Trial court, pursuant to an appellate order that the appeal should proceed despite defendant's death, properly admitted text messages from two phones seized during a traffic stop because there was no argument by defendant that the messages lacked authentication, and, by asking questions about the specific content of the messages, defense counsel effectively opened the door to allow the State to move for the admission of the text messages. State v. Burns, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 415 (Tenn. Crim. App. June 16, 2020).

20. Evidence.

It was not error for the trial court to grant defendants' motion in limine prohibiting the patient's children from inquiring into the physician's failed efforts in the examination for board certification in his specialty because the court was unable to find any significance to the fact that a physician attempted to obtain board certification, and the children were permitted to introduce the fact that the physician was not board certified. White v. Premier Med. Group, 254 S.W.3d 411, 2007 Tenn. App. LEXIS 733 (Tenn. Ct. App. Nov. 28, 2007), appeal denied, — S.W.3d —, 2008 Tenn. LEXIS 350 (Tenn. Apr. 28, 2008).

During defendant's trial for vehicular assault and aggravated vehicular homicide where trial court admitted the testimony of a deceased witness from the preliminary hearing, trial court's exclusion of a deputy's report detailing the decedent's prior inconsistent statement was improper; statement could have been used to impeach the witness under Tenn. R. Evid. 613 and the error was harmless under T.R.A.P. 36 because defendant had an ample opportunity to impeach the decedent's preliminary hearing testimony, and the deputy's proposed testimony was cumulative. State v. Bowman, 327 S.W.3d

69, 2009 Tenn. Crim. App. LEXIS 35 (Tenn. Crim. App. Jan. 14, 2009), appeal denied, — S.W.3d —, 2009 Tenn. LEXIS 395 (Tenn. June 15, 2009), cert. denied, Bowman v. Tennessee, 175 L. Ed. 2d 388, 130 S. Ct. 559, 2009 U.S. LEXIS 8080 (U.S. 2009).

Evidentiary errors more probably than not affected a judgment, pursuant to T.R.A.P. 36(b), requiring that it be set aside, because pervasive cross examination of appellant railway company's expert based on an investigator's deposition was improper under Tenn. R. Evid. 705, since it included a theory that the rail car that struck the widow's husband was moving at eight miles an hour, which did not appear anywhere else in evidence. Melton v. BNSF Ry. Co., 322 S.W.3d 174, 2010 Tenn. App. LEXIS 128 (Tenn. Ct. App. Feb. 22, 2010), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 740 (Tenn. Aug. 25, 2010).

Trial court did not abuse its discretion by excluding evidence of the injured person's drug and alcohol use on the date of the accident and after the accident because an expert testified that there was a history of alcohol and/or recreational drug use, thus, the jury considered the issue. Wells v. State, 435 S.W.3d 734, 2013 Tenn. App. LEXIS 670 (Tenn. Ct. App. Oct. 8, 2013), appeal denied, — S.W.3d —, 2014 Tenn. LEXIS 323 (Tenn. Apr. 9, 2014).

Trial court committed harmless error when it excluded defendant's testimony that defendant was living in Kentucky during the time period when offenses occurred in Tennessee—on the ground that defendant failed to give the state of Tennessee the notice required for alibi evidence —because the testimony was not alibi evidence. However, the error was harmless because the evidence—the victim's testimony, DNA evidence, and text messages—weighed in favor of the state of Tennessee and because defendant was able to present a defense to the jury. State v. Gomez, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 117 (Tenn. Crim. App. Feb. 22, 2019).

When defendant did not make a contemporaneous objection at defendant's probation revocation hearing to testimony from a witness that the witness heard from another individual that the owner of defendant's employer had terminated defendant's employment, the issue was reviewable for plain error only. Because there was no objection, no clear and unequivocal rule of law was breached by the admission of hearsay, nor was a substantial right of the accused adversely affected. State v. Crafton, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 219 (Tenn. Crim. App. Apr. 9, 2019).

Any alleged error in the trial court's refusal to consider proffered evidence to establish a personal representative's inconsistent statements concerning the ownership of the property at issue was harmless given the record before the appellate court. The personal representative admitted the inconsistency of the personal representative's actions by virtue of the fact that the personal representative always believed the property vested at the time of the decedent's passing. In re Estate of Schubert, — S.W.3d —, 2020 Tenn. App. LEXIS 419 (Tenn. Ct. App. Sept. 18, 2020).

Defendant failed to establish plain error in the admission of the statements of an eyewitness to a shooting through the testimony of a police officer because the trial court determined that the statements were non-testimonial—as the witness ran to the officer and made the statements—and then determined that the statements were hearsay—but were admissible under the excited utterance exception. Furthermore, the testimony about which defendant complained—that defendant shot the victim—was properly admitted by other witnesses during trial. State v. Branch, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 79 (Tenn. Crim. App. Feb. 11, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 362 (Tenn. June 3, 2020).

Before allowing cross-examination about specific instances of defendant's violent conduct, the trial court failed to determine that a reasonable factual basis existed and that the probative value outweighed the prejudicial effect, plus after defendant denied threatening to kill a detective, the trial court improperly permitted extrinsic evidence to prove this took place; while the trial court erred, the error was harmless as the proof supported defendant's conviction and he opened the door for the State to offer the evidence. State v. Land, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 99 (Tenn. Crim. App. Feb. 19, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 364 (Tenn. July 20, 2020).

21. No Plain Error.

On appeal from his convictions for first-degree premeditated murder and abuse of a corpse, defendant's claim that the trial court erred by permitting the state to argue that defendant raped the victim and then killed her to cover up the rape was waived for failing to lodge a contemporaneous objection, T.R.A.P. 36(a), 3(e). Although the prosecutor's statement arguably included facts not in evidence, defense counsel did not object to the argument, and the prosecutor admitted that she could not prove her assertions beyond a reasonable doubt; under those circumstances, the record did not establish either that defendant did not waive the issue for tactical reasons or that consideration of the error was necessary to do substantial justice and thus, the prosecutor's argument, even if improper, did not rise to the level of plain error. State v. Hill, 333 S.W.3d 106, 2010 Tenn. Crim. App. LEXIS 371 (Tenn. Crim. App. May 12, 2010), appeal denied, — S.W.3d —, 2010 Tenn. LEXIS 953 (Tenn. Oct. 12, 2010).

Case was remanded for resentencing under T.C.A. § 40-35-202 for aggravated rape under

T.C.A. § 39-13-502(a)(2) as it was plain error under T.R.A.P. 36(b) to allow a post-trial sentencing position to cure a deficient pre-trial T.C.A. § 40-35-120(i)(2) notice, which had failed to state that defendant was a repeat violent offender, or to set forth the nature of the sodomy conviction as a qualifying prior conviction and the dates of the prior period of incarceration; the severity of the sentence required a result similar to that imposed for defective notices under T.C.A. 39-13-208(c). State v. Cooper, 321 S.W.3d 501, 2010 Tenn. LEXIS 870 (Tenn. Sept. 21, 2010).

In an action in which a jury found that a will that a widow sought to admit to probate was obtained through the undue influence of the widow and that the decedent was not of sound mind when he executed the will, testimony regarding the widow's real property holdings and her late mother's will was irrelevant because it was not suspicious that the widow's mother left her entire estate to her only living child, the mere fact that the widow assisted both her mother and the decedent during their illnesses by taking them to an attorney so that they might execute their wills did not show a common scheme or plan to unduly influence either testator, and evidence of the widow's financial condition was irrelevant to the issues in the case. The erroneous admission of such evidence warranted a new trial under T.R.A.P. 36(b) because the improperly admitted evidence more probably than not prejudiced the jury to the conclusion that the widow was a wealthy woman who was intent on acquiring the decedent's estate through manipulation and subterfuge. In re Estate of Smallman, 398 S.W.3d 134, 2013 Tenn. LEXIS 213 (Tenn. Feb. 26, 2013).

Trial court did not commit plain error under T.R.A.P. 36(b) in allowing evidence of a victim's past sexual history for impeachment purposes only as the trial court did not violate Tenn. R. Evid. 412 as it allowed defendant to establish the prior abuse by the victim's father and allowed defendant to ask about details of the father's abuse when those details were similar to allegations the victim levied against defendant; the limitation did not violate the Confrontation Clause, U.S. Const. amend. VI, as defendant was permitted to ask the victim questions about details of the prior abuse when those details were similar to any of the allegations she made against defendant. State v. Nance, 393 S.W.3d 212, 2012 Tenn. Crim. App. LEXIS 316 (Tenn. Crim. App. May 16, 2012), appeal denied, — S.W.3d —, 2012 Tenn. LEXIS 898 (Tenn. Nov. 27, 2012).

Defendant was not entitled to relief on the basis of plain error because defendant would not have been able to demonstrate that substantial justice required the reversal of defendant's conviction for first-degree felony murder in perpetration of an attempted aggravated robbery. State v. Bishop, 431 S.W.3d 22, 2014 Tenn. LEXIS 189 (Tenn. Mar. 6, 2014), cert. denied, Bishop v. Tennessee, 190 L. Ed. 2d 92, 135 S. Ct. 120, — U.S. —, 2014 U.S. LEXIS 6666 (U.S. 2014).

Defendant was not entitled to relief under the plain error doctrine because the inaccuracy in the state's election regarding the facts relied upon to establish the element of sexual penetration was not so significant that it probably changed the outcome of the trial; the state's election and the jury instruction identified a date and location and referenced a meaningful event in the victim's life. State v. Knowles, 470 S.W.3d 416, 2015 Tenn. LEXIS 591 (Tenn. July 31, 2015).

Defendant was not entitled to relief under the plain error doctrine because the inaccuracy in the state's election of offenses was not so significant that it probably changed the outcome of the trial, and defendant failed to provide a record that clearly established what occurred in the trial court. State v. Knowles, 470 S.W.3d 416, 2015 Tenn. LEXIS 591 (Tenn. July 31, 2015).

Trial court did not err in failing to instruct the jury on the lesser-included offenses of criminally negligent homicide and facilitation of criminally negligent homicide because defendant did not submit a written request to the trial court for those instructions; and he was not entitled to plain error relief as the jury received a sequential instruction as well as an instruction on immediate lesser-included offenses as the record showed that the trial court instructed the jury on second degree murder, facilitation of second degree murder, reckless homicide, and facilitation of reckless homicide as lesser-included offenses of first degree felony murder. State v. Lester, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 889 (Tenn. Crim. App. Dec. 10, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 201 (Tenn. Apr. 11, 2019).

Prosecutor's closing argument did not constitute plain error because the prosecutor's statements actually acknowledged that the proof in the case was that there was a bloody cigarette butt stuck to the victim's bloody face; thus, the prosecutor was not arguing that there was no evidence of a bloody cigarette butt, rather he was arguing that there was no evidence that it was found at the crime scene or that it held any potential evidentiary significance, and the prosecutor did not intentionally misstate the evidence or mislead the jury as to the inferences it could draw from the evidence. State v. Lester, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 889 (Tenn. Crim. App. Dec. 10, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 201 (Tenn. Apr. 11, 2019).

Prosecutor's closing argument did not constitute plain error because, while the prosecutor's reference to a bloody cigarette butt as one of defense counsel's little theories could poten-

tially be characterized as intending to inflame the passions or prejudices of the jury by implying that defense counsel was being dishonest, it was not so egregious or inflammatory that it might have affected the outcome of the trial to defendant's prejudice. State v. Lester, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 889 (Tenn. Crim. App. Dec. 10, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 201 (Tenn. Apr. 11, 2019).

Although defendant argued that the trial court should have excused a juror for cause on its own initiative, defendant was not entitled to plain error relief because defendant did not make a showing that counsel's failure to challenge the juror was not a tactical decision, especially given that the juror's connections to the defense bar may have made him more favorable to the defense; and defendant failed to establish a breach of a clear and unequivocal rule of law by failing to show that the juror should have been excused for cause due to exposure to potentially prejudicial information or any other ground provided by law. State v. Lester, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 889 (Tenn. Crim. App. Dec. 10, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 201 (Tenn. Apr. 11, 2019).

Defendant did not show it was plain error not to instruct a jury on the lesser included offense of misdemeanor reckless endangerment because the jury was instructed on the lesser included offenses of attempted second degree murder and attempted voluntary manslaughter but chose to convict defendant of attempted first degree murder, so defendant did not show a reasonable probability that a reasonable jury would have convicted defendant of misdemeanor reckless endangerment instead of attempted first degree murder. State v. Chambers, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 241 (Tenn. Crim. App. Apr. 15, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 330 (Tenn. July 19, 2019).

Prosecutor's improper comments did not create plain error because the state's evidence was overwhelming. State v. Lockhart, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 248 (Tenn. Crim. App. Apr. 17, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 442 (Tenn. Aug. 20, 2019).

Defendant was not entitled to plain error relief as consideration of the issue of the victim's prior arrest for domestic assault to show that she was the first aggressor in support of defendant's self-defense claim was not necessary to do substantial justice because, given the absence of a self-defense instruction, any first aggressor proof would have been irrelevant to the jury's determination. State v. Keast, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 255 (Tenn. Crim. App. Apr. 18, 2019), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 444 (Tenn. Aug. 23, 2019).

After making no pre-trial motion alleging an indictment was duplicitous, defendant did not show the indictment plainly erred because defendant did not show (1) a clear and unequivocal rule of law was breached, (2) defendant's substantial right was adversely affected, or (3) consideration of the error was necessary to do substantial justice, as the indictment's reference to the display of "genitals or buttocks" was simply alternate theories. State v. Johnson, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 422 (Tenn. Crim. App. July 15, 2019).

Defendant could not establish plain error review was warranted as nothing in the record suggested a clear and unequivocal rule of law was breached, a substantial right of the accused was adversely affected, or consideration of the issue is necessary to do substantial justice; the state properly summarized the testimony of the victim's friend by characterizing the victim as "terrified" upon entering the friend's motel room. State v. Winters, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 611 (Tenn. Crim. App. Sept. 30, 2019).

Defendant could not meet the minimum requirements to warrant plain error review because the state did not use the term "terrorized" in its closing argument; as a result, the record did not clearly establish what occurred in the trial court as alleged by defendant and required for plain error review. State v. Winters, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 611 (Tenn. Crim. App. Sept. 30, 2019).

Defendant could not establish the prerequisites to plain error review as to the State's election of offenses because the State attempted to differentiate between the six counts of child abuse by using both the injuries inflicted upon the victim and the modalities used to inflict those injuries; the method of differentiation utilized was sufficient to ensure the jurors utilized the same set of factors to convict defendant of aggravated child abuse and of facilitation of aggravated child abuse. State v. Harris, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 708 (Tenn. Crim. App. Nov. 5, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 236 (Tenn. Mar. 26, 2020).

Trial court did not plainly err in denying defendant's motion for a new trial based on prosecutorial misconduct because, while the prosecutor's arguments might have seemed passionate, they were not improper; and the record was devoid of any evidence that the argument of the prosecutor disrupted the case or improperly appealed to the emotions of the jury. State v. Ware, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 710 (Tenn. Crim. App. Nov. 7, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 233 (Tenn. Mar. 26, 2020).

Trial court determined that defendant's two offenses were totally intertwined and that the proof of one would have been admissible in the trial of the other; therefore, the trial court

reasonably determined that defendant was not entitled to a severance because the offenses were part of a common scheme or plan and plain error relief was not warranted. State v. Jives-Nealy, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 156 (Tenn. Crim. App. Feb. 28, 2020), appeal denied, State v. Jives-Nealy, — S.W.3d —, 2020 Tenn. LEXIS 319 (Tenn. Aug. 11, 2020).

Trial court strictly limited a witness's testimony to only that which directly contradicted the testimony offered by another witness; no clear and unequivocal rule of law was breached, and thus this claim did not satisfy the criteria for plain error review. State v. Collins, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 290 (Tenn. Crim. App. Apr. 24, 2020), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 504 (Tenn. Sept. 21, 2020).

Defendant was not entitled to plain error relief because defense counsel initially tried to use defendant's submission to the polygraph to defendant's advantage at sentencing; the trial court focused on admissions made by defendant both before and after the polygraph examination, rather than the fact that defendant was found to be deceptive on some questions; and there was no evidence that defendant's admissions to the doctor who performed the evaluation were not voluntary. State v. Durick, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 669 (Tenn. Crim. App. Oct. 13, 2020).

Although defendant contended that the prosecutor improperly questioned the prospective jurors about their understanding and acceptance of the felony murder rule and made an improper hypothetical question that tended to exact a pledge from the jurors, the appellate court could not conclude that any of the prosecutor's statements, if improper, adversely affected defendant's substantial rights. Accordingly, defendant was not entitled to relief because defendant failed to establish that the prosecutor's statements rose to the level of plain error. State v. Toomes, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 700 (Tenn. Crim. App. Oct. 29, 2020).

Trial court did not commit plain error by failing to sever the offenses alleged against defendant for an alleged home invasion in the morning from the offenses alleged against defendant for an alleged return in the afternoon because the evidence of both sets of crimes demonstrated a larger, continuing plan or conspiracy between defendant and co-defendant to take the money which the victim told co-defendant that the victim was going to receive. State v. Anderson, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 76 (Tenn. Crim. App. Mar. 5, 2021).

22. Plain Error.

Although the issue of the state's election of the facts it was relying upon to establish the charge of rape of a child was closely related to defendant's challenge to the sufficiency of the evidence, the claims were separate, and thus, the court of criminal appeals should have applied plain error review when assessing the effect of the inaccurate election, rather than evaluating the error as if it had been properly preserved. State v. Knowles, 470 S.W.3d 416, 2015 Tenn. LEXIS 591 (Tenn. July 31, 2015).

Because defendant did not object contemporaneously or comment upon the state's election of offenses or the trial court's instruction or raise it as error in his motion for new trial, the supreme court's review was pursuant to the plain error doctrine. State v. Knowles, 470 S.W.3d 416, 2015 Tenn. LEXIS 591 (Tenn. July 31, 2015).

Defendant's aggravated assault conviction had to be reversed because the state's failure to elect an offense as to the aggravated assault charge, and the trial court's failure to require the state to do so, resulted in plain error; because the state failed to elect the specific instance for which it wanted the jury to consider for the charge, a clear and unequivocal rule of law was breached, and defendant's constitutional right to a unanimous verdict was adversely affected. State v. Smith, 492 S.W.3d 224, 2016 Tenn. LEXIS 383 (Tenn. June 24, 2016).

Defendant's aggravated assault conviction had to be reversed because the state's failure to elect an offense as to the aggravated assault charge, and the trial court's failure to require the state to do so, resulted in plain error; the record contained no indication that defendant waived the election issue for tactical reasons, and consideration of the election error was necessary to do substantial justice. State v. Smith, 492 S.W.3d 224, 2016 Tenn. LEXIS 383 (Tenn. June 24, 2016).

Dual convictions for aggravated child abuse in two counts of the indictment violated double jeopardy principles, and the imposition of dual convictions for those offenses rose to the level of plain error, because the counts charged the same act of abuse via different modalities; the remedy was not dismissal of one of the counts or a remand for a new trial but a merger of the jury verdicts for those counts. State v. Harris, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 708 (Tenn. Crim. App. Nov. 5, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 236 (Tenn. Mar. 26, 2020).

23. Preservation for Review.

On appeal from his drug convictions, defendant's argument that the warrant failed to comply with Tenn. R. Crim. P. 41(c) because the judge failed to hand deliver the search warrant to the executing officer was raised for the first time on appeal and was therefore waived, T.R.A.P. 36(a). State v. Hayes, 337 S.W.3d 235, 2010 Tenn. Crim. App. LEXIS 684 (Tenn. Crim. App. Aug. 18, 2010), appeal denied, — S.W.3d —, 2011 Tenn. LEXIS 152 (Tenn. Feb. 17, 2011).

Pursuant to T.R.A.P. 36(a), as an argument based on lack of standing was not raised in the trial court and appeared for the first time in an appellate brief, the issue was deemed waived. ABN AMRO Mortg. Group, Inc. v. S. SEC. Fed. Credit Union, 372 S.W.3d 121, 2011 Tenn. App. LEXIS 625 (Tenn. Ct. App. Nov. 17, 2011), appeal denied, ABN AMRO Mortg. Group, Inc. v. Southern Sec. Fed. Credit Union, — S.W.3d —, 2012 Tenn. LEXIS 240 (Tenn. Apr. 11, 2012).

Although the father raised the issue of whether his constitutional rights of due process and equal protection had been violated because he did not receive notice of the grounds for abandonment prior to the filing of the termination petition, that issue was raised for the first time in the father's application for permission to appeal to the Supreme Court of Tennessee. The court could not address questions that were not raised in the trial court. T.R.A.P. 36(a). In re Angela E., 402 S.W.3d 636, 2013 Tenn. LEXIS 303 (Tenn. Mar. 13, 2013).

Defendant did not waive the issue of double jeopardy because defendant's amended motion for new trial was sufficient to direct the trial court's and the state of Tennessee's attention to defendant's challenge to multiple convictions for employing a firearm during the commission of a dangerous felony when defendant fired a single weapon. Moreover, the intermediate appellate court construed defendant's argument as a challenge to defendant's firearm convictions based on double jeopardy grounds. State v. Harbison, 539 S.W.3d 149, 2018 Tenn. LEXIS 7 (Tenn. Jan. 9, 2018).

Because the trial court did not make an express finding on the issue of fraud and because the appellees did not present any arguments at trial or in their appellate brief on the issue of fraud, the appellate court declined to address the merits of the fraud claim. Jarnigan v. Moyers, 568 S.W.3d 585, 2018 Tenn. App. LEXIS 118 (Tenn. Ct. App. Mar. 2, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 464 (Tenn. July 19, 2018).

Appellate court declined to address whether the appellees in fact had standing to sue because the appellant failed to raise that issue before the trial court. Jarnigan v. Moyers, 568 S.W.3d 585, 2018 Tenn. App. LEXIS 118 (Tenn. Ct. App. Mar. 2, 2018), appeal denied, — S.W.3d —, 2018 Tenn. LEXIS 464 (Tenn. July 19, 2018).

Although defendant contended that a CD of convenience store surveillance videos contained additional videos of angles that were not authenticated and placed into evidence, the issue was waived because defendant made no offer of proof, the issues were only tentatively suggested, and the record was only partially and incompletely developed. Moreover, any error in the admission of the evidence was harmless because the evidence of defendant's guilt in colluding with co-defendant was overwhelming. State v. Bingham, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 760 (Tenn. Crim. App. Oct. 8, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 61 (Tenn. Jan. 17, 2019).

Defendant's procedural issue, alleging that the jury was allowed to improperly focus on particular parts of convenience store surveillance videos without any supervision from the trial court to protect defendant's right to a fair trial was waived because defense counsel never objected to the procedure the trial court employed in allowing the jury to review the videos in the jury room but, instead, complained only of permitting the jury to view the entire contents of the videotape rather than restricting them to the portions viewed at trial. State v. Bingham, — S.W.3d —, 2018 Tenn. Crim. App. LEXIS 760 (Tenn. Crim. App. Oct. 8, 2018), appeal denied, — S.W.3d —, 2019 Tenn. LEXIS 61 (Tenn. Jan. 17, 2019).

Appellant's counsel did not object to testimony about specific acts, but instead stated that a witness could state specific acts but opinion as to character was too general. Appellant, thus, failed to timely object to the introduction of specific acts evidence, which was essentially the opposite of appellant's position on appeal so that the issue was waived. Chorazghiazad v. Chorazghiazad, — S.W.3d —, 2019 Tenn. App. LEXIS 215 (Tenn. Ct. App. May 3, 2019).

Trial court properly revoked defendant's probation and ordered him to serve the remainder of his effective 10-year sentence in confinement because the appellate record did not contain evidence related to his ineffective assistance claims, defendant admitted at the revocation hearing that he violated the conditions of his release, and the court had the authority to order him to serve the remainder of his sentence in confinement. State v. McAdoo, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 363 (Tenn. Crim. App. June 25, 2019).

Although the defense did not object when the state of Tennessee questioned defendant about defendant's involvement in the death of a witness to a shooting, the defense raised the issue in defendant's amended motion for a new trial. Consequently, appellate review was limited to plain error. State v. Frazier, — S.W.3d —, 2019 Tenn. Crim. App. LEXIS 385 (Tenn. Crim. App. July 1, 2019).

Because defendant did not object to either of the allegedly improper comments during the State of Tennessee's closing arguments and also failed to include the first challenged comment in defendant's motion for new trial, defendant's improper comment claim was thereby waived. Furthermore, there was no plain error as neither of the challenged arguments were exceptionally egregious. State v. Gleason, — S.W.3d —, 2020 Tenn. Crim. App. LEXIS 78 (Tenn. Crim. App. Feb. 10, 2020), appeal de-

nied, — S.W.3d —, 2020 Tenn. LEXIS 350 (Tenn. Aug. 10, 2020).

Defendant's probation revocation petition did not include allegations involving defendant defrauding a businessman and defendant did not lodge an objection to notice at the revocation hearing or raise it as an issue on appeal. Accordingly, any issue in this regard was waived, but, in light of the due process rights implicated by this omission, the appellate court examined the matter for plain error. State v. Simpson, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 20 (Tenn. Crim. App. Jan. 13, 2021).

24. No Reversible Error.

Although appellants asked the trial court to include complete depositions with attached exhibits from the previous case in the record on the appeal–as appellants maintained that the full depositions were necessary to provide context to the deposition excerpts–appellants had the opportunity to file the full depositions with the trial court before the court reached its decision to deny the request. Because this was a problem of appellants own making, they were not entitled to relief on this basis. Miller v. TRH Health Ins. Co., — S.W.3d —, 2019 Tenn. App. LEXIS 487 (Tenn. Ct. App. Oct. 2, 2019).

In an appeal arising from a dispute over an unorthodox, two-page contract pursuant to which plaintiff sold his home to defendant and continued to reside in the home, the appellate court concluded the evidence preponderated in favor of the trial court's finding that defendant did not deceive plaintiff. Accordingly, the trial court properly dismissed plaintiff's claim that defendant violated the Tennessee Consumer Protection Act. Brown v. Wright, — S.W.3d —, 2019 Tenn. App. LEXIS 496 (Tenn. Ct. App. Oct. 7, 2019), appeal denied, — S.W.3d —, 2020 Tenn. LEXIS 235 (Tenn. Mar. 25, 2020).

Defendants were not entitled to relief on the issue regarding their claim that the trial court improperly commented on the evidence by separating multi-page exhibits and placing them in manila folders. The trial court's actions merely tried to organize the 103 exhibits containing approximately 1500 pages of information, and in doing so, the trial court did not even remotely comment on the evidence. State v. Lyons, — S.W.3d —, 2021 Tenn. Crim. App. LEXIS 100 (Tenn. Crim. App. Mar. 22, 2021).

Rule 37. [Reserved.]

Rule 38. Entry of Judgment; Copies of Opinion and Judgment. —

The notation of a judgment in the docket constitutes entry of the judgment. The clerk of the appellate court shall prepare and enter the judgment following receipt of the opinion of the appellate court unless the court orders otherwise. The clerk shall, on the day judgment is entered, mail a copy of the opinion and notice of the date of entry of the judgment to the parties. Entry of the judgment shall not be delayed for the taxing of costs.

Textbooks. Tennessee Jurisprudence. 15 Tenn. Juris., Injunctions, § 66.

Law Reviews. The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 1.

Rule 39. Rehearing. — (a) On Petition; Grounds. — Rehearing may be granted by the Supreme Court, Court of Appeals, or Court of Criminal Appeals on its own motion or on petition of a party. In determining whether to grant a rehearing, the following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons that will be considered: (1) the court's opinion incorrectly states the material facts established by the evidence and set forth in the record; (2) the court's opinion is in conflict with a statute, prior decision, or other principle of law; (3) the court's opinion overlooks or misapprehends a material fact or proposition of law; and (4) the court's opinion relies upon matters of fact or law upon which the parties have not been heard and that are open to reasonable dispute. A rehearing will not be granted to permit reargument of matters fully argued.

(b) Time; Content; Length. — A petition for rehearing must be filed with the clerk of the appellate court within 10 days after entry of judgment unless on motion the time is shortened or enlarged by the court or a judge thereof.

Motions for extending time to file petitions for rehearing will be allowed only in extreme and unavoidable circumstances. The petition shall set forth the reasons the appellate court should reconsider, with proper references to the particular portions of the opinion, record or briefs relied upon. Except by permission of the court or a judge thereof, the petition shall not exceed 15 pages.

(c) Number of Copies; Service. — A sufficient number of copies of each petition shall be filed with the clerk of the appellate court to provide the clerk and each judge of the appellate court with one copy, and one copy shall be served on each party in the manner provided in Rule 20 for the service of papers unless the appellate court shall by order direct the filing or service of a greater or lesser number.

(d) Answer; Oral Argument. — No answer to the petition will be permitted unless requested by the court, but no action will be taken except to grant or deny rehearing. Oral argument will be permitted only if ordered by the court on its own motion.

(e) Action on the Petition; Subsequent Proceedings. — Rehearing will be granted if a majority of the members of the appellate court are satisfied rehearing is appropriate. If a petition is granted, the appellate court shall make such order as to reargument or resubmission as is deemed proper under the circumstances of the particular case.

(f) Limitation on Consecutive Petitions. — When the Court of Appeals or the Court of Criminal Appeals has acted upon a petition for rehearing, no further petitions for rehearing shall be filed in that court. No second petition for rehearing shall be filed in the Supreme Court except upon motion and leave granted by the court or a judge thereof. [As amended by order effective July 1, 1996.]

Advisory Commission Comments. Subdivision (a) states that a rehearing is not granted to permit reargument of matters already fully argued. Instead, the petition to rehear, though granted solely in the discretion of the appellate court, will generally lie only in those instances specified in subdivision (a).

Subdivision (d) provides that no answer to the petition will be permitted, but that no action will be taken except to grant or deny rehearing. Rehearing will be granted only if a majority of the appellate court concludes that a rehearing is appropriate. If rehearing is granted the appellate court must make such order as to reargument or resubmission as is deemed appropriate.

Subdivision (f) provides that only one petition for rehearing will ordinarily be entertained. A second petition for rehearing by any party in the Supreme Court may be submitted only upon motion and leave granted by that court or a judge thereof.

Advisory Commission Comments [1993]. The Supreme Court generally disfavors petitions to rehear following denials of applications for permission to appeal.

Advisory Commission Comments [1996]. The amendment to Rule 39(f) makes clear that one cannot file multiple petitions to rehear.

Compiler's Notes. T.R.A.P. 39(b) and (f) may affect Tenn. Code Ann. § 16-5-111.

Textbooks. Tennessee Forms (Robinson, Ramsey and Harwell), No. 2-39.-1.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, § 266.

Law Reviews. The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 1.

NOTES TO DECISIONS

ANALYSIS

1. Grounds for Petition.
2. Petition Denied.

1. Grounds for Petition.

Supplementation of the record does not constitute a meritorious ground for a rehearing pursuant to T.R.A.P. 39(a). State v. Roberts, 755

S.W.2d 833, 1988 Tenn. Crim. App. LEXIS 172 (Tenn. Crim. App. 1988), rehearing denied, 755 S.W.2d 833, 1988 Tenn. Crim. App. LEXIS 384 (Tenn. Crim. App. 1988).

2. Petition Denied.

Denial of the corporation's motion for rehearing was appropriate because, although the corporation pled estoppel in its answer, it never brought that theory to the attention of the trial court as a ground for summary judgment; therefore, consideration of that theory was not appropriate. Clawson v. Burrow, 250 S.W.3d 59, 2007 Tenn. App. LEXIS 558 (Tenn. Ct. App. Aug. 29, 2007).

Tennessee Nursing Board's petition for rehearing was denied because the notice did not fairly appraise the nurse under U.S. Const. amend. 14 and Tenn. Const. art. I, § 8 that the Division of Health Related Boards was seeking revocation or suspension of her license; division also presented no competent evidence regarding the nurse's psychological condition. Miller v. Tennessee Bd. of Nursing, 256 S.W.3d 225, 2007 Tenn. App. LEXIS 826 (Tenn. Ct. App. Oct. 22, 2007).

Petition for rehearing was denied under T.R.A.P. 39 because even though an appellate court had misstated certain facts and conclusions in a case involving a statute of limitations period, an employee had no duty to investigate the cause of his headaches where there was no knowledge of toxic encephalopathy until a diagnosis was made. Hensley v. CSX Transp., Inc., 278 S.W.3d 282, 2008 Tenn. App. LEXIS 204 (Tenn. Ct. App. Apr. 3, 2008).

Petition for rehearing filed by trustees was denied because the water discharge permit appeals authorized by T.C.A. § 69-3-105(i) displaced the petitions for declaratory orders under T.C.A. § 4-5-223, which they sought, before the Tennessee Water Quality Control Board. Pickard v. Tenn. Water Quality Control Bd., 424 S.W.3d 511, 2014 Tenn. LEXIS 1 (Tenn. Jan. 6, 2014).

Rule 40. Costs. — (a) To Whom Allowed. — Except as otherwise provided by statute or these rules, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the appellate court. Costs related to the filing of motions, orders and briefs by amicus curiae shall be assessed and collected against the amicus curiae filer unless the court orders otherwise.

(b) Costs for and Against the State of Tennessee. — In cases involving the state of Tennessee, its officers, or agencies, costs shall be awarded in accordance with the provisions of subdivision (a) of this rule.

(c) Recoverable Costs on Appeal. — Recoverable costs on appeal include the cost of preparing and transmitting the record, the cost of a transcript of the evidence or proceedings, the cost of producing necessary copies of briefs and the record, the premiums paid for bonds to preserve rights pending appeal, any litigation taxes, and any other fees of the appellate court or clerk.

(d) Party's Statement of Recoverable Costs; Objections. — If a party has not been assessed costs on appeal under section (a) of this rule, that party may file with the appropriate appellate court a Party's Statement of Recoverable Costs in order to recover costs on appeal pursuant to section (c) of this rule. The party shall file the Party's Statement of Recoverable Costs no later than 15 days after the issuance of the mandate; the Party's Statement of Recoverable Costs may not be filed before the issuance of the mandate. The party against whom costs have been assessed under section (a) shall be liable for such costs. If the court assesses costs against both the appellant and appellee, the parties shall bear their own costs and may not recover any costs on appeal under section (c)

of this rule. Any party shall have 15 days after the filing of the Party's Statement of Recoverable Costs to file any objections with the appellate court clerk.

(e) Rate of Cost for Producing. — A party's costs of producing necessary copies of briefs or other appellate papers which are recoverable costs under section (c) shall be taxable at rates not higher than those generally charged for photocopying in the area where the office of the attorney seeking such costs is located.

(f) Resolution of Objections to Party's Statement of Recoverable Costs. — If objections are timely filed to the Party's Statement of Recoverable Costs, the appellate court clerk shall consider all of the documents filed relative to the Party's Statement of Recoverable Costs and issue a clerk's report in which the clerk shall approve and/or disapprove such costs in whole or in part as being authorized and/or not authorized by law. Any party may file an objection to the clerk's decision with the appropriate appellate court within 10 days of the filing of the clerk's report.

(g) Amended Mandate. — If no objection to a Party's Statement of Recoverable Costs is timely filed, the appellate court clerk shall issue an amended mandate with the addition of the Party's Statement of Recoverable Costs. If no objection to the clerk's report is timely filed, the appellate court clerk shall issue an amended mandate with the addition of the clerk's report and accompanying Party's Statement of Recoverable Costs to the mandate. If an objection to the clerk's report is timely filed, the appellate court clerk shall issue an amended mandate by adding the order of the appropriate appellate court resolving the cost dispute.

(h) Enforcement of Amended Mandate. — A party who seeks to enforce collection of the Party's Statement of Recoverable Costs in the amended mandate from the liable party may do so by filing a motion in the trial court from which the appeal originated.

(i) Forfeiture of Costs of the Clerk of the Trial Court. — For failure to complete and transmit the record on appeal in the time and manner provided in these rules, the clerk of the trial court shall forfeit the clerk's entire fee set forth in Tenn. Code Ann. § 8-21-401(i)(11) for preparing and transmitting the record or such portion thereof as appropriate to the appellant(s) who paid such a fee. [As amended by order entered January 31, 1984, effective August 15, 1984; by order entered March 23, 1984; by order effective July 1, 1997; by order effective July 1, 1998; by order filed January 31, 2002, effective July 1, 2002; by order filed January 8, 2008, effective July 1, 2008; and by order entered December 14, 2009, effective July 1, 2010.]

Advisory Commission Comments. *Subdivision (a).* This subdivision states the general rule that except as otherwise provided by a statute or these rules, costs are to be taxed in favor of the prevailing party. In all cases, however, the appellate court has the discretion to award costs in a manner other than that specified in this subdivision.

Subdivision (b). The effect of this subdivision is to place the state of Tennessee on the same footing as a private party with respect to award of costs.

Subdivision (c). This subdivision makes costs taxable based on the principle that all items of cost expended in the prosecution of a proceeding should be recoverable by the successful party.

Subdivision (d). A party who desires the costs of producing briefs or any other recoverable costs not included in the trial clerk's bill of costs

must file an itemized and verified bill of costs with the clerk of the appellate court within 75 days after entry of the judgment. Objections to the bill of costs as filed must be made within 10 days after the filing of the bill of costs unless extended by the court. Under Rule 38 of these rules the entry of judgment is not delayed for the taxation of costs.

Subdivision (e). The task of initially preparing and certifying an itemized statement of costs is with the clerk of the appellate court. However, any party dissatisfied with the action of the clerk may seek review from the appellate court.

Subdivision (f). This subdivision makes clear that commercially printed appellate papers are not required. In order to minimize the costs of appeal, this subdivision also provides that the cost of producing briefs and other papers shall be taxable at rates not higher than those generally charged for photocopying.

Advisory Commission Comments [1998]. The second sentence of subsection (d) is amended to provide for assessment of costs concerning questions certified from a federal tribunal.

Advisory Commission Comments [2008]. The 2008 amendment to Rule 40 amends the rule to conform to the present practice in the appellate court clerk's office in the following respects:

(1) To avoid confusion with the appellate court clerk's "bill of costs," the document submitted by attorneys has been renamed as the "Party's Statement of Recoverable Costs."

(2) The 2008 amendment makes clear that the party against whom the costs, i.e., appellate court clerk's costs, are assessed are also liable for costs properly included in a Party's Statement of Recoverable Costs. Where the court divides the costs, neither party can seek "recoverable costs" from the other party, but instead the parties must bear their own costs of copying briefs, etc.

(3) The 2008 amendment requires parties to file the Party's Statement of Recoverable Costs no more than 15 days after the issuance of the mandate but no sooner than the date of the issuance of the mandate. Under the prior rule, parties could file their "verified bill of costs" before the mandate issued, which created an unnecessary administrative burden on the clerk's staff.

(4) The 2008 amendment also sets forth a process by which disputes concerning a Party's Statement of Recoverable Costs are resolved.

(5) Depending upon at what stage of the process the Party's Statement of Recoverable Costs is resolved, the 2008 amendment makes clear that the Party's Statement of Recoverable Costs, the clerk's report, or the order of the appellate court is to be included in an amended mandate to be transmitted to the trial court clerk.

(6) Finally, the 2008 amendment provides that the party entitled to recover these costs may do so by filing a motion in the trial court which already has the original judgment in which costs are assessed against the other party and the amended mandate in which the prevailing party's Party's Statement of Recoverable Costs are included.

Advisory Commission Comments [2010]. The amendment to Rule 40(a) provides that costs associated with the filing of an amicus brief will automatically be assessed against the amicus at the time of the filing of the amicus brief unless the court provides otherwise.

Compiler's Notes. The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated January 31, 2002, was ratified and approved by 2002 House Resolution No. 212 and Senate Resolution No. 123. The order promulgating the amendment of this rule provided that it take effect July 1, 2002.

The amendment of this rule, as promulgated by the Supreme Court in its order dated January 8, 2008, was ratified and approved by 2008 House Resolution 238 and Senate Resolution 216. The order promulgating the amendment of this rule provided that it take effect July 1, 2008.

The amendment of this rule, as promulgated and adopted by the Supreme Court in its order dated December 14, 2009, was ratified and approved by 2010 Senate Resolution 178 and 2010 House Resolution 238. The order promulgating the amendment of this rule provided that it take effect July 1, 2010.

Cross-References. Costs, T.C.A. §§ 20-12-101 — 20-12-144.

Textbooks. Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 50, 52, 58; 8 Tenn. Juris., Costs, § 32.

Law Reviews. The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 1.

Attorney General Opinions. Liability for payment of appeals costs in criminal appeals, OAG 96-093 (7/29/96).

NOTES TO DECISIONS

ANALYSIS

1. Record Excessive.
2. Recoverable Costs.
3. Costs Awarded.

1. Record Excessive.

Appellate court ordered disallowance of trial clerk's costs for including in the record many pages of trial briefs and memorandum of authority of counsel, as such documents had no

place in the appellate record under T.R.A.P. 24(a). Aclin v. Speight, 611 S.W.2d 54, 1980 Tenn. App. LEXIS 401 (Tenn. Ct. App. 1980).

2. Recoverable Costs.

T.R.A.P. 40(c) clearly provides for the recovery of the cost expended by the successful party for preparation of a transcript of the evidence necessary to prosecute the appeal, and is not limited by T.R.A.P. 40(d). Smith v. Watts, 625 S.W.2d 712, 1981 Tenn. LEXIS 515 (Tenn. 1981).

3. Costs Awarded.

Instead of agreeing to a joint motion, appellant chose to file an appeal; although appellees claimed that because the issue of notice could have been resolved without appellate review, they should not bear the cost of the appeal, in its discretion, the court taxed costs one-half to appellees and one-half to appellant. Flowers v. Kimmins, — S.W.3d —, 2020 Tenn. App. LEXIS 475 (Tenn. Ct. App. Oct. 27, 2020).

Rule 41. Interest on Judgments. — If a judgment for money in a civil case is affirmed or the appeal is dismissed, whatever interest is allowed by law shall be payable computed from the date of the verdict of the jury or the equivalent determined by the court in a non-jury case, which date shall be set forth in the judgment entered in the trial court. If a judgment is modified or reversed with a direction that a judgment for money be entered in the trial court, the mandate shall contain instructions with respect to allowance of interest. [As amended effective July 1, 1980.]

Advisory Commission Comments. This rule does not modify any existing law providing for interest before judgment, nor does it affect the rate of interest. The second sentence permits flexibility in cases in which a judgment is modified or reversed. The rule expressly provides for the allowance of interest if an appeal is dismissed as well as if the judgment is affirmed.

Advisory Commission Comments [1980]. The change in the first sentence of Rule 41 deals with the computation of interest in civil actions in both jury and non jury cases. The existing rule provides for interest from the date of entry of judgment. The amendment provides for interest from the time of the announcement of a jury verdict or of announcement of decision by the trial judge. The reason for the amendment is that there sometimes is a delay between the announcement of the jury verdict or announcement of decision by the trial judge and the formal entry of judgment.

Compiler's Notes. T.R.A.P. 41 may affect Tenn. Code Ann. § 47-14-122.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), §§ 226, 701.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, § 240.

Law Reviews. The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 1.

NOTES TO DECISIONS

Analysis

1. Forfeiture of Interest.
2. Prejudgment Interest.
3. Non-Jury Cases.

1. Forfeiture of Interest.

Defendant's contention that the failure of an appellate court to direct the manner of computation of interest was a forfeiture of all postjudgment interest, was meritless, for only if the appellate court deemed that its action required that interest be computed other than as required by statute, the judgment of the appellate court should so state. Inman v. Inman, 840 S.W.2d 927, 1992 Tenn. App. LEXIS 575 (Tenn. Ct. App. 1992); but see Alexander v. Inman (1998).

Statutory postjudgment interest began to accrue from date of original judgment of trial court despite failure of court of appeals to refer to postjudgment interest in order remanding case. Inman v. Alexander, 871 S.W.2d 153, 1993 Tenn. App. LEXIS 509 (Tenn. Ct. App. 1993).

2. Prejudgment Interest.

The last sentence of T.R.A.P. 41 includes prejudgment interest, and therefore the trial court had no authority to make such an award absent instruction from the court of appeals, except interest that is mandated by statute. Hudson v. Rhoten, 863 S.W.2d 734, 1993 Tenn. App. LEXIS 468 (Tenn. Ct. App. 1993).

3. Non-Jury Cases.

Although the rules of civil and appellate procedure contemplate, and good practice demands, that a letter from the trial court containing findings of fact and relevant to interest be filed with the clerk, appellee was not prejudiced by the court's failure to so file where appellee actually received the letter. Davis v.

Davis, 924 S.W.2d 351, 1996 Tenn. LEXIS 356 (Tenn. 1996).

Rule 42. Issuance, Stay, and Recall of Mandates From the Appellate Court. — (a) Definition; Issuance; Stay on Petition for Rehearing. — Copies, certified by the clerk of the appellate court, of the judgment, any order as to costs or instructions as to interest, and a copy of the opinion of the appellate court shall constitute the mandate.

The clerk of the Supreme Court shall transmit to the clerk of the trial court the mandate of the Supreme Court, with notice to the parties, 11 days after entry of the judgment unless the court orders otherwise. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless the court orders otherwise. If the petition is denied, the mandate shall issue immediately upon the filing of an order denying rehearing. In cases remanded to the Court of Appeals or Court of Criminal Appeals, a formal mandate shall not issue unless the Supreme Court orders otherwise, but the provisions of this rule are otherwise applicable.

The clerk of the Court of Appeals and Court of Criminal Appeals shall transmit to the clerk of the trial court the mandate of the Court of Appeals or Court of Criminal Appeals, with notice to the parties, 64 days after entry of judgment unless the court orders otherwise. The timely filing of a petition for rehearing will stay the mandate until disposition of the petition unless the court orders otherwise. The mandate shall issue 64 days after denial of the petition for rehearing or, if the petition for rehearing is granted, 64 days after entry of judgment on rehearing.

Issuance of the mandate in all cases shall not be delayed for the taxing of costs. The clerk of the appellate court shall be responsible for collecting the clerk's fees.

(b) Stay When Review by Supreme Court Is Sought. — Unless otherwise ordered by the Supreme Court, Court of Appeals, Court of Criminal Appeals, or a judge thereof, the timely filing of an application for permission to appeal in the Supreme Court shall stay the issuance of the mandate of the Court of Appeals or Court of Criminal Appeals, which stay is effective until final disposition by the Supreme Court. Upon the filing of an order of the Supreme Court denying the application for permission to appeal, the mandate shall issue immediately.

(c) Stay When Review May Be Sought in the Supreme Court of the United States. — In cases in which review by the Supreme Court of the United States may be sought, the appellate court whose decision is sought to be reviewed or a judge thereof, and in any event the Supreme Court of Tennessee or a judge thereof, may stay the mandate.

(d) Recall of a Mandate. — The power to stay a mandate includes the power to recall a mandate. [As amended effective July 1, 1980; and by order effective July 1, 1996; and by order entered January 26, 1999, effective July 1, 1999.]

Advisory Commission Comments. Subdivisions (b) and (c) specify the procedure to be followed when the decision of an intermediate appellate court is the subject of an application for permission to appeal to the Supreme Court of this state, and when any decision of any court of this state may be reviewed by the Supreme Court of the United States.

The rule provides that a formal mandate is not necessary when the Supreme Court re-

mands a case to the Court of Appeals or Court of Criminal Appeals. In addition, the rule specifies when the mandate issues from an intermediate appellate court upon the grant or denial of a petition for rehearing.

Advisory Commission Comments [1996]. This is an amendment to conform to the 1995 amendment extending application for permission to appeal time from 30 days to 60 days.

Compiler's Notes. T.R.A.P. 42(a) and (b) may affect Tenn. Code Ann. §§ 16-4-111, 16-5-111.

Textbooks. Pritchard on Wills and Administration of Estates (4th ed., Phillips and Robinson), § 910.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 27, 50, 84, 117, 217, 238-246, 248, 251, 257; 5 Tenn. Juris., Certiorari, § 2.

Law Reviews. The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 1.

Attorney General Opinions. Application of Title 26 to collection of appellate court costs, OAG 99-003 (1/19/99).

NOTES TO DECISIONS

ANALYSIS

1. Limitations Upon Remands.
2. Failure to Comply with Rule.
3. Premature Issuance of Mandate.

1. Limitations Upon Remands.

Neither the trial judge nor the court of appeals has authority to expand the limitation placed by the supreme court upon a remand. Cook v. McCullough, 735 S.W.2d 464, 1987 Tenn. App. LEXIS 3181 (Tenn. Ct. App. 1987).

Trial court, on remand, properly confirmed a clerk and master's report determining that part of the PR's expenses should be disallowed because, although the PR may have acted in good faith by maintaining the subject residence with estate funds, her actions were not for the exclusive and necessary benefit of the estate since the property was owned by a family company, and the trial court was well within its authority to consider the entire opinion when entering a modified order on remand. In re Estate of McCants, — S.W.3d —, 2020 Tenn. App. LEXIS 140 (Tenn. Ct. App. Apr. 3, 2020).

2. Failure to Comply with Rule.

Order of trial court reinstating conviction, entered before the court received mandate of court of appeals and without notice to parties, was premature. State v. Cash, 867 S.W.2d 741, 1993 Tenn. Crim. App. LEXIS 196 (Tenn. Crim. App. 1993).

3. Premature Issuance of Mandate.

Appellate court order directing the issuance of a mandate ordering the trial court to immediately comply with the court of appeal's judgment in a child custody case was ill advised where there was no risk of harm to the children as the order deprived the father of an opportunity to appeal. Brooks v. Carter, 993 S.W.2d 603, 1999 Tenn. LEXIS 275 (Tenn. 1999).

Rule 43. Filing of Mandate in the Trial Court and Proceedings Thereafter. — (a) Filing of Mandate. — The clerk of the trial court shall file the mandate promptly upon receiving it.

(b) Dismissal or Affirmance. — When the appellate court dismisses the appeal or affirms the judgment and the mandate is filed in the trial court, execution may issue and other proceedings may be conducted as if no appeal had been taken.

(c) Remandment. — When the appellate court remands the case for a new trial or hearing and the mandate is filed in the trial court, the case shall be reinstated therein and the subsequent proceedings conducted after at least 10 days notice to the parties.

Textbooks. Gibson's Suits in Chancery (7th ed., Inman), § 315.

Pritchard on Wills and Administration of Estates (4th ed., Phillips and Robinson), § 910.

Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 50-246, 248, 251, 257.

Law Reviews. The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 1.

NOTES TO DECISIONS

ANALYSIS

1. Waiver of Notice.
2. Limitations Upon Remands.
3. Failure to Comply with Rule.

1. Waiver of Notice.

If notice pursuant to T.R.A.P. 43 or T.C.A. §§ 21-1-810 and 21-1-811 was omitted, such omission was waived by proceeding to trial without objection. Wall v. Thalco, Inc., 614 S.W.2d 803, 1981 Tenn. App. LEXIS 489 (Tenn. Ct. App. 1981).

2. Limitations Upon Remands.

Neither the trial judge nor the court of appeals has authority to expand the limitation placed by the supreme court upon a remand. Cook v. McCullough, 735 S.W.2d 464, 1987 Tenn. App. LEXIS 3181 (Tenn. Ct. App. 1987).

3. Failure to Comply with Rule.

Order of trial court reinstating conviction, entered before the court received mandate of court of appeals and without notice to parties, was premature. State v. Cash, 867 S.W.2d 741, 1993 Tenn. Crim. App. LEXIS 196 (Tenn. Crim. App. 1993).

Rule 44. Process in the Appellate Court. — (a) Form. — The form of process in appellate courts shall be as near as may be to similar process issued pursuant to the Tennessee Rules of Civil or Criminal Procedure.

(b) Service, Execution and Return. — Process in the appellate court shall be served, executed and returned in the same manner as process issued pursuant to the Tennessee Rules of Civil or Criminal Procedure.

J. RULES BY THE INTERMEDIATE APPELLATE COURTS

Rule 45. Rules by the Court of Appeals and Court of Criminal Appeals. — The Court of Appeals and Court of Criminal Appeals by action of a majority of the judges may make and amend rules governing their practice not inconsistent with these rules. Rules and amendments so made shall be published. In all cases not provided for by rule, the Court of Appeals and Court of Criminal Appeals may regulate their practice in any manner not inconsistent with these rules.

Textbooks. Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, § 27.

Law Reviews. The Theoretical Foundations of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 45 Tenn. L. Rev. 161.

Rule 46. [Reserved.]

K. TITLE; FORMS; EFFECTIVE DATE

Rule 47. Title. — These rules shall be known and cited as the Tennessee Rules of Appellate Procedure.

Textbooks. Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 27, 52.

Rule 48. Forms. — The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement that the rules contemplate.

Textbooks. Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 27, 52.

Law Reviews. The Procedural Details of the Proposed Tennessee Rules of Appellate Procedure (John L. Sobieski, Jr.), 46 Tenn. L. Rev. 1.

Rule 49. Effective Date. — These rules shall take effect on July 1, 1979. They govern all appellate proceedings brought after they take effect and also all further procedure in proceedings then pending except to the extent in the opinion of the appellate court their application in a particular proceeding pending when the rules take effect would not be feasible or would work injustice, in which event the former procedure applies.

Textbooks. Tennessee Jurisprudence. 2 Tenn. Juris., Appeal and Error, §§ 20, 27, 83.

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1. Proceedings Pending.

Where new rules took effect while proceedings were still pending and prior procedure was complied with, appeal would not be dismissed because notice of appeal was not filed within time required by new rules although filed after new rules became effective. State v. Sharp, 604 S.W.2d 886, 1980 Tenn. Crim. App. LEXIS 294 (Tenn. Crim. App. 1980).

Tennessee Rules of
Appellate Procedure

APPENDIX A: FORMS

TENNESSEE RULES OF APPELLATE PROCEDURE

APPENDIX A: FORMS

Form 1

[Amend footnote 1 as indicated below:]

NOTICE OF APPEAL[1]

In the _____ Court for _____ County, Tennessee

No. _____

A. B., Plaintiff	)	
	)	
v.	)	Notice of Appeal
	)	
C. D., Defendant	)	

Notice is hereby given that C. D., defendant above named, hereby appeals to the (Supreme Court of Tennessee or Court of Appeals or Court of Criminal Appeals) from the final judgment entered in this action on the _____ day of _____, 20___.

/s/_____

_____
(Address)

Counsel for C. D.

[1] The ~~copy of the~~ notice of appeal filed with the clerk of the appellate court should include a list of the parties upon whom service of notice of docketing of the appeal is required by Rule 5 of these rules.

Form 2

PETITION FOR DIRECT APPELLATE REVIEW OF ADMINISTRATIVE PROCEEDINGS[2]

Court of Appeals for the _____ Section of Tennessee

No. _____

A. B., Petitioner

v. Petition for Review

X, Y, Z Commission, Respondent

A. B. hereby petitions the court for review of the order of the X, Y, Z Commission entered on the _____ day of _____, 20__.

/s/_____

_____

(Address)

Counsel for A. B.

[2]The copy of the Petition for Review filed with the clerk of the court of appeals shall include a list of the parties upon whom service of notice of docketing of the proceeding is required by Rule 12 of these rules.

TENNESSEE COURTS
UNIFORM FACSIMILE FILING COVER SHEET

TO (COURT CLERK): _____

WITH (COURT): _____

CLERK'S FAX NUMBER: _____

CASE NAME: _____

DOCKET NUMBER: _____

TITLE OF DOCUMENT: _____

FROM (SENDER): _____

SENDER'S ADDRESS: _____

_____

SENDER'S VOICE TELEPHONE NUMBER: _____

SENDER'S FAX TELEPHONE NUMBER: _____

DATE: _____ TOTAL PAGES, INCLUDING COVER PAGE: _____

FILING INSTRUCTIONS/COMMENTS (attach additional sheet if necessary):

Unless authorized by the Court, a facsimile transmission exceeding ~~ten (10)~~fifty (50) pages, including the cover page, shall not be filed by the clerk.

Compiler's Notes. The amendment of Appendix A, which amended Form 1 and Form 3, as promulgated and adopted by the Supreme Court in its order dated December 21, 2016, was ratified and approved by 2017 House Resolution 19 and Senate Resolution 16. The order promulgating the amendment of Form 1 and Form 3, provided that it take effect July 1, 2017.

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TENNESSEE RULES OF JUVENILE PRACTICE AND PROCEDURE

[ADOPTED FEBRUARY 22, 2016; EFFECTIVE JULY 1, 2016]

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GENERAL PROVISIONS.

Rule 101. Title of Rules — Scope — Purpose and Construction.

(a) **Title.** These rules shall be known and cited as the Tennessee Rules of Juvenile Practice and Procedure.

(b) **Scope.** These rules apply to delinquent, unruly, and dependent and neglect proceedings.

(c) **Exclusions.**

(1) Traffic offenses are governed by T.C.A. § 37-1-146.

(2) Surrenders of parental rights are governed by T.C.A. §§ 36-1-111 and 112.

(3) The Tennessee Rules of Civil Procedure shall govern the following proceedings:

(A) termination of parental rights pursuant to T.C.A. § 36-1-113;

(B) parentage pursuant to T.C.A. § 36-2-301, et seq;

(C) guardianship and mental health commitment involving children;

(D) child custody proceedings under T.C.A. §§ 36-6-101, et seq., 36-6-201, et seq., and 37-1-104(a)(2) and (e);

(E) grandparent visitation proceedings pursuant to T.C.A. § 36-6-306; and

(F) civil contempt pursuant to T.C.A. §§ 29-9-104 and 105.

(4) The procedures employed in general sessions court under the Tennessee Rules of Criminal Procedure shall govern the following proceedings:

(A) child abuse prosecutions, pursuant to T.C.A. §§ 37-1-412 and 39-15-401;

(B) nonsupport of children pursuant to T.C.A. § 39-15-101, et. seq.;

(C) contributing to the delinquency or unruly behavior of a child, pursuant to T.C.A. § 37-1-156;

(D) contributing to the dependency and neglect of a child, pursuant to T.C.A. § 37-1-157;

(E) offenses involving adults arising under T.C.A. § 49-6-3001, et. seq.; and

(F) criminal contempt pursuant to T.C.A. § 29-9-102.

(5) The Rules of the Tennessee Supreme Court shall govern proceedings under T.C.A. §§ 37-10-303 and 304.

(d) **Purpose and Construction.** These rules are designed to implement the purposes of the juvenile court as expressed in T.C.A. § 37-1-101 by providing speedy and inexpensive procedures for the hearing of juvenile cases that assure fairness and equity and that protect the rights and interests of all parties; by promoting uniformity in practice and procedure; and by providing guidance to judges, magistrates, attorneys, parties, youth services and probation officers, and others participating in the juvenile court. [Added by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. These rules are promulgated pursuant to statutory authority granting rule-making power to the Supreme Court. They are intended to provide a simple and practical means of operating in juvenile court in a manner which will adequately implement the law.

These rules are not comprehensive. For example, they do not provide specific procedures for proceedings for the transfer between Tennessee and another state of children found to be delinquent, unruly, or dependent and neglected, for disposition as provided in T.C.A. §§ 37-1-141- 37-1-144; nor do they deal with proceedings under the Interstate Juvenile Compact as found at T.C.A. §§ 37-4-101 - 37-4-106; with proceedings under the Interstate Compact on the Placement of Children as found at T.C.A. §§ 37-4-201, 37-4-202; with proceedings in which children seek to obtain judicial consent to marriage, employment, or enlistment in the armed services; nor with special medical proceedings pursuant to T.C.A. § 33-8-301, et. seq. It is intended that these rules be applied in every instance in which they address the procedure involved. If they do not expressly or by clear implication relate to the procedure in question, then existing law is to be applied.

The Commission recommends that local juvenile courts adopt their own written rules consistent with these rules and with relevant statutory and case law, to cover particular circumstances not presently addressed by these rules. Examples of areas which might be addressed by local rules are suggested in the comments to these rules.

Rule 1.01(c) identifies the proceedings not covered by these rules and denotes the statutes or rules that are applicable to each type of proceeding.

The 2016 amendments revised and re-ordered the rules, dividing them into four sec-

tions: (1) general, (2) delinquent and unruly, (3) dependent and neglected, and (4) foster care.

Compiler's Notes. The adoption of Rule 101, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 101 provided that it take effect July 1, 2016.

Attorney General Opinions. Dismissal of paternity suit for failure to prosecute, OAG 99-099 (5/4/99).

Juvenile court disposition of children following a termination of parental rights, OAG 99-208 (10/20/99).

Rule 102. [Reserved.]

Rule 103. Service of process and summons.

(a) **General Provisions.** After the petition has been filed the clerk shall schedule a time for a hearing. The clerk shall, without delay, issue the summonses to the parties, including a child alleged to be delinquent or unruly, requiring them to appear before the court to answer the allegations of the petition. The summons shall also be directed to the child alleged to be dependent and neglected and 14 or more years of age. A copy of the petition shall accompany the summons unless the summons is served by publication in which case the published summons shall indicate the general nature of the allegations and where a copy of the petition can be obtained.

(b) **Order to Appear and Bring Child to Hearing.** The court may endorse upon the summons an order directing the parents, guardian or other custodian of the child to appear personally at the hearing and directing the person having custody, possession or control of the child to bring the child to the hearing.

(c) **Service of Summons.**

(1) With the exception of an emergency hearing, preliminary hearing, or detention hearing, if a party to be served with a summons is within this state and can be found, the summons shall be served upon the party personally at least 3 days before the hearing. If the party is within this state and cannot be found, but the party's address is known or can with reasonable diligence be ascertained, the summons may be served upon the party by mailing a copy by registered or certified mail at least 5 days before the hearing. If the party is without this state but can be found or the party's address ascertained, service of the summons may be made either by delivering a copy to the party personally or by mailing a copy to the party by registered or certified mail at least 5 days before the hearing. Service by mail shall not be the basis for the entry of a judgment by default unless the record contains a return receipt showing personal acceptance by the party. If service by mail is unsuccessful, it may be tried again or other methods authorized by these rules or by statute may be used. If a party refuses to accept delivery by mail and it is so stated in the return receipt of the United States Postal Service, the written return receipt if returned and filed in the action shall be deemed an actual and valid service of the summons, process, or notice. Service by mail is complete upon mailing.

(2) If the child has been removed from the home, an attempt must be made to serve the summons and petition prior to an emergency hearing, preliminary hearing, or detention hearing. If service cannot be achieved prior to the

hearing, the parties shall be notified as soon as possible of the date, time and place of the hearing, the child's custody status and the reasons for the child's removal.

(3) If after reasonable effort the party cannot be found and the party's mailing address cannot be ascertained, the court may order service of the summons upon the party by publication in accordance with T.C.A. §§ 21-1-203 and 204. The hearing shall not be earlier than 5 days after the date of the last publication.

(4) Service of the summons may be made by any suitable person who is not a party and is not less than 18 years of age.

(5) The court may authorize the payment of the costs of service and of necessary travel expenses incurred by persons summoned or otherwise required to appear at the hearing, as provided by law.

(6) Service of a summons upon a party in a foreign country shall be pursuant to the Tennessee Rules of Civil Procedure Rule 4A - Service Upon Defendant In a Foreign Country.

(d) **Waiver of Service.** A party other than a child may waive service of summons by written stipulation or voluntary appearance. A delinquent or unruly child may waive service of summons in accordance with Rule 205. [Added by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. The 2016 amendment adds a distinction in subdivision (c) between the requirements for emergency, preliminary and detention hearings and the requirements for other types of hearings. There may be a circumstance where a party has been notified of the hearing but has not been served. This does not relieve the petitioner of the obligation to effect service.

The time to serve a summons is excluded from Rule 110 regarding the calculation and extension of time. See Rule 201 regarding the initiation of cases in delinquent and unruly proceedings and Rule 301 for dependent and neglect proceedings.

If a party appears voluntarily at a hearing and has not been served, the court should provide the party with a copy of the petition and memorialize the service in an order or return.

Compiler's Notes. The adoption of Rule 103, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 103 provided that it take effect July 1, 2016.

Decisions Under Prior Law

1. Service by Publication.

In a termination of parental rights proceeding, given the absence of information regarding steps taken to identify the father, an adoption agency did not carry its burden of demonstrating the diligent inquiry required by T.C.A. § 21-1-203(a) in order to use service by publication, as simply asking the birth mother if she knew the name of the father and then giving up was not sufficient; the location of the party, the name of the host of the party, the names of attendees of the party, and the type of vehicle in which the child was conceived were all obvious areas of inquiry. Adoption Place, Inc. v. Doe, 273 S.W.3d 142, 2007 Tenn. App. LEXIS 750 (Tenn. Ct. App. Dec. 5, 2007), appeal denied, The Adoption Place, Inc. v. Doe, — S.W.3d —, 2008 Tenn. LEXIS 90 (Tenn. Feb. 4, 2008).

Rule 104. Appearance of attorney.

(a) **Entry of Appearance.** An attorney who undertakes to represent a party in any juvenile court action shall immediately notify the court, unless appointed by written order of the court. An attorney must notify all parties of the entry or appointment. For the purpose of this rule, the filing of any pleading signed by an attorney constitutes an entry of appearance.

(b) **Continued Representation.** An attorney who has entered an appearance or who has been appointed by the court shall continue such representation until relieved by order of the court.

(c) **Prosecuting Attorney.** Whenever required by statute or rule, or at his or her discretion, the district attorney general shall appear in the juvenile court and prosecute on behalf of the state. [Added by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. The Commission cautions attorneys to pay special attention to subdivision (b). In the absence of a court order relieving the attorney, that attorney remains attorney of record in any case to which the attorney was appointed or entered an appearance.

In no event should a youth services officer or other employee of the court appear as prosecutor in juvenile court or fulfill in any way such role. This does not, however, prevent the youth services officer from being the petitioner or a witness in a proceeding.

Compiler's Notes. The adoption of Rule 104, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 104 provided that it take effect July 1, 2016.

Rule 105. Responsive pleadings and motions.

(a) **Answer.** A written answer to a petition shall not be required.

(b) **Motion.**

(1) An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be in writing, shall state with particularity the grounds relied upon, and shall set forth the relief or order sought.

(2) Upon the filing of the motion, the clerk shall schedule a tentative date for the motion to be heard.

(3) All motions shall include the date upon which the motion is expected to be heard and shall be served on the parties a reasonable time prior to that date.

(4) A written response to a motion shall not be required. [Added by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. This rule was formerly Rule 20 of the Tennessee Rules of Juvenile Procedure.

The Commission notes that, although a written response to a pleading or motion is not required under these rules, it is not prohibited.

The Commission suggests that local rules would be an appropriate place to establish guidelines for what a "reasonable time" under this rule would be. This may differ among various localities due to the differences in dockets and available hearing dates. A best practice would be to consult with opposing counsel and any unrepresented parties in advance in order to set a date for hearing of any motion to ensure that all necessary persons are available.

Effective July 1, 2012, the Supreme Court adopted Tenn. Sup. Ct. R. 10B governing motions seeking disqualification or recusal of a judge. Section 1 of Rule 10B provides a procedural framework for determining when the judge of a court of record should not preside over the case. In summary, Section 1 provides for the filing of a motion for disqualification or recusal and also provides for the judge's prompt ruling on the motion. Section 2 of Rule 10B governs appeals from the denial of such motions, and it provides that such appeals may be affected either by filing an interlocutory appeal as of right authorized by the rule or by raising the disqualification or recusal issue in an appeal as of right at the conclusion of the case. Under Section 2.01, those two methods of appeal are "the exclusive methods for seeking appellate review of any issue concerning the trial court's ruling on a motion filed pursuant to this Rule." (Emphasis added.) As a result, "neither Tenn. R. App. P. 9 nor Tenn. R. App. P. 10 may be used to seek an interlocutory or extraordinary appeal by permission concerning the judge's ruling on such a motion." Tenn. Sup. Ct. R. 10B, Explanatory Comment to Section 2.

The Explanatory Comment to Tenn. Sup. Ct. R. 10B § 1 notes that juvenile courts are courts of record and that juvenile court judges therefore are included within Section 1 of this Rule. Section 4 of Tenn. Sup. Ct. R. 10B, however, governs motions for disqualification of judicial

officers other than a judge of a court of record (e.g. magistrates, referees, and masters).

Attorneys or self-represented litigants should consult Tenn. Sup. Ct. R. 10B, concerning the procedure for filing motions seeking the disqualification or recusal of a juvenile court judge or other judicial officer and for appealing from a denial of such a motion.

Compiler's Notes. The adoption of Rule 105, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 105 provided that it take effect July 1, 2016.

NOTES TO DECISIONS

1. Mistake.

Reference to neglect and dependency in the father's pro se petition was a mistake and the action was properly characterized as one to establish paternity and visitation; father sought custody or visitation, and outside of the outdated, incorrect form he used, the only mention made to dependency and neglect was within the proposed order, and the juvenile court struck that language when it learned of the mistake. In re Easton W., — S.W.3d —, 2020 Tenn. App. LEXIS 305 (Tenn. Ct. App. July 1, 2020).

Rule 106. Filing and service of pleadings and other papers.

(a) **Service — When Required.** Unless the Court otherwise orders, every order required by its terms to be served; every pleading subsequent to the original petition; and every written motion (other than ex parte), notice, appearance, or similar papers shall be served upon each of the parties, including the child alleged to be delinquent or unruly. Service shall also be made on a child alleged to be dependent and neglected, if age 14 or over. If a court appointed special advocate (CASA) is appointed, the CASA volunteer shall be served in the same manner as a party.

(b) **Service — How Made.**

(1) Whenever service of a pleading is required or permitted to be made on a party represented by an attorney or guardian ad litem, the service shall be made upon the attorney or guardian ad litem unless service on the party is ordered by the court. Service upon the attorney, guardian ad litem or upon a party shall be made by delivering a copy of the document to be served either in person, by leaving it at the person's office, by leaving it at the person's home in a conspicuous place or with a person of suitable age and discretion residing therein, or by mailing it to such person's last known address. If no address is known, service is completed by leaving a copy with the clerk of the court. Service by mail is complete upon mailing. Items which may be filed by facsimile transmission pursuant to this rule may be served by facsimile transmission.

(2) If all parties, their attorneys or guardians ad litem agree, in writing, service of documents may be made via email in Adobe PDF format in lieu of service by mail. A signed notice of such agreement, containing the email addresses of parties and the attorneys, shall be filed with the clerk.

(c) **Service — Proof of.** Whenever any pleading or other paper is served, proof of the time and manner of such service shall be filed before action is taken thereon by the court or the parties. Proof may be by certificate of an attorney of record, the clerk, by affidavit of the person who served the papers, or by any other proof satisfactory to the court.

(d) **Filing.** All papers after the petition required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter. Discovery need not be filed, unless ordered by the court.

(e) **Filing with the Court Defined.** The filing of pleadings and other papers with the court as required by these rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge, in which event the judge shall note thereon the filing date and immediately transmit them to the office of the clerk. The clerk shall endorse upon every pleading and other papers filed with the clerk in an action the date and hour of the filing. If papers required or permitted to be filed are prepared by or on behalf of a pro se litigant incarcerated in a correctional facility and are not received by the clerk of the court until after the deadline for filing, filing shall be timely if the papers were delivered to the appropriate individual at the correctional facility within the time allowed for filing. This provision shall also apply to service of papers by such litigants. "Correctional facility" shall include a prison, jail, county workhouse or similar institution in which the pro se litigant is incarcerated. Should timeliness of filing or service become an issue, the burden is on the pro se litigant to establish compliance with this provision.

(f) **Facsimile Filing.** The juvenile court clerk shall accept papers for filing by facsimile transmission as provided in Rule 5A of the Rules of Civil Procedure.

(g) **Facsimile Filing Exceptions.** The following documents shall not be filed by facsimile transmission:

(1) Any pleading or similar document for which a filing fee must be paid (excluding the facsimile service charge), including, without limitation, a petition, a request for a hearing before the judge from the magistrate's order, or a notice of appeal to a trial court or appellate court; or

(2) A summons; bond; a document requiring an official seal; or a document the court has previously ordered to be filed under seal.

(h) **Electronic Filing, Signing, Or Verification.** Any juvenile court may, by local rule, allow papers to be filed, signed or verified by electronic means that comply with technological standards promulgated by the Supreme Court. Pleadings and other papers filed electronically under such local rules shall be considered the same as written papers. [Added by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. Subdivision (a) addresses service of documents upon the parties subsequent to the filing of the original petition. This is intended to include service of any proposed permanency plan for a child in foster care prior to the initial or any subsequent ratification hearing.

Subdivision (b) allows for items which may be filed by facsimile to be served in the same manner. In addition, service upon a party, attorney, or guardian ad litem may be made by email upon a signed agreement of all parties, attorneys or guardians ad litem. Documents served by email are required to be attached as Adobe PDF files. Adobe PDF format was chosen because it is required for federal court filings and for service by email pursuant to Rule 5.02 of the Tennessee Rules of Civil Procedure.

Subdivision (f) requires the juvenile court clerk accept papers for filing by facsimile transmission as provided in Rule SA of the Rules of Civil Procedure. Rule 5A.04 sets out the charge for facsimile filing, and specifies the procedure for collecting the charge when the sending party has been allowed to proceed on a paupers oath. The documents excepted from facsimile filing in subdivision (g) of this Rule are consistent with the exceptions in Rule SA of the Rules of Civil Procedure. When filing by facsimile, the sender bears the risk of ineffective transmission and should confirm the clerk received the facsimile.

Subdivision (g) provides for the electronic filing, signing and verification of papers in juvenile court by local rule. The local rule must comply with technological standards promulgated by the Supreme Court, published at Electronic Filing for Civil Cases, Policy & Technical

Standards, Administrative Office of the Courts, adopted September 2011, or any future standards. This amendment is modeled after Rule 58 of the Rules of Civil Procedure.

When applicable, attorneys of record and unrepresented parties are encouraged to file a notice of change of address with the court and to serve copies of the notice on all attorneys of record and unrepresented parties. Failure to do so may result in a party not receiving important documents and information.

Attorneys and unrepresented parties are responsible for inquiring whether the juvenile court has local rules that allow for facsimile or electronic filing.

Compiler's Notes. The adoption of Rule 106, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 106 provided that it take effect July 1, 2016.

Rule 107. Subpoenas.

(a) **Form — Issuance.** Every subpoena shall be issued by the clerk. Each subpoena shall state the name of the court and the title of the action. Each subpoena shall command the person to attend and give testimony at a hearing and shall specify the time and place and the name of the party for whom testimony will be given. The clerk shall issue a subpoena or a subpoena for the production of documentary evidence, signed but otherwise in blank, to a party requesting it, who shall fill it in before service.

(b) **Subpoena of Persons.** With the exception of emergency hearings, preliminary hearings, detention hearings, or for good cause shown, all subpoenas for the attendance of witnesses shall be served at least 5 calendar days prior to the hearing.

(c) **Subpoena for Production of Documents and Things.** With the exception of emergency hearings, preliminary hearings, and detention hearings, all subpoenas for the production of documents, images, records, data or like information shall be served at least 10 calendar days prior to the hearing, unless otherwise provided by law. Copies of the subpoena must be served pursuant to Rule 106 on all parties, and all material produced must be made available for inspection, copying, testing, or sampling by all parties, except as otherwise provided by law.

(d) **Service.** A subpoena may be served by any person authorized to serve process or the witness may acknowledge service in writing on the subpoena. Service of the subpoena shall be made by delivering or offering to deliver a copy to the person to whom it is directed in accordance with this or any local rule. [Added by order filed December 29, 2015, effective July 1, 2016; and by order filed January 8, 2018, effective July 1, 2018.]

Advisory Commission Comments. The original Rules of Juvenile Procedure did not contain a rule regarding the issuance of subpoenas. The rule only applies to serving a subpoena for a court hearing. See Rule 206 regarding discovery in delinquent and unruly cases and Rule 305 in dependent and neglect cases.

This rule provides for a minimum time in which a subpoena must be served prior to a court hearing. The time limits do not apply to emergency, detention or preliminary hearings, though subpoenas should be served as far in advance of the hearing as practicable.

The time to serve a subpoena is excluded from Rule 110 regarding the calculation and extension of time.

Subdivision (c) is applicable to a subpoena for the production of documents and things. Note that other laws may override this provision. For example, the Health Insurance Portability and Accountability Act of 1996 (HIPAA; Pub.L. 104-191), contains specific provisions regarding the disclosure of health care records in response to a subpoena. See 45 CFR 164.512.

Subdivision (d) allows juvenile courts to have local rules addressing acceptable methods of service of subpoenas.

This rule does not preclude the filing of a motion to quash a subpoena.

Advisory Commission Comments [2018]. The 2018 amendment adds a new sentence to the end of subsection (c), so that the procedure here conforms to Rule 45.02, Tennessee Rules of Civil Procedure.

Compiler's Notes. The adoption of Rule 107, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 107 provided that it take effect July 1, 2016.

In its order filed January 8, 2018, the Supreme Court adopted amendments to this rule, effective July 1, 2018, subject to approval by resolution of the General Assembly.

The amendment of Rule 107, which amended subdivision (c) and added the [2018] Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated January 8, 2018, was ratified and approved by 2018 House Resolution 208 and Senate Resolution 167. The order promulgating the amendment of subdivision (c) and the addition of the [2018] Advisory Commission Comments, provided that it take effect July 1, 2018.

Rule 108. Injunctive relief.

(a) **How Obtained.**

(1) A request for injunctive relief shall be in the form of a motion or a petition, or on the court's own initiative, and may be obtained by:

(A) An ex parte restraining order;

(B) An injunction issued during the pendency of a matter; or

(C) An injunction issued as part of a dispositional order.

(2) Every request for injunctive relief shall state whether a previous application for the relief has been refused by any court.

(b) **In General.**

(1) Every ex parte restraining order or injunction shall be specific in terms and shall describe in reasonable detail the act restrained or enjoined.

(2) Every ex parte restraining order or injunction shall be indorsed with the date and hour of issuance, shall be signed by the judge or magistrate granting it, and shall be filed in the clerk's office.

(3) Every ex parte restraining order or injunction shall be binding upon the parties to the action, their officers, agents and attorneys; and upon other persons in active concert or participation with them who receive actual notice of the ex parte restraining order or injunction by personal service or otherwise.

(c) **Ex Parte Restraining Order.**

(1) An ex parte restraining order shall only restrict the doing of an act.

(2) An ex parte restraining order may be issued by the judge of the court in which the matter is pending or is to be filed, or by any magistrate serving such court.

(3) An ex parte restraining order may be issued when the court finds: (1) that a child may abscond or be removed from the court's jurisdiction; or (2) that there is a danger of immediate harm to a child such that a delay for a hearing would be likely to result in severe or irreparable harm.

(4) The standard of proof applicable in issuance of an ex parte restraining order shall be probable cause. The court may consider a motion, petition, sworn affidavit, sworn testimony or reliable hearsay.

(5) A copy of the ex parte restraining order shall be promptly served on each party by a person authorized to serve a summons. If an ex parte restraining order is issued at the commencement of an action, a copy shall be served with the summons.

(6) An ex parte restraining order becomes effective and binding on the party to be restrained at the time of service or when the party to be restrained is informed of the order, whichever is earlier.

(7) An ex parte restraining order shall expire by its terms and shall not exceed 15 days unless within such time period: (1) the court extends the order after affording the party to be restrained an opportunity to be heard, or (2) the party to be restrained consents to the extension. Any such extension of an ex parte restraining order shall be in the form of an injunction.

(8) If the request for an ex parte restraining order is brought against a parent of a child and the relief requested would interfere with the parent's constitutional right to have care and control of the child, the court shall proceed with a preliminary hearing within 72 hours of entry of the ex parte order, pursuant to Rule 302, rather than the 15 day timeframe prescribed above.

(d) **Injunction.**

(1) An injunction may restrict or mandatorily direct the doing of an act, either temporarily or permanently.

(2) Prior to the issuance of an injunction, the court shall afford the party to be enjoined notice, grounds therefore, and an opportunity to be heard.

(3) An injunction may be issued, modified or dissolved by the judge or magistrate of the court in which the matter is pending. The court shall only modify or dissolve an injunction when the court finds such to be consistent with the child's best interests.

(4) During the pendency of a matter, the court may issue an injunction when the court finds that the conduct of the person to be enjoined is or may be detrimental or harmful to the child.

(5) As part of a dispositional order, the court may issue an injunction when the court finds that the conduct of the person to be enjoined is or may be detrimental or harmful to the child and would tend to defeat the execution of a dispositional order.

(6) The standard of proof applicable in issuance of injunctive relief shall be preponderance of the evidence. Evidence shall be admitted in accordance with the Rules of Evidence. In the court's discretion, any evidence so admitted may be admissible in the underlying matter and need not be repeated if all parties participated in the hearing for injunctive relief.

(7) The court may issue an injunction upon such terms and conditions, and the injunction shall remain in force for such time, as the court determines to be consistent with the child's best interests.

(e) **Injunctive Relief Against Non-Party.** The court may issue an ex parte restraining order, injunction, or no contact order against a person who is not a party to the dependent and neglected, delinquent, or unruly proceeding if that person's conduct is or may be detrimental or harmful to the child. In such cases, the person to be restrained or enjoined shall be a party only to the petition or motion for injunctive relief. Neither the request for injunctive relief nor the order granting injunctive relief shall confer party status in the underlying case on the person to be enjoined. [Added by order filed December 29, 2015, effective July 1, 2016; and as amended by order filed December 21, 2016, effective July 1, 2017.]

Advisory Commission Comments. Injunctive relief may be issued pursuant to T.C.A. § 37-1-152.

The Commission has chosen to use the term "restraining order" to refer only to an ex parte order granted by the court, while the term

"injunction" applies to all orders granted after a hearing. The Commission chose the term "injunction" to clarify that the court may restrain an act or mandatorily direct the doing of an act.

A dependent and neglect matter is an inquiry as to the status of a child rather than a proceeding to determine guilt or to apportion blame or liability among various persons. As the court stated in *State Dep't of Children's Servs. v. Huffines-Dalton*, No. M2008-01267-COA-R3-JV, 2009 Tenn. App. LEXIS 364, at *18, 2009 WL 1684679 (Tenn. Ct. App. June 15, 2009):

> Under Tenn. Code Ann. § 37-1-129, the court must first hold a hearing and make findings whether a child is dependent and neglected within the meaning of the statute. "The function of the adjudicatory hearing is to determine whether the allegations of dependency, neglect, or abuse are true." Accordingly, the adjudication is not against either parent or the custodian but addresses the question of whether the child is dependent and neglected for any of the reasons enumerated by the statute. During this adjudicatory phase, the parties are "entitled to the opportunity to introduce evidence and otherwise be heard in the party's own behalf and to cross-examine adverse witnesses," Tenn. Code Ann. § 37-1-127(a), and the Rules of Evidence apply.
>
> (Citations omitted.)

Because a dependent and neglect proceeding may involve persons other than parents or guardians, such as "caretakers" as referenced in the definition of "abuse" in T.C.A. § 37-1-102(b)(1), or "persons with whom the child lives" under T.C.A. § 37-1-102(b)(12)(B), the Commission intended to clarify that injunctive relief may be sought against such persons. Such persons may not enjoy a legal relationship with the child but such person's conduct may have caused or contributed to the child being found to be dependent and neglected. As the Court stated in *In re: Melanie T.*, 352 S.W.3d 687, 697 (Tenn. Ct. App. 2011):

> [I]t is clear that a biological or legal parent/child relationship is not essential to uphold a finding that a minor is "dependent and neglected." The statute expressly states that a "child" is "dependent and neglected" if that child lives with a "parent, guardian or person" who *"by reason of cruelty, ... immorality or depravity is unfit to properly care for such child."* By using the words "parent, guardian or person with whom the child lives," the General Assembly made it perfectly clear that a dependent and neglect claim ... does not require that the "unfit" person be a biological or legal parent of the child at issue. Therefore, a person who lives with a child need not be a biological or legal parent of the child in order for a "dependent and neglected" action to be maintained against that person.
>
> (Emphasis in original; citations omitted.)

Thus, the seeking of injunctive relief against such non-parent persons is allowed and does not, in and of itself, confer party status on such persons in the underlying dependent and neglect matter. Further, the proceeding regarding the issuance of injunctive relief may be separate from the underlying matter.

The issue of who, exactly, is a "party" to a dependent or neglect proceeding is not as straightforward as it first appears. Those with a legal relationship to the child, such as parents, are, of course, proper parties and are named respondents in such matters. The analysis grows more complex when the matter involves a step-parent or a boyfriend or girlfriend to a parent, those who have no legal interest in the child. Such persons may have caused or contributed to the child's dependent and neglect status, and whose conduct is in issue in the proceeding, but may not be appropriate persons to take steps to regain entrance to the child's life. The better practice is to view those more remote, legally, from the child as respondents in an injunction proceeding, but not as respondents in the underlying dependent and neglect matter.

The Commission notes *City of Chattanooga v. Swift*, 442 S.W.2d 257, 258 (Tenn. 1969) ("By the term 'party', in general, is meant one having a right to control proceedings, to make a defense, to adduce and cross-examine witnesses, and to appeal from the judgment") (citing *Boyles v. Smith*, 37 Tenn. 105, 107 (Tenn. 1857)).

See Rule 110 for the computation of time.

Advisory Commission Comments [2017]. The rule is amended by deleting subdivision 108(a)(1)(D), which referred to no contact orders pursuant to T.C.A. § 37-1-152. Also, the last paragraph of the original Advisory Commission comment is deleted. These changes were necessary due to an amendment to T.C.A. § 37-1-152.

The rule is also amended by deleting a paragraph in the original Advisory Commission Comments and adding the substance of that paragraph as the new subdivision (c)(8) of the rule.

Compiler's Notes. The adoption of Rule 108, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 108 provided that it take effect July 1, 2016.

The amendment of Rule 108, which amended subdivisions (a) and (c), amended the original Advisory Commission Comments and added the [2017] Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 21, 2016, was ratified and approved by 2017 House Resolution 18 and Senate Resolution 15. The order

promulgating the amendment of subdivisions (a) and (c), the amendment of the original Advisory Commission Comments and the addition of the [2017] Advisory Commission Comments, provided that it take effect July 1, 2017.

Rule 109. Orders for the attachment of children.

(a) **Requirements for Issuance of Orders for Attachment.** Orders for the attachment of children shall be based upon a judicial determination that there is probable cause to believe that the child is in need of the immediate protection of the court because:

(1) The conduct, condition or surroundings of the child are endangering the child's health or welfare or that of others; or

(2) The child may abscond or be removed from the jurisdiction of the court; or

(3) Service of a summons or subpoena would be ineffectual or the parties are evading service.

The statement of a person requesting the order of attachment must be by affidavit or sworn testimony reduced to writing and must provide sufficient factual information to support an independent determination that probable cause exists for the issuance of the order. If hearsay evidence is relied upon, the affidavit or testimony must include the basis for the credibility of both the declarant and the declarant's statements.

(b) An attachment for a violation of pretrial diversion, judicial diversion, probation, or home placement (aftercare) supervision shall not issue unless:

(1) The child poses a significant likelihood of significant injury to another person or significant likelihood of damage to property;

(2) The child cannot be located by the supervising person, persons, or entity after documented efforts to locate the child by the supervising person, persons, or entity; or

(3) The child fails to appear for a court proceeding.

If the child has an attorney of record, that attorney must be served with the attachment request made to the court.

(c) **Failure to Appear.** When a child fails to appear at a hearing or other court-scheduled proceeding to which the child has been properly served or directed by appropriate court personnel to appear, the court may, on its own initiative or on the basis of a sworn writing, issue an attachment.

(d) **Terms of Order.** The order for attachment shall order that the child be brought immediately before the court or that the child be taken into custody in accordance with Rule 203 or 302. [Added by order filed December 29, 2015, effective July 1, 2016; adopted by order dated January 8, 2019, effective October 1, 2019.]

Advisory Commission Comments. Ordinarily, proceedings in juvenile court will be initiated and conducted pursuant to the issuance of a petition and summons rather than the issuance of attachment. Attachments should be used only when necessary to further the goals and purposes of the juvenile court. The Commission notes that the offense of failure to appear is a defined offense and may provide independent grounds for the issuance of an order to take a child into custody if charged.

The issuance of an order of attachment does not determine what should occur once that child is taken into custody. There may be instances in which an order to take a child into custody is warranted but, once accomplished, that child may not meet the requirements to be held in a secure facility pending hearing. In addition, the purpose of an order to take a child into custody may vary from case to case. The order should give specific instructions as to how the attachment order should be carried out.

Subdivision (b) [subdivision (c)] allows the court to issue an attachment in the event the child fails to appear at a court-scheduled hearing, meeting or conference after the child has been duly summoned to appear and fails to do so. The attachment may direct the appropriate authorities to take the child to a detention facility or to court or to another place. Prior to issuing an attachment for failure to appear, whether or not the child is charged with the delinquent act of failure to appear, the child must have received appropriate notice specifying the date, time and location of the proceeding in issue. Accordingly, the Commission encourages each court to implement notice procedures which satisfy due process and afford court participants ample notice of proceedings. For instance, a summons generally is required to initiate most court proceedings, unless the child is served with an arrest warrant or has been issued a citation, while notice of subsequent court dates may be accomplished by less formal means so long as the method chosen is effective.

This rule clarifies the evidentiary requirements for the issuance of orders for the attachment of children based on the provisions of T.C.A. §§ 37-1-113(a)(2), 114(a)(2), 117(b), and 122.

This rule will apply to the process of obtaining an "arrest order" for a child pursuant to T.C.A. §§ 37-1-113(a)(2).

As only attachments of children are addressed in this rule, reference to T.C.A. § 37-1-122, regarding attachments of parents, guardians, and other persons having custody of children under juvenile court jurisdiction, was omitted from the rule. That code section should be consulted for guidance in regard to such action.

Advisory Commission Comments [2017]. The rule is amended by adding this 2017 Advisory Commission Comments as further explanation. Additionally, the fourth paragraph of the original Advisory Commission Comment is amended by changing two references to T.C.A. § 37-1-128(b) to T.C.A. § 37-1-117(b), in light of the amendments to the statutes.

An attachment is distinguished from an order for the removal of custody or order of detention, in that it addresses only the physical taking of the person of the child, under terms specified by the court, for the purposes specified in this rule. An attachment may accompany an order of removal of custody, order of detention, or other order, if necessary to accomplish the taking of child's person, but will not be necessitated in every case, as where the child is already in the physical custody of the intended entity.

If the probable cause determination in subdivision (a) is based on a written affidavit reciting the facts, it may be sworn to in person or by audio-visual means. *Black's Law Dictionary* defines affidavit as "(a) voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths." *Black's Law Dictionary* 66 (9th ed. 2009).

Advisory Commission Comments [2019]. Rule 109 is amended by adding new subdivision (b) to address the amendment to Tenn. Code Ann. §37-1-122(c) (2018 Tenn. Pub. Acts, ch. 1052, § 16 (effective July 1, 2018)). As a result of the statutory changes, the reference to subsection (b) in the third paragraph of the original Advisory Commission Comment changes to point to subsection (c) of the rule. Also, the statutory references in the fourth and fifth paragraphs of the original Advisory Comment should point to Tenn. Code Ann. § 37-1-113(a)(2) but originally the comment inadvertently omitted the (a); the cross-reference is corrected here to point to Tenn. Code Ann. § 37-1-113(a)(2).

Compiler's Notes. The adoption of Rule 109, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 109 provided that it take effect July 1, 2016.

The amendment of Rule 109 by the amendment of the original Advisory Commission Comments and the addition of the [2017] Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 21, 2016, was ratified and approved by 2017 House Resolution 18 and Senate Resolution 15. The order promulgating the amendment of Rule 109 by amending the original Advisory Commission Comments and adding the [2017] Advisory Commission Comments, provided that it take effect July 1, 2017.

The amendment of Rule 109, which added current (b), redesignated subsections (b)-(c) as subsections (c)-(d) and added the [2019] Advisory Commission Comment, as promulgated and adopted by the Supreme Court in its order dated January 8, 2019, was ratified and approved by 2019 Special Session House Resolution 3 and 2019 Regular Session Senate Resolution 13. The order promulgating amendment of Rule 109 by the addition of current (b), redesignation of subsections (b)-(c) as subsections (c)-(d) and the addition the [2019] Advisory Commission Comment, provided that it take effect October 1, 2019.

Rule 110. Time.

(a) **Computation.** In computing any period of time prescribed or allowed by these rules, by order of court, or by any applicable statute, the date of the act, event or default is not to be included. The last day of the period so computed shall be included unless:

(1) it is a Saturday, a Sunday, or a legal holiday as defined in Tenn. Code Ann. § 15-1-101, or

(2) the act to be done is the filing of a paper in court, and the last day is a day on which the office of the court clerk is closed or on which weather or other conditions have made the office of the court clerk inaccessible.

In either instance, the event period runs until the end of the next day which is not one of the aforementioned days. Absent statutory authority or a Rule of Juvenile Procedure to the contrary, when the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation.

(b) **Extension.** For cause shown, the court may extend the period of time to perform an act if the request is made prior to the expiration of the period originally prescribed. However, upon motion made after the expiration of the specified period of time to perform an act, the court may permit the act to be done where the failure to act was the result of excusable neglect. This subdivision does not apply to the time for scheduling a detention or preliminary hearing, holding hearings regarding the violation of a valid court order, filing a notice of appeal or request for hearing before the judge from the magistrate's order.

(c) **Exceptions.** This rule does not apply to the time provided to:

(1) serve a summons or subpoena;

(2) make a probable cause determination pursuant to Rules 203 and 302;

(3) ratify a permanency plan pursuant to T.C.A. § 37-2-403(a); or

(4) hold a permanency hearing pursuant to T.C.A. §§ 37-1-166(g)(5) and 37-2-409. [Added by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. Rule 110 adopts the same formula as that provided by T.C.A. § 1-3-102, with two additions: (1) If the last day of a period falls on a Saturday, Sunday, or legal holiday, the period runs until the end of the next day which is not a Saturday, Sunday or legal holiday. Thus, if the period would normally expire, for example, on November 9, but November 9 fell on a Saturday, November 10 was a Sunday, and November 11 was a legal holiday, the rule makes it clear that the period would run until the end of the day, Tuesday, November 12. When the prescribed period is less than 11 days, intermediate Saturdays, Sundays and holidays are excluded. When the time allowed is so short, the party limited by the time should not be further handicapped by losing 1 or more days because normal business operations are suspended by Saturday, Sunday, or legal holiday observances.

Subdivision (b) establishes a single standard for the courts to follow in granting enlargement of the time periods within which various acts must be done. The Rules of Civil Procedure allow for extensions to be liberally granted, but this should not be the case in juvenile court. Extension is to be allowed, even after expiration of the original period, where the failure to take timely action was due to excusable neglect. This subdivision does not apply to the time for scheduling a detention or preliminary hearing, holding hearings regarding the violation of a valid court order, filing a notice of appeal or request for hearing before the judge from the magistrate's order.

See Rule 117 regarding the entry of orders. Prior to the entry of an order, a lawyer or party may request that a copy of the order be mailed upon entry. If the clerk fails to mail a copy of the order immediately after entry, the parties prejudiced may pursue relief through Rule 213 in delinquent or unruly cases and Rule 310 in dependent and neglect cases, rather than pursuant to this rule.

Subdivision (c) provides that the entire rule is not applicable to the time provided to serve a

summons, make a probable cause determination pursuant to Rules 203 and 302, ratify a permanency plan pursuant to T.C.A. § 37-2-403(a), or hold a permanency hearing pursuant to T.C.A. §§ 37-1-166(g) and 37-2-409. The time period of 48 hours for making the probable cause determination pursuant to Rules 203 and 302 is compulsory and may not be extended by the court. The timeframes for ratification of the permanency plan and holding permanency hearings are federally mandated and tied to funding requirements for children in foster care. Service of a summons or subpoena is also excepted from this rule.

Subdivision (c) also tolls the time for a child charged with a delinquent offense and found to be incompetent to stand trial. An adjudicatory hearing or hearing to transfer the child to criminal court may not be held until such time as the child is found to be competent to stand trial.

Compiler's Notes. The adoption of Rule 110, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 110 provided that it take effect July 1, 2016.

Rule 111. Scheduling conferences and orders.

(a) **Conference.** In any action, the court may in its discretion, or upon motion of any party, conduct a conference with the attorneys for the parties and any unrepresented parties, in person, by telephone, or other suitable means, and thereafter enter a scheduling order that limits the time to:

(1) join other parties and to amend the pleadings;

(2) file and hear motions;

(3) complete discovery; and

(4) set the matter for adjudication.

(b) **Scheduling Order.** After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order.

(c) **Sanctions.** The court may sanction a party or a party's attorney if:

(1) a party or party's attorney fails to obey a scheduling order, or

(2) no appearance is made on behalf of a party at a scheduling conference, or

(3) a party or party's attorney is substantially unprepared to participate in the conference, or

(4) a party or party's attorney fails to participate in good faith,

In lieu of or in addition to any other sanction, the court may require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the court finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust. [Added by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. The 2016 amendments added this rule for the purpose of reducing unnecessary delays. It is based on parts of Rule 16 of the Tennessee Rules of Civil Procedure. This rule does not preclude a court entering a scheduling order without holding a pretrial conference.

Judges may consider entering a scheduling order at a preliminary hearing in a dependent and neglect proceeding. The scheduling order may include, but is not limited to, the dates of the Department's child and family team meeting, ratification hearing, foster care review board, adjudication, and dispositional hearings.

See Rule 37.02 of the Tennessee Rules of Civil Procedure for guidance regarding sanctions.

Compiler's Notes. The adoption of Rule 111, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 111 provided that it take effect July 1, 2016.

Rule 112. Attendance of parties and other necessary persons.

(a) **Initial Inquiry by Court.** At the beginning of each hearing, the court shall ascertain whether all necessary persons are before the court, which may include the child, parents (including alleged biological fathers), guardian or other custodian, and other parties and participants to the proceeding. If a necessary person is not present, the court shall determine whether notice of the hearing was provided to that person and whether the hearing may proceed.

(b) **Responsibility of Department when Party to Proceeding.** If a parent's identity or whereabouts are unknown and the Department of Children's Services is a party to the proceedings, the court shall ascertain whether the Department has made reasonable efforts to determine the identity and the whereabouts of the absent parent and include such finding in its order.

(c) **Participation by Contemporaneous Means.** In any proceeding, for good cause shown in compelling circumstances and with appropriate safeguards, the court may permit participation in open court by contemporaneous audio-visual transmission from a different location. However, during a delinquent or unruly adjudicatory hearing, a witness may only testify from a different location if the child has waived the right to confrontation. [Added by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. The 2016 amendment is based on the requirements of the previous rule regarding permanency hearings. It is important that juvenile courts make the same inquiries at all hearings. If the court determines that an absent party did not receive adequate notice of the hearing, then the hearing should be continued.

Statutory law should be consulted in determining whether a participant is a necessary person pursuant to subdivision (a). T.C.A. § 37-1-149(b) provides for the appointment of a court appointed special advocate (CASA) to act in the best interests of the child "during and after court proceedings." T.C.A. § 37-2-416 specifies that foster parents, prospective adoptive parents, or a relative providing care for a child in state custody should be notified of any hearing or review to be held with respect to the child. The statute indicates these persons have a right to be heard at any hearing or review. However, these statutes do not confer party status to CASA volunteers, foster parents, prospective adoptive parents, or a relative providing care for a child. If these participants are to testify, they should be treated as any other witness.

When a parent, who is absent due to that parent's incarceration, expresses a desire to participate by audio-visual means, the court should request that the facility make reasonable accommodations to allow that parent's participation possible. If the facility where the parent is incarcerated is able to transport and guard the parent for the purpose of in-person participation, the court should assist with coordinating those efforts.

When the court is determining whether or not the Department of Children's Services has made reasonable efforts to ascertain the identity and whereabouts of an absent parent, the court may find it helpful to consult the Department's Administrative Policies and Procedures on conducting diligent searches.

Subdivision (c) is similar to Tenn. R. Civ. P. 43.01 and allows for participation by a party or witness by contemporaneous audio-visual transmission from a different location. This should be allowed only for good cause, in compelling circumstances, and with appropriate safeguards. Additionally, a number of statutes permit telephonic testimony in certain types of cases. *See, e.g.*, Tenn. Code Ann. § 24-7-121(d) (2000) (permitting telephonic testimony regarding payment records in child support cases); Tenn. Code Ann. § 34-8-106(b) (Supp. 2014) (permitting witnesses located in other states to testify by telephone in conservatorship or guardianship proceedings); Tenn. Code Ann. § 36-1-113(f)(3) (2014) (permitting an incarcerated parent or guardian to participate by telephone in a hearing to terminate parental rights); Tenn. Code Ann. § 36-5-2316(f) (2014) (permitting a witness located in another state to testify by telephone in cases under the Uniform Interstate Family Support Act); Tenn. Code Ann. § 36-6-214(b) (2014) (permitting a witness located in another state to testify by telephone in cases under the Uniform Child Custody Jurisdiction and Enforcement Act). Participation by an attorney from a different location may be appropriate in preliminary or administrative matters.

Compiler's Notes. The adoption of Rule 112, as promulgated and adopted by the Su-

preme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 112 provided that it take effect July 1, 2016.

Law Reviews. Protecting Our Most Vulnerable Citizens: New Guidelines Clarify, Strengthen Mission for Guardians Ad Litem, 38 No. 6 Tenn. B.J. 13 (2002).

Rule 113. [Reserved.]

Rule 114. Confidentiality of proceedings.

(a) **Dependent and Neglect Proceedings.** Dependent and neglect cases shall not be open to the public.

(b) **Delinquent and Unruly Proceedings.** Delinquent and unruly cases are open to the public. However, in the discretion of the court, the general public may be excluded from any proceeding. On application of a party or on the court's own initiative, the court may determine that a proceeding, in whole or in part, should be closed except to those persons having a direct interest in the case. In determining whether to close the proceedings, and thereby balancing the interests of the parties and the public's interests in open proceedings, the court shall apply the following rules:

(1) When closure is sought by a party:

(A) The party seeking to close the hearing shall have the burden of proof;

(B) The court shall not close proceedings to any extent unless it determines that failure to do so would result in particularized prejudice to the party seeking closure that would override the public's compelling interest in open proceedings;

(C) Any order of closure must not be broader than necessary to protect the determined interests of the party seeking closure;

(2) The juvenile court must consider reasonable alternatives to closure of proceedings; and

(3) The juvenile court must make adequate written findings to support any order of closure. [Added by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. This rule clarifies that dependent and neglect cases should be closed and not open to the public. This proceeding should be open to only those persons who are necessary to the particular proceeding.

State v. James, 902 S.W.2d 911 (Tenn. 1995) authorizes the closure process specified in subdivision (b) for delinquent and unruly cases. Such proceedings ""may" be closed only through the process as outlined above.

Compiler's Notes. The adoption of Rule 114, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 114 provided that it take effect July 1, 2016.

Decisions Under Prior Law

1. Closure of Proceedings.

The juvenile court should balance the public's interest in open judicial proceedings and the litigants' right to a fair trial in deciding whether to close juvenile proceedings. State v. James, 902 S.W.2d 911, 1995 Tenn. LEXIS 328 (Tenn. 1995).

Rule 115. Recording hearings.

All hearings, except ex parte hearings, shall be audio recorded by the clerk of the court and retained for a minimum of one year from the date of the final disposition of the case. [Added by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. In accordance with T.C.A. §§ 37-1-124(c) and 37-1-159(a), the juvenile court is a court of record. Under this rule, all juvenile courts must create and maintain an audio recording of all hearings in juvenile court, in addition to keeping and maintaining appropriate minutes of hearings. Alternative means of recording, e.g. audio-visual equipment, are acceptable. This rule does not preclude simultaneous recording by a court reporter or other means of recording by a party.

This rule is not applicable to reviews conducted by a foster care review board.

Compiler's Notes. The adoption of Rule 115, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 115 provided that it take effect July 1, 2016.

Rule 116. Standard of proof.

In any hearing in which the standard of proof is not expressly designated by statute or rule, the standard of proof shall be preponderance of the evidence. [Added by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. Most hearings in juvenile court apply an appropriate standard of proof found in statute or rule. However, the standard of proof in some hearings is not expressly stated. For example, the rule governing competency hearings does not designate a specific standard of proof. Other examples would be court approval of pretrial diversion under these rules or hearings to terminate home placement under T.C.A. § 37-1-137(e). In any such hearing, and in the absence of appellate court guidance, the appropriate standard of proof to be applied by the court would be preponderance of the evidence.

Compiler's Notes. The adoption of Rule 116, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 116 provided that it take effect July 1, 2016.

Rule 117. Entry of order.

(a) **Effective.** Entry of a court order is effective when an order containing one of the following is marked on the face by the clerk as filed for entry:

(1) the signatures of the judge or magistrate and all parties or counsel, or

(2) the signatures of the judge or magistrate and one party or counsel with a certificate of counsel that a copy of the proposed order has been served on all other parties or counsel, or

(3) the signature of the judge or magistrate and a certificate of the clerk that a copy has been served on all other parties or counsel.

(b) **Duties of Clerk.** Following the entry of order, the clerk shall make appropriate docket notations and shall copy the order on the minutes, but failure to do so will not affect the validity of entry of the order. When requested by counselor self-represented parties, the clerk shall without delay mail or deliver a copy of the entered order to all parties or counsel. If the clerk fails to do so, a party prejudiced by that failure may seek relief under Rule 213 in delinquent or unruly cases and Rule 310 in dependent and neglect cases. [Added by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. This rule is designed to make uniform across the state the procedure for the entry of an order and to make certain the effective date of the

order. Under this rule, unless otherwise ordered by the court, the effective date of the order is the date of its filing with the clerk after being signed by the judge or magistrate, even though it may not be copied or entered on the minute book until a later date.

Prior to entry of a written order, parties are usually bound by the terms of the court's oral command, assuming the command is specific and unambiguous. *Blackburn v. Blackburn*, 270 S.W.3d 42 (Tenn. 2008). *See also Ross v. Ross*, No. M2008-00594-COA-R3-CV, 2008 Tenn. App. LEXIS 729, 2008 WL 5191329 (Tenn. Ct. App. Dec. 10, 2008) (holding that violating the court's oral command may constitute contempt if the command is specific and unambiguous in all respects).

Subdivision (a) specifies that an order of the court cannot be filed until it bears not only signature of the judge or magistrate, but also (1) the signatures of all parties or their counselor (2) a certificate of counselor the clerk that copies of the order have been served on all parties or counsel of record. The purpose is to provide notice to all parties or their counsel before the order becomes final to allow any party to file a timely appeal.

Occasionally, it is foreseeable that an order will not be entered promptly upon submission to the judge or magistrate although a party contemplates filing an appeal or post-trial motion. When a party anticipates such an order will not be promptly entered, the party may be assured of notice of entry by employing this rule. A lawyer or party who requests a copy of the order stamped with the entry date should not be prejudiced by a clerk's failure to comply with the request. Upon request, the clerk is to immediately mail or deliver a copy of the order to all concerned. The request and mailing, or failure to mail, do not affect the time for filing a post-trial motion or a notice of appeal. Parties prejudiced by clerical negligence may pursue relief pursuant to Rule 213 in delinquent or unruly cases and Rule 310 in dependent and neglect cases.

Rule 106 requires service on counsel when a party is represented.

Delivery of the order by the clerk may be accomplished by physically providing the order to the person, or through facsimile or electronic transmission of the order.

Advisory Commission Comments. [2018] Pursuant to Rule 118(c), the right to an appeal attaches upon entry of the final order.

Compiler's Notes. The adoption of Rule 117, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 117 provided that it take effect July 1, 2016.

The amendment of Rule 117 by the addition of the [2018] Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated January 8, 2018, was ratified and approved by 2018 House Resolution 208 and Senate Resolution 167. The order promulgating the amendment of Rule 117 by adding the [2018] Advisory Commission Comments, provided that it take effect July 1, 2018.

Rule 118. Appeals.

(a) **General.** Appeals shall be taken pursuant to T.C.A. § 37-1-159.

(b) **Right to an Attorney.** The right to an attorney at all stages of the proceedings shall include the right to an attorney in an appeal.

(c) **When Right Attaches.** The right to an appeal attaches upon entry of the final order.

(d) **Notification.** At any hearing which will result in a final order, the judge shall notify all parties of their right to appeal and the time limits for and manner in which the right to appeal can be perfected, and the right to an attorney on appeal.

(e) **Filing.** An appeal may be filed with the clerk of the juvenile court within 10 days of the entry of the final order. A prematurely filed notice of appeal shall be treated as filed on the day of entry of the order from which the appeal is taken.

(f) **Perfection.** An appeal is perfected when a notice of appeal is filed and:

(1) a filing fee is paid, or bond in lieu of the filing fee is posted;

(2) an affidavit of indigency is filed within the applicable time period and an order allowing filing on a pauper's oath is subsequently entered; or

(3) the court has previously determined the appellant to be indigent.

(g) **Indigent Status.** If leave to proceed as an indigent person is denied, the clerk of the juvenile court shall serve notice of the denial to the parties.

(h) **Record on Appeal.** When an appeal has been perfected, the clerk shall cause the entire record in the case, including the juvenile court's findings and written reports from probation officers, court employees or professional consultants, to be taken to the circuit court, where the case shall be set for a *de novo* hearing.

(i) **Parties to the Appeal.** All parties to the juvenile court proceeding shall be parties to the *de novo* hearing. [Added by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. Appeals under this rule do not include the request for a hearing before the juvenile court judge after entry of a magistrate's order. Such requests are controlled by T.C.A. § 37-1-107 governing magistrates.

The right to appeal accrues upon entry of a final order. Prior to the 2016 amendment, the previous language read "upon entry of the order of final disposition." The Commission modified the language to make clear that orders other than an order entered following a dispositional hearing may be considered "final orders." Black's Law Dictionary defines final order as "an order that is dispositive of the entire case." *Black's Law Dictionary* 1206 (9th ed. 2009). Tennessee case law holds that a judgment is final "when it decides and disposes of the whole merits of the case leaving nothing for the further judgment of the court." *Richardson v. Board of Dentistry*, 913 S.W.2d 446, 460 (Tenn. 1995) (citing *Saunders v. Metropolitan Gov't of Nashville & Davidson County*, 383 S.W.2d 28, 31 (Tenn. 1964)). Examples of final orders in juvenile court include, but are not limited to, orders revoking probation or terminating home placement, an order finding a child violated a valid court order pursuant to § 31.303 (f)(2) & (3) of Title 28 of the Code of Federal Regulations, dispositional orders, and the same orders issued by a magistrate that have not been appealed to the judge. This list is not exclusive, and other orders may be considered final orders. The Commission also notes the case of *In re Valentine*, 79 S.W.3d 539, 547 (Tenn. 2002), in which the court held that ratification of a permanency plan is not a final order.

This rule clarifies that a notice of an appeal, pursuant to T.C.A. § 37-1-159, must be filed with the clerk of the juvenile court and not with the youth services officer or any other office.

Pursuant to subdivision (i) and T.C.A. § 37-1-159, all parties subject to the final order are parties to the appeal.

This rule clarifies that an appeal is perfected when the notice of appeal is filed and the required filing fee is paid or otherwise satisfied. Such satisfaction includes payment of the fee or by proceeding *in forma pauperis*. See T.C.A. § 20-12-127.

See Rule 110 for the computation of time.

T.C.A. § 37-1-103, regarding the juvenile court's exclusive jurisdiction, has been amended to make clear that the juvenile court retains jurisdiction to the extent needed to complete any reviews or permanency hearings for children in foster care during the pendency of the appeal to administer the case until the appeal has been decided or further orders entered by the circuit court.

The constitutional prohibition against being placed twice in jeopardy for the same offense applies to juvenile court proceedings as well as adult proceedings. *Breed v. Jones*, 421 U.S. 519 (1975); *State v. Jackson*, 503 S.W.2d 185 (Tenn. 1973). Normally, jeopardy attaches in a nonjury proceeding when a witness is sworn to testify. *State v. Pennington*, 952 S.W.2d 420, 422 (Tenn. 1997). *See also, State v. Bryan*, W1999-00620-CCA-R3-CD, 2000 WL 33288749, 2000 Tenn. Crim. App. LEXIS 511 (Tenn. Crim. App. June 27, 2000). The constitutional prohibition against being placed twice in jeopardy for the same offense precludes the state from seeking de novo appeal in a delinquent or unruly case which has been dismissed following a hearing on the merits. *State v. Jackson*, supra.

Compiler's Notes. The adoption of Rule 118, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 118 provided that it take effect July 1, 2016.

DELINQUENT/UNRULY PROCEEDINGS.

Rule 201. Preliminary inquiry and informal adjustment.

(a) **Purposes.** The juvenile court preliminary inquiry is intended to:

(1) Provide for resolution of complaints by excluding from the juvenile court at its inception:

(A) Those matters over which the juvenile court has no jurisdiction;

(B) Those matters in which there appears to be insufficient evidence to support a petition or citation; or

(C) Those matters in which sufficient evidence may exist to bring a child within the jurisdiction of the juvenile court but which are not serious enough to require official action under the juvenile court law or which may be suitably referred to a non-judicial agency available in the community;

(2) Provide for the commencement of proceedings in the juvenile court by the filing of a petition or citation only when necessary for the welfare of the child or the safety and protection of the public.

(b) **Receipt of Complaint.** Any person or agency having knowledge of the facts may file a complaint with the juvenile court or an officer designated by the court alleging facts to indicate a child is delinquent or unruly. The court representative accepting the complaint shall note thereon the date and time of receipt of the complaint.

(c) **Duties of Designated Court Officer.** Upon receipt of the complaint, the designated court officer shall:

(1) Interview or otherwise seek information from the complainant, victim and any witness to the alleged offense.

(2) Conduct an interview with the child who is the subject of the complaint and the child's parents, guardian or legal custodian. At the beginning of the interview, the officer shall explain the nature of the complaint and inform the child of the right to counsel, where applicable, that if the child cannot afford an attorney one will be appointed if applicable, and that the child has a right to remain silent and any statements made by the child will not be admissible in any proceeding prior to the dispositional hearing.

(A) If the child invokes the right to an attorney, the designated court officer shall immediately suspend the interview, allow for the appointment or retention of counsel, and reschedule the matter.

(B) If the child chooses to proceed with the interview without counsel, the designated court officer shall obtain a written waiver from the child and proceed with the interview.

(3) If the designated court officer determines that the juvenile court does not have jurisdiction over the matter or there appears to be insufficient evidence to support the complaint, then the complaint shall be closed and no further action taken by the court.

(d) **Informal Adjustment.**

(1) If the designated court officer determines that the matter is not serious enough to require official action before the juvenile court judge, then the designated court officer may remedy the situation by giving counsel and advice to the parties through an informal adjustment. No admission of the allegation contained in the complaint shall be required of the child when determining whether to proceed with an informal adjustment. In determining whether informal adjustment should be undertaken, the designated court officer may consider:

(A) Whether the child has had a problem in the home, school or community which indicates that counsel and advice would be desirable;

(B) Whether the child and the parents, guardian or legal custodian seem able to resolve the matter with the assistance of the designated court officer or other court staff, and without formal juvenile court action;

(C) Whether further observation or evaluation by the designated court officer is needed before a decision can be reached;

(D) The attitude of the child, parents, guardian, or legal custodian;

(E) The concerns of the victim, child, the parents, guardian, or legal custodian, and/or any other affected persons or agencies;

(F) The age, maturity and mental condition of the child;

(G) The prior history or record, if any, of the child;

(H) The recommendation, if any, of the referring party or agency;

(I) The results of any mental health, drug and alcohol or other assessments or screenings of the child; and

(J) Any other circumstances which indicate that informal adjustment would be consistent with the best interest of the child and the public.

(2) The informal adjustment shall not occur without the consent of the child and the child's parents, guardian or other legal custodian. Prior to giving consent, the child must be notified that participation is optional and may be terminated by the child at any time.

(3) The informal adjustment process shall not continue beyond a period of 3 months from its commencement unless such extension is approved by the court for an additional period not to exceed a total of 6 months. The terms of the informal adjustment agreement may not include the imposition on the child of any financial obligations or the obligation to pay restitution.

(4) Upon successful completion of a period of informal adjustment, the complaint shall be closed and no further action taken by the court. If a petition has been filed, then the petition shall be dismissed with prejudice.

(5) The designated court officer may terminate the informal adjustment and proceed with formal court action if at any time the child or the child's parents, guardian or legal custodian:

(A) Declines to participate further in the informal adjustment process;

(B) Denies the jurisdiction of the juvenile court over the instant matter;

(C) Expresses a desire that the facts be determined by the court;

(D) Fails to comply with the terms of the informal adjustment program.

(6) Upon termination of the informal adjustment process, the designated court officer shall notify the child and the child's parent, guardian or legal custodian thereof, and the victim. The termination shall be reported to the court. Such notification shall include the basis for the termination.

(e) **Informal Adjustment Determined Inappropriate.** If the designated court officer determines informal adjustment to be inappropriate, then formal court proceedings shall commence with the filing of a petition or citation.

(f) **Statements of Child.** Any statements made by the child during the preliminary inquiry or informal adjustment are not admissible in the delinquent or unruly subject proceeding prior to the dispositional hearing. [Added by order filed December 29, 2015, effective July 1, 2016; and as amended by order filed December 21, 2016, effective July 1, 2017; adopted by order dated January 8, 2019, effective October 1, 2019.]

Advisory Commission Comments. The 2016 amendment combines two previous rules regarding intake in and informal adjustment in delinquent and unruly cases. The intent of this rule is to allow local courts flexibility in how they handle informal adjustment, but also to spell out those basic procedures which must take place in every case in which informal adjustment is undertaken to ensure that informal adjustment is voluntary, as required in T.C.A § 37-1-110.

The requirement in subdivision (b) that the court representative accepting a complaint shall note thereon the date and time of receipt of the complaint has been added to ensure that complaints are reduced to writing and documentation exists as to when the complaint was received. The term "complaint" includes, but is not limited to, a petition or citation. The complaint may be filed with the clerk of the court or another person designated by the court. The term "complaint" as used in these rules is not equivalent to a complaint referenced in the Rules of Civil Procedure.

As part of the preliminary inquiry, subdivision (c) requires the designated court officer to notify the child of the child's right to an attorney at the beginning of the interview with the child. T.C.A. § 37-1-126 provides that a child is entitled to be represented by an attorney in any delinquent proceeding. A child is entitled to an attorney when charged with an unruly offense when the child is in jeopardy of being removed from the home pursuant to T.C.A. § 37-1-132(b). Not all children charged with an unruly offense are entitled to an attorney. The right attaches when the child is in jeopardy of being placed outside the child's home with a person, agency or facility. Prior to placing custody of an unruly child with the Department of Children's Services, the court is obligated to refer the child to the Department's juvenile-family crisis intervention program pursuant to T.C.A. § 37-1-168. A child's assertion of the right to counsel should not preclude an informal adjustment when appropriate.

It should be noted that, although attitude may be a factor under subdivision (d)(l)(iv) to consider in determining whether to undertake informal adjustment, it should not be the sole basis for denying informal adjustment. Each locality is encouraged to adopt and implement standardized risk and needs assessment tools in order to assist in this process.

In many instances, the child or the child's family may desire to pay the alleged victim for any harm done. If the child and the victim agree to restitution, this can be done independently of the informal adjustment.

Subdivision (e) provides that when an informal adjustment is determined to be inappropriate then formal court proceedings shall commence with the filing of a petition or citation. If a petition has not been filed at this point in time, then such petition should be filed with the clerk of the court. If a citation has been filed that meets the requirements of T.C.A. § 40-7-118, then a petition need not be filed in order to commence formal proceedings. If an informal adjustment is determined to be inappropriate, the designated court officer should assess whether a pretrial diversion is appropriate.

Courts should develop written local procedures and criteria for initiating informal adjustments. Such criteria might include a listing of the types of cases, or charges, which might be handled by informal adjustment. Local rules should include a process by which the district attorney general, petitioner, or victim of the offense may object to an informal adjustment.

Advisory Commission Comments [2017]. The rule is amended by deleting the last sentence of subdivision 201(d)(3). That sentence (which provided, "The process shall only include counsel and advice, or referral to an agency available in the community for successful completion of a suitable treatment program, class or some form of alternative dispute resolution") was intended to have been deleted in the comprehensive revision of the Rules of Juvenile Procedure effective July 1, 2016, but was inadvertently included in the revision.

Additionally, the fifth paragraph of the original Advisory Commission Comment is amended by deleting references to subdivision 201(d)(3), which also should have been removed in the comprehensive revision of the Rules of Juvenile Procedure.

Advisory Commission Comments [2019]. Rule 201 is amended by adding the words "or citation" to subsections (a)(1)(B) and (a)(2) as Tenn. Code Ann. § 37-1-115(c) specifically provides for the issuance of a citation in certain cases, after the passage of 2018 Tenn. Pub. Acts, ch. 1052, § 12. Subsections (d)(1) and (d)(3) are amended to conform to Tenn. Code Ann. § 37-1-110(a)(2) and (d) (2018 Tenn. Pub. Acts, ch. 1052, §§ 10–11 (effective July 1, 2018)). Subdivision (f) is amended by deleting the word "any" and substituting "the delinquent or unruly subject" before the word "proceeding" to clarify the original intent of the rule that statements made by the child during the preliminary inquiry or informal adjustment are not admissible prior to the dispositional hearing in the subject case only Tenn. Code Ann. § 37-1-110(d).

Compiler's Notes. The adoption of Rule 201, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 201 provided that it take effect July 1, 2016.

The amendment of Rule 201, which amended subdivision (d)(3), amended the original Advisory Commission Comments and added the [2017] Advisory Commission Comments, as

promulgated and adopted by the Supreme Court in its order dated December 21, 2016, was ratified and approved by 2017 House Resolution 18 and Senate Resolution 15. The order promulgating the amendment of subdivision (d)(3), the amendment of the original Advisory Commission Comments and the addition of the [2017] Advisory Commission Comments, provided that it take effect July 1, 2017.

The amendment of Rule 201, amended subdivisions (a)(1)(B), (a)(2), (d)(1), (d)(3), and (f) and added the [2019] Advisory Commission Comment, as promulgated and adopted by the Supreme Court in its order dated January 8, 2019, was ratified and approved by 2019 Special Session House Resolution 3 and 2019 Regular Session Senate Resolution 13. The order promulgating amendment of Rule 201 by amendment of subdivisions (a)(1)(B), (a)(2), (d)(1), (d)(3), and (f) and the addition the [2019] Advisory Commission Comment, provided that it take effect October 1, 2019.

Rule 202. Pretrial diversion.

(a) **Pretrial Diversion Agreement.** If the designated court officer determines that the matter is appropriate for pretrial diversion, the pretrial diversion agreement shall be in writing and signed by the child, the child's parent, guardian or other legal custodian and the designated court office. No admission of the allegation contained in the petition shall be required of the child when determining whether to proceed with a pretrial diversion. The agreement must be approved by the court before it is of any force and effect.

(b) **Consent.** The pretrial diversion shall not occur without consent of the child and the child's parent, guardian or other legal custodian.

(c) **Time Limits.** The pretrial diversion process may continue for a period up to 6 months, unless the child is discharged sooner by the court. Upon application of any party made prior to the expiration of the initial time period, and after notice and a hearing, the diversion may be extended for a period not to exceed an additional 6 months.

(d) **Modification.** The parties, by mutual consent and with court approval, may modify the requirements of the agreement at any time before its termination.

(e) **Violation of Pretrial Diversion.** If failure to comply with the agreement is alleged, the child shall be given written notice of the alleged violation and an opportunity to be heard on that issue prior to the reinstatement of proceedings pursuant to the original charge. Notice of the failure to comply must be filed prior to the expiration of the pretrial diversion. The filing of the notice extends the period of pretrial diversion pending a prompt hearing on the merits of the alleged violation.

(f) **Statements of Child.** Any statements made by the child during the preliminary inquiry or pretrial diversion are not admissible in the delinquent or unruly subject proceeding prior to the dispositional hearing. [Added by order filed December 29, 2015, effective July 1, 2016; and as amended by order filed December 21, 2016, effective July 1, 2017; adopted by order dated January 8, 2019, effective October 1, 2019.]

Advisory Commission Comments. The procedures set forth in this rule essentially allow for a process similar to informal adjustment, with no official finding as to guilt; however, because conditions of a pretrial diversion may be more demanding than those allowed in an informal adjustment there must be court approval of any agreement. Prior to determining whether a case is appropriate for pretrial diversion, the designated court officer should follow the procedures in Rule 201(a)-(c), regarding the preliminary inquiry.

Courts should develop written local procedures and criteria for initiating pretrial diversion. Such criteria might include a listing of the types of cases, or charges, which might be handled by pretrial diversion. Pretrial diversion might be initiated by the parties or by the

court itself, through motion or through whatever other procedure the court determines is appropriate. Local rules and procedures should ensure the district attorney general is notified of cases in which pretrial diversion is being considered, in light of the legitimate public interest in the disposition of more serious cases.

Pursuant to T.C.A. § 37-1-110, if the child completes the pretrial diversion agreement, the case is dismissed. If the court, or the designated court officer, determines that the case is serious enough that such dismissal should not occur, the case should proceed to court as in any other case warranting official court action, and, if the child readily admits guilt and wishes to negotiate a settlement based upon a plea of guilty, such negotiated settlement should be handled in accordance with Rule 209.

Advisory Commission Comments [2017]. The rule is amended by deleting the first sentence of subdivision 202(d) and changing the title to "Modification." That sentence (which provided, "In addition to any counsel and advice authorized for an informal adjustment, sanctions, including, but not limited to community service work and monetary restitution may be made a part of the agreement") was intended to have been deleted in the comprehensive revision of the Rules of Juvenile Procedure effective July 1, 2016, but was inadvertently included in the revision.

Additionally, the last sentence of the first paragraph of the original Advisory Commission Comment is deleted, because it also should have been removed in the comprehensive revision of the Rules of Juvenile Procedure.

Advisory Commission Comments [2019]. Rule 202(a) is amended to conform to Tenn. Code Ann. § 37-1-110(d) (2018 Tenn. Pub. Acts, ch. 1052, § 11) (effective July 1, 2018). Subdivision (f) is amended by deleting the word "any" and substituting "the delinquent or unruly subject" before the word "proceeding" to clarify the original intent of the rule that statements made by the child during the preliminary inquiry or informal adjustment are not admissible prior to the dispositional hearing in the subject case only Tenn. Code Ann. § 37-1-110(d).

Compiler's Notes. The adoption of Rule 202, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 202 provided that it take effect July 1, 2016.

The amendment of Rule 202, which amended subdivision (d), amended the original Advisory Commission Comments and added the [2017] Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 21, 2016, was ratified and approved by 2017 House Resolution 18 and Senate Resolution 15. The order promulgating the amendment of subdivision (d), the amendment of the original Advisory Commission Comments and the addition of the [2017] Advisory Commission Comments, provided that it take effect July 1, 2017.

The amendment of Rule 202, amended subsections (a) and (f) and added the [2019] Advisory Commission Comment, as promulgated and adopted by the Supreme Court in its order dated January 8, 2019, was ratified and approved by 2019 Special Session House Resolution 3 and 2019 Regular Session Senate Resolution 13. The order promulgating amendment of Rule 202 by amendment of subsections (a) and (f) and the addition the [2019] Advisory Commission Comment, provided that it take effect October 1, 2019.

Attorney General Opinions. Pretrial diversion is not available to juveniles who are appealing a finding of delinquency, OAG 05-012 (1/26/05).

Rule 203. Procedures upon taking a delinquent child into custody.

(a) **Delinquent child taken into custody and released.** When a child is taken into custody and is not detainable, the child shall be released to the child's parent, guardian or other custodian within a reasonable time. The child and the person to whom a child is released shall be served a summons requiring the child's return to court at such time and place as the court directs.

(b) **Delinquent child taken into custody and not released.**

(1) If a child is taken into custody without an order and:

(A) The child is alleged to be delinquent and held in secure detention, a probable cause determination that an offense has been committed by the child shall be made by a magistrate within 48 hours of the child being taken into custody; or

(B) The child is alleged to be delinquent and detained under the special circumstances exception pursuant to T.C.A. § 37-1-114(c)(3), a probable cause determination that an offense has been committed by the child and a

finding of special circumstances shall be made by a magistrate within 24 hours, excluding nonjudicial days, but no later than 48 hours of the child being taken into custody.

In either case, if the magistrate does not make the required findings, the child shall be immediately released to the child's parent, guardian or other custodian. If the required findings are made and the child remains in secure detention, a detention hearing must be held within the timeframes outlined in subdivision (b)(2). "Magistrate" means a person designated as such pursuant to the provisions of T.C.A §§ 37-1-107 or 40-1-106. Probable cause determinations shall be based on a written affidavit, which may be sworn to in person or by audio-visual electronic means.

(2) If a child alleged to be delinquent is taken into custody pursuant to an order of attachment or if a probable cause determination is made pursuant to paragraph (b), the child shall not remain in detention longer than 72 hours, excluding nonjudicial days, but in no event more than 84 hours, unless a detention hearing is held. For a child so detained, a petition setting forth the allegations against the child and the basis for asserting the court's jurisdiction shall be filed prior to the child's detention hearing.

(c) **Secure detention of delinquent child.**

(1) A child alleged to be delinquent and not released shall be placed in a juvenile detention facility. The court and the child's parent, guardian or other custodian shall immediately be notified of the child's location and of the reason for the child's detention.

(2) A child not released shall be informed upon being placed in the detention facility, both verbally and in writing, by a person designated by the court of:

(A) The reason for being detained, including the nature of the alleged offense;

(B) The child's right to a detention hearing and an explanation of the purpose of a detention hearing;

(C) The child's right to an attorney and that an attorney will be appointed to represent the child as soon as possible prior to the detention hearing if the child's parent or custodian is financially unable or refuses to retain an attorney for the child;

(D) The right not to say anything about the charges being placed against the child and that anything the child says may be used against the child in court;

(E) The right to communicate with the child's attorney and parent, guardian or other custodian, and that provision will be made by the detention facility to allow for such private communication.

(d) **Detention Hearing.**

(1) *Advisement of Rights.* At the beginning of the detention hearing, the court shall inform the parties of the purpose of the hearing and the possible consequences of the detention hearing, and shall inform the child of the child's rights pursuant to Rule 205.

(2) *Evidence.* Any finding that there is probable cause to believe that an offense has been committed, and that the child committed it, shall be based on evidence admitted pursuant to the Rules of Evidence, except that such evidence may include reliable hearsay.

(3) *Required Determinations.* The court, in making the decision on whether to detain the child, shall:

(A) Determine whether probable cause exists as to whether the charged offense or a lesser included offense has been committed and whether the child committed it; and

(B) If probable cause has been determined, whether the offense is one which qualifies for continued detention under T.C.A § 37-1-114; and

(C) If probable cause has been determined and the offense qualifies for continued detention, determine whether it is in the best interest of the child and the community that the child remain in detention pending further hearings. In making this best interest determination, the court should consider the likelihood that the child would abscond or be removed from the jurisdiction of the court; and

(D) Determine whether any less restrictive alternatives to detention are available which would satisfy the court's best interest determination above. The court may impose conditions on release such as the setting of bail, restrictions on the child's movements and activities, requirements of the child's parent, guardian, or custodian, or other community-based alternatives as an alternative to continued detention.

(4) *Release of Child.* If the court does not find the child is detainable as above, the child shall be released to an appropriate parent, guardian or responsible adult. The court may impose conditions on release as above, and a hearing shall be scheduled.

(5) *Continued Detention of Child.* If the court orders the child to be detained, or if the child waives a the detention hearing, the court shall ensure that the child's case will be scheduled so as to limit the time the child spends in secure detention.

(6) *Waiver of Time Limit for Detention Hearing.* The time limit for the hearing may be waived by a knowing and voluntary written waiver by the child. Any such waiver may be revoked at any time, at which time a detention hearing shall be held within the time frame outlined in T.C.A. § 37-1-117. [Added by order filed December 29, 2015, effective July 1, 2016; and as amended by order filed December 21, 2016, effective July 1, 2017.]

Advisory Commission Comments. This rule applies only to children alleged to be delinquent. A child alleged to be unruly and taken into custody may not be held in a secure facility for a period longer than allowed in T.C.A. § 37-1-114.

Subdivision (b) clarifies that upon a warrantless arrest of a child alleged to be delinquent, a neutral and detached magistrate must make a probable cause determination that the child has committed the delinquent offense within 48 hours of the arrest. This determination may be made *ex parte*. Under the Fourth Amendment, in order for a state to detain a person arrested without a warrant, a judicial officer must determine that probable cause exists to believe the person has committed a crime. *Gerstein v. Pugh*, 420 U.S. 103 (1974). The judicial officer must make this determination "either before or promptly after arrest. "*Id.* at 124. Seventeen years later, the Court further refined its *Gerstein* decision, holding that probable cause determinations must be made within 48 hours of a warrantless arrest. *County of Riverside v. McLaughlin*, 500 U.S. 44, 57 (1991) ("A jurisdiction that chooses to offer combined [probable cause and arraignment] proceedings must do so as soon as is reasonably feasible, but in no event later than 48 hours after arrest"). Although the Supreme Court has not addressed whether *Gerstein* hearings are required for juveniles, the Sixth Circuit has answered this question affirmatively. *Cox v. Turley*, 506 F.2d 1347, 1353 (6th Cir. 1974) ("Both the Fourth Amendment and the Fifth Amendment were violated because there was no prompt determination of probable cause — a constitutional mandate that protects juveniles as well as

adults"). See also *State v. Bishop*, No. W2010-01207-SC-R11-CD, 2014 Tenn. LEXIS 189, 2008 WL 888198 (Tenn. 2013), and *State v. Huddleston*, 924 S.W.2d 666 (Tenn. 1996).

The probable cause determination in subdivision (b)(l) must be based on a written affidavit reciting the facts, which may be sworn to in person or by audio-visual electronic means. Black's Law Dictionary defines affidavit as "(a) voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths." *Black's Law Dictionary* 66 (9th ed. 2009).

Subdivision (b)(2) refers to an "order of attachment." The Commission uses the phrase "order of attachment" to refer to any court order commanding that the child be taken into custody. Some jurisdictions may refer to these orders as orders of arrest or arrest warrants. Such orders of attachment may direct the appropriate authorities to take the child to a detention facility, to the police station, to court, or to another place.

Wherever possible, community-based alternatives to secure detention facilities should be used. This preference is in keeping with the prohibition in T.C.A. § 37-1-114 against any detention or shelter care of children unless "there is no less drastic alternative to removal of the child from the custody of his parent, guardian or legal custodian available which would reasonably and adequately protect the child's health or safety or prevent the child's removal from the jurisdiction of the court pending a hearing."

The Commission recognizes that detention is a severe curtailment of the child's liberty and affects not only the child, but the child's parent, guardian or custodian. A child in detention is presumed to be innocent and retains all rights guaranteed to children facing charges but who are not detained. Accordingly, detention should be as brief as possible and should be used only when absolutely necessary to accomplish the objectives of the statute. The court should determine, on an individual basis, whether the child's continued detention is warranted under T.C.A. § 37-1-114 and that there are no less drastic alternatives available. The court should make specific findings of fact justifying continued detention.

A child alleged to be delinquent has the right to an attorney at the detention hearing, as well as all other stages of a delinquency proceeding. The court must inform the child of the right to an attorney at the beginning of the hearing, pursuant to the procedures in Rule 205. Also, in order for a child to effectively waive the right to an attorney, the court must comply with the process to obtain a knowing and voluntary waiver in that rule.

Courts should have an established practice in place for the appointment of attorneys as soon as possible prior to detention hearings. If at all practicable, detention hearings should not be continued for the sole reason of locating and appointing attorneys. The Commission recognizes that time constraints may interfere with this objective, but would stress that continued deprivation of liberty is a significant event in the life of a child.

Advisory Commission Comments [2017]. A new sentence (which reads, "If the required findings are made and the child remains in secure detention, a detention hearing must be held within the timeframes outlined in subdivision (b)(2)") is added to subdivision (b)(1) to provide further clarification that a detention hearing must be held even though the required 48-hour probable cause findings are made.

Compiler's Notes. The adoption of Rule 203, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 203 provided that it take effect July 1, 2016.

The amendment of Rule 203, which amended subdivision (b) and added the [2017] Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 21, 2016, was ratified and approved by 2017 House Resolution 18 and Senate Resolution 15. The order promulgating the amendment of subdivision (b) and the addition of the [2017] Advisory Commission Comments, provided that it take effect July 1, 2017.

Law Reviews. Tennessee Bar Association Committee Reports 1983-84, 20 No. 3 Tenn. B.J. 27 (1984).

The Incarceration of the Status Offender, 18 Mem. St. U.L. Rev. 713 (1988).

Decisions Under Prior Law

1. Construction with Other Statutes and Rules.

T.C.A. § 37-1-115 provides that, within a reasonable time of taking a child into custody, the police must either release the child to his parents' custody, bring the child before the court, or place the child in an appropriate detention facility for juveniles, thereby triggering procedural protections relating to the detention of juveniles. State v. Carroll, 36 S.W.3d 854, 1999 Tenn. Crim. App. LEXIS 1346 (Tenn. Crim. App. 1999).

Rule 204. Use of restraints on children in the courtroom.

(a) Children appearing in juvenile court may be restrained if the court determines that:

(1) The behavior of the child represents a threat to his or her safety or the safety of other people in the courtroom; or

(2) The behavior of the child presents a substantial risk of flight from the courtroom; and

(3) There are no less restrictive alternatives to restraints that will prevent flight or risk of harm to the child or another person in the courtroom.

(b) Any party may request to be heard as to whether or not restraints are necessary, and upon request, a judge shall make findings on the record regarding the decision to restrain the child. [Added by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. The general statutory requirement is to "remove the taint of criminality" from children appearing in our juvenile courts.

It is not anticipated by this Commission that juvenile courts will be required to engage in an extensive fact-finding hearing prior to ruling that restraints on a particular child are appropriate. It is further understood that Tennessee juvenile courtrooms vary greatly in structure, availability of security personnel and their ability to handle security concerns. A few of the factors the court may wish to consider prior to ruling restraints are appropriate are:

1) The seriousness of the charges;

2) The delinquency history of the child;

3) Any past disruptive courtroom behavior by the child;

4) Any past escape attempts by the child;

5) Any security risks at a particular time in a courtroom due to structure and/or low staffing levels of security personnel.

The Commission is seeking to promote an individual determination by the court as to whether a child should be restrained in the courtroom. The focus of this rule should be balancing between the child's best interest and the safety of the courtroom. This rule only addresses children within the courtroom. It does not address transportation to and from the courthouse and to and from the courtroom.

A large number of children in delinquency proceedings have suffered neglect or abuse, and/or have physical or mental disabilities. Restraints on these children are particularly inappropriate in most circumstances.

Communication between a child and an adult attorney is often difficult, and restraints compound that problem. Children disengage from communication with their attorneys even more than adult defendants because "juveniles have limited understanding of the criminal justice system and the roles of the institutional actors within it." *Graham v. Florida*, 560 U.S. 48, 51 (2010).

Compiler's Notes. The adoption of Rule 204, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 146 and Senate Resolution 78. The order promulgating the adoption of Rule 204 provided that it take effect July 1, 2016.

Rule 205. Notification and waiver of rights of children.

(a) **Right To Attorney.**

(1) *Notification of Right to Attorney.* In all proceedings in which a child is by law entitled to representation by an attorney, the court shall expressly inform the child of the right to an attorney. If a child waives the right to an attorney, the court shall inform the child of the continuing right to an attorney at all stages of the proceedings.

(2) *Waiver of Right to an Attorney.* No child shall be deemed to have waived the assistance of an attorney until and unless:

(A) The child has been fully informed of the right to an attorney;

(B) The child subsequently knowingly and voluntarily waives the right to an attorney; and

(C) The waiver is confirmed in writing by the child.

(3) *Appointment of Attorney.* When a child who is entitled to a court-appointed attorney does not knowingly and voluntarily waive the right to an attorney and cannot afford an attorney, or when the child's parents or other persons legally obligated to care for and support the child are able to afford an attorney but refuse to hire one, the court shall appoint an attorney and assess attorney's fees pursuant to T.C.A. § 37-1-150.

(b) **Notification And Waiver of Additional Rights at a Hearing.**

(1) *Notification of Rights to a Child Who has Waived the Right to an Attorney.* At the outset of any juvenile court hearing, the court shall advise any child who has waived the right to an attorney of:

(A) The right to remain silent;

(B) The right to plead not guilty;

(C) The right to a trial;

(D) The right to confront and cross-examine adverse witnesses;

(E) The right to present testimony on the child's behalf;

(F) The right to subpoena evidence on the child's own behalf;

(G) The right to appeal any final order, the time limits for and manner in which the right to appeal can be perfected, and the right to an attorney on appeal.

(2) *Notification and Waiver Where Child Represented by An Attorney.* When the child is represented by an attorney, the attorney shall fully advise the child of the child's rights under the Constitution of the United States, the Constitution of Tennessee, any other law, and any rule of court. The child shall make the decision whether or not to waive those rights, after full consultation with the child's attorney. The obligation of the attorney to advise the child of the child's rights in no way diminishes the Court's obligations both to advise the child of the child's rights and to ascertain whether waivers of those rights are made knowingly and voluntarily.

(3) *Waiver of Rights Where Child Not Represented by An Attorney.* When the child is not represented by an attorney, the child may not waive any rights guaranteed to the child under the Constitution of the United States, the Constitution of Tennessee, any other law, or any rule of court unless the Court has fully advised the child of the child's rights and has determined that the child knowingly and voluntarily waives those rights. The court shall not accept a waiver or deem a waiver to be knowing and voluntary unless or until the child has consulted with a knowledgeable adult who has no interest adverse to the child.

(c) **Knowing and Voluntary Waivers.**

(1) *Criteria for Knowing and Voluntary Waivers.* The court shall only accept a waiver if the child is able to make an intelligent and understanding decision based on the child's mental condition, age, education, experience, the nature or complexity of the case, or any other relevant factor.

(2) *Procedure for Making and Confirming Waivers.* Any and all waivers of rights at a hearing shall be made orally and in open court, and shall be confirmed in writing by the child and the judge. When the child is not represented by an attorney, the court shall advise the child in open court of the right to an appointed attorney. The court shall not proceed with the hearing unless the child has waived the right to an attorney in accordance with the

provisions of this rule. [Added by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. Children alleged to be delinquent and children alleged to be unruly and in jeopardy of being removed from the home have the right to an attorney pursuant to T.C.A. § 37-1-126. In addition, this statute also mandates appointment of an attorney for a child who is "not represented by the child's parent, guardian, guardian ad litem, or custodian" and who is alleged to be delinquent, or unruly and in jeopardy of being removed from the home. The statute contemplates that a child will not appear in court without adult guidance and representation. Parents are not automatically disqualified from fulfilling this function. However, as the Supreme Court has observed in a different context, "As a general rule, counsel should be provided, and ... any doubt should be resolved in favor of appointment of counsel." *State ex rei. Gillard v. Cook,* 528 S.W.2d 545, 548 (Tenn. 1975).

A "knowledgeable adult who has no interest adverse to the child," referenced in subdivision (b)(3), is a person who can provide advice to the child and who will have no interests that interfere with providing dispassionate and mature advice to the child. This person should have no interests that prevent the person from keeping the child's best interests and the child's desires in the forefront. A person who now or in the past brought charges against the child generally does not qualify. Where possible, this person should have a pre-existing relationship with the child. While parents generally satisfy this requirement, the court should determine the level of trust between the child and the child's parents before allowing the parent to satisfy this requirement. When a child is in the custody of the Department, its employees do not satisfy the requirement of this rule. Depending on the circumstances, a foster parent may qualify.

It is the responsibility of the attorney representing the child charged with a delinquent or unruly offense to fully advise the child of his or her rights. If a child chooses to waive his or her rights, the child can only do so once the court has determined that the child has been advised of each and every right and knowingly and voluntarily is waiving each of the rights.

All waivers of rights shall be made orally and in open court and confirmed in a writing signed by both the judge and the child waiving the rights. The confirming document can be a preprinted form, but must specify the rights that are being waived and must acknowledge that the individual is choosing to waive those rights.

Subdivision (c) provides that the court shall only accept a waiver by a child of his or her rights only if the child is able to make an intelligent and understanding decision based on certain factors. The Tennessee Supreme Court has applied the totality-of-the-circumstances test in analyzing juvenile waivers. *See State v. Callahan*, 979 S.W.2d 577 (Tenn. 1998).

The court should address the child, not the parents or other adults who are present in the courtroom, and should always take into account the child's age, mental condition, education, experience and the nature and complexity of the case when deciding how to question the child about the child's understanding of the rights and whether the child waives those rights. The court must address the child in language appropriate to that particular child.

Compiler's Notes. The adoption of Rule 205, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 205 provided that it take effect July 1, 2016.

Rule 206. Discovery.

(a) Each juvenile court shall ensure that the parties in delinquent and unruly proceedings have access to any discovery materials consistent with Rule 16 of the Rules of Criminal Procedure.

(b) An informal request for discovery is encouraged, but if the parties cannot agree as to discovery, then a formal discovery request shall be made. [Added by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. In drafting this rule, the Commission was concerned with potential burdens and delays that might be caused if existing criminal discovery methods were applied without modification to juvenile court proceedings. This does not preclude adoption by each court of local rules of procedure to implement the discovery mechanisms found in the Tennessee Rules of Criminal Procedure. The Commission emphasizes the mandate of Supreme Court Rule 18, which limits local rules to those "not inconsistent with ... the Rules of Juvenile Procedure[.]"

State v. Willoughby, 594 S. W.2d 388 (Tenn. 1980) holds that discovery rules do not apply to preliminary examinations and hearings. There-

fore, this rule would not apply to any probable cause hearing in juvenile court with the caveat that this rule is not the exclusive procedure for obtaining discovery. Please note that some discovery may be critical in a transfer hearing. The Court should use its discretion in granting access to information necessary to defend or prosecute a transfer case. The state must disclose any exculpatory evidence to the child's attorney per *Brady v. Maryland*, 373 U.S. 83 (1963).

If the parties cannot agree on discovery, then the Tennessee Rules of Criminal Procedure shall be utilized to ensure that each side has access to discovery materials in each case. If a request for discovery is made on behalf of the child and the district attorney is not prosecuting the case, the person prosecuting the case must comply with Rule 16 of the Rules of Criminal Procedure.

Juvenile court practitioners are advised to fully acquaint themselves with Rule 16 of the Rules of Criminal Procedure.

Compiler's Notes. The adoption of Rule 206, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 206 provided that it take effect July 1, 2016.

Rule 207. Procedures related to child's mental condition.

(a) **At Time of Adjudicatory Hearing.**

(1) If at any time prior to or during the adjudicatory hearing in a delinquent or unruly case, the court has reasonable grounds to believe the child named in the petition may be incompetent to proceed with an adjudicatory hearing, the court shall stay the proceedings pending a determination of the child's competency to stand trial. Reasonable grounds to believe that the child is incompetent to proceed may be based upon an oral or written motion by any party or upon the court's own initiative.

(2) The court shall order one or more evaluations of a child to assist in determining whether the child is mentally competent to stand trial. The evaluations are to be performed by a licensed psychologist or psychiatrist who has expertise in child development and has received training in forensic evaluation procedures through formal instruction, professional supervision, or both.

(3) If the issue of a child's competency to stand trial arises prior to the child having either a retained or appointed attorney, no further action will occur until an attorney is in place to represent the child.

(4) In any case in which such an evaluation is ordered, the court shall schedule a hearing in order to determine competency.

(5) If the child is found to be incompetent to proceed with the adjudicatory hearing, the adjudication shall be stayed pending further proceedings and time limits shall be tolled. If the court finds that the provision of services or treatment to the child may result in the child achieving competence, then the court may order such treatment or services. In addition, the court may inform the parties as to procedures for voluntary admission to public and private mental health facilities in lieu of judicial commitment. If the child does not meet the standards for involuntary hospitalization, but remains incompetent to stand trial, the child shall be released to the appropriate guardian or custodian pending further hearings in juvenile court.

(6) If the child is found to be competent the court shall proceed with an adjudicatory hearing.

(7) The child's mental competence to stand trial may be raised at any stage of the proceeding by motion, and the court has a continuing obligation to consider the issue when raised.

(b) **At Time of the Offense; Affirmative Defense.**

(1) If the child named in the petition intends to introduce expert testimony relating to a mental disease, defect, or other condition bearing upon the issue of whether the child had the mental state required for the offense charged, the child shall, within the time provided for the filing of pretrial motions or at such later time as the court may direct, notify the court in writing of such intention and file a copy of such notice with the clerk. Upon filing of the notice, upon motion of the state, or on its own initiative, the court may cause the child to be examined in accordance with the procedures set forth in this rule and consistent with the procedures outlined in Rule 12.2 of the Rules of Criminal Procedure.

(2) The court, upon good cause shown and in its discretion, may waive the requirements in subdivision (b)(1) and permit the introduction of such defense, or may continue the hearing for the purpose of an examination in accordance with the procedures set forth in this rule. A continuance granted for this purpose tolls the time limits for adjudicatory hearings.

(c) **Inadmissibility of Child's Statements During Competency Examination.** No statement made by the child in the course of any examination relating to his or her competency to stand trial (whether conducted with or without the child's consent), no testimony by any expert based on such statement, and no other fruits of the statement are admissible in evidence against the child in a delinquent or unruly adjudicatory hearing. [Added by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. There are no reported cases in Tennessee addressing the question of whether or under what circumstances an insanity defense is available in juvenile court proceedings. Application of this defense in juvenile proceedings has been recognized in various jurisdictions. *See, e.g. In re Two Minor Children*, 592 P.2d 166 (Nev. 1979); *State ex reI. Causey*, 363 So. 2d 472 (La. 1978); *Winburn v. State*, 145 N.W.2d 178 (Wis. 1966); *see also In re Ramon M.*, 584 P.2d 524 (Cal. 1978); and *State v. Ferrell*, 209 S.W.2d 642 (Tex. Civ. App. 1948). The leading case holding the insanity defense inapplicable to delinquency proceedings, *In re H.C.*, 256 A.2d 322 (N.J. 1969), was subsequently held to be overridden by modifications of the New Jersey Juvenile Court Act. *In re R.G. W.*, 342 A.2d 869 (N.J. 1975), aff"d, 358 A.2d 473 (N.J. 1976). However, at least one jurisdiction continues to preclude the insanity defense from being asserted at the adjudicatory hearing (although recognizing the claim of incompetence to stand trial). *See In re C. W.M.*, 407 A.2d 617 (D.C. 1979); *see also Golden v. State*, 21 S.W.3d 801 (Ark. 2000).

This rule is not intended to alter the substantive law respecting the applicability of the insanity defense to juvenile court proceedings in Tennessee or to delineate those circumstances under which such a defense may be available. Rather, it provides procedures for those cases in which "the child intends to introduce expert testimony relating to mental disease, defect or other condition bearing upon the issue of whether the child had the mental state required for the offense charged."

The 2016 amendment was drafted to articulate a clear difference between a finding of incompetency by the court and an affirmative defense of diminished capacity. In addition, the rule clarifies that a child's statements made during an evaluation of their competency shall not be used against them in court as an admission of guilt.

Rule 110 provides that in a delinquency proceeding the computation of time shall toll during the period in which the child is found to be incompetent to stand trial.

Compiler's Notes. The adoption of Rule 207, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 207 provided that it take effect July 1, 2016.

Rule 208. Transfer to criminal court.

(a) **Notice of Intent to Seek Transfer of Jurisdiction of Child to Criminal Court.** The state must file written notice, in good faith and not for the purpose of delay, of the intent to seek transfer in accordance with Tenn. Code Ann. § 37-1-134. The decision on whether or not the state will seek transfer must be made within 90 days of the child being charged with an offense and no less than 14 days prior to the transfer hearing or the adjudicatory hearing, whichever occurs first. This time period may be extended by the court for good cause. The written notice of intent to seek transfer must be filed at least 14 days prior to the transfer hearing. Once that notice is filed, the court shall not hear the case on its merits, but shall proceed to conduct a hearing only in accordance with Tenn. Code Ann. § 37-1-134.

(b) **Transfer Hearing.**

(1) At the transfer hearing:

(A) A prosecutor shall represent the state;

(B) The child shall be represented by an attorney;

(C) The child may testify as a witness in his or her own behalf, and may call and examine other witnesses and produce other evidence on his or her own behalf, however no plea shall be accepted by the court; and

(D) Each witness shall testify under oath or affirmation and be subject to cross-examination.

(2) The same rules of evidence shall apply as are applicable to a preliminary examination, pursuant to the Tennessee Rules of Criminal Procedure.

(3) Unless the child appears in any way to be mentally ill or intellectually disabled, and unless personally or through counsel asserts that the child is mentally ill or intellectually disabled, it shall be presumed that the child is not committable to an institution for the mentally ill or intellectually disabled, and the court may so find. If mental illness is alleged, the court shall order psychological or psychiatric examination at any stage of the proceeding.

(4) If the court determines that the criteria for transfer have been satisfied and finds that there is probable cause for transfer, the child may be transferred to criminal court.

(5) Any order of transfer shall specify the grounds for transfer and set bond if the offense is bailable pursuant to state law. [Added by order filed December 29, 2015, effective July 1, 2016; and as amended by order filed December 21, 2016, effective July 1, 2017.]

Advisory Commission Comments. When considering whether "reasonable grounds" is equivalent to "probable cause," the courts in Tennessee have opined: "While no definition of 'reasonable grounds' is provided in the statute, the term has been used interchangeably with 'probable cause' by the courts of this state." *State v. Bowery*, 189 S.W.3d 240, 248 (Tenn. Crim. App. 2004); *State v. Melson*, 638 S.W.2d 342, 350 (Tenn. 1982); *State v. Humphreys*, 70 S.W.3d 752, 761 (Tenn. Crim. App. 2001).

Regarding the provision in subdivision (b)(1) that the child shall be represented by an attorney, the child must have the benefit of an attorney at the transfer hearing due to the significant ramifications if the child's case is transferred to adult court.

The U. S. Supreme Court's rulings in *Miller v. Alabama*, 132 S. Ct. 2455 (2012), *Graham v. Florida*, 560 U.S. 48 (2010), and *Roper v. Simmons*, 543 U.S. 551 (2005) recognized that courts must consider a juvenile's "lessened culpability" and greater "capacity for change". In accordance with these cases, the child must be represented by counsel in order to ensure consideration by the courts of all issues involving a minor defendant in a delinquency action, especially the unique nature of the juvenile offender.

Under T.C.A. § 37-1-134, the court must find

reasonable grounds to believe that (i) the child committed the delinquent act as alleged, (ii) the child is not committable to an institution for the intellectually disabled or mentally ill, and (iii) the interests of the community require that the child be put under legal restraint or discipline. Regarding subdivision (b)(3) and § 37-1-134, it has been held by both the Tennessee Court of Appeals and Court of Criminal Appeals that, although the burden of proof is on the prosecution on such issue, there is a presumption of noncommittability similar to that relating to sanity in criminal trials. Such presumption can be rebutted by evidence introduced by the defendant, and in such event the burden would shift back to the prosecution to persuade the court the child is not committable. *See Howell v. Hodge*, 710 F.3d 381, 386 (6th Cir. 2013). The Commission suggests, however, that it is good practice in any case for the court to arrange for testing and evaluation, evidence of which may be introduced by either of the parties or the court on the issue of committability.

Subdivision (b)(l)(C) provides that no plea shall be accepted by the court during the transfer hearing. This does not preclude the parties from agreeing to terminate the transfer hearing prior to its completion and holding an adjudicatory hearing. Once a plea is accepted by the juvenile court, double jeopardy attaches and the matter may not be transferred to criminal court. *See Breed v. Jones*, 421 U.S. 519, 95 S. Ct. 1779 (1975) and *State v. Jackson*, 503 S.W.2d 185 (Tenn. 1973).

If the case is not transferred to criminal court, T.C.A. § 37-1-134 prohibits the judge who conducted the transfer hearing from presiding over the adjudicatory hearing on the petition if a party objects. Also, T.C.A. § 37-1-134 prohibits a judge who has conducted a transfer hearing from presiding at a hearing in the same case in criminal court. Such a situation might arise if a judge were sitting specially in criminal court, or if a person who was formerly the juvenile court judge were elected to the criminal court or to any other court which might hear such a case by special arrangement.

Advisory Commission Comments [2017]. Subdivision (b)(4) is amended to substitute the term "probable cause" for the term "reasonable grounds" because T.C.A. § 37-1-134 was amended to use the term "probable cause."

Compiler's Notes. The adoption of Rule 208, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 208 provided that it take effect July 1, 2016.

The amendment of Rule 208, which amended subdivision (b) and added the [2017] Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 21, 2016, was ratified and approved by 2017 House Resolution 18 and Senate Resolution 15. The order promulgating the amendment of subdivision (b) and the addition of the [2017] Advisory Commission Comments, provided that it take effect July 1, 2017.

Rule 209. Plea of guilty or no contest — Judicial diversion.

(a) **Court's Inquiry of Child.** Before accepting a plea of guilty or no contest, and in addition to the requirements set out in Rule 205, the court must address the child personally in open court and inform the child of, and determine that the child understands, the following:

(1) The nature of the charge to which the plea is offered and the possible dispositional consequences of the plea; if a specific disposition is the basis of the plea, the child should be informed specifically of the nature of that disposition;

(2) That if the child is not represented by an attorney, the child has a right to be represented by an attorney at every stage of the proceedings including the guilty plea, and that, if necessary, one will be appointed;

(3) That the child has the right to plead not guilty or to persist in that plea if it has already been made;

(4) That if the child has been charged with a delinquent offense, the child has a right to a trial to determine whether the child is guilty of the charged offense; and that, at that trial, the judge may only find the child guilty if the judge finds that the state has proven the child's guilt of the offense or a lesser included offense beyond a reasonable doubt;

(5) That if the child has been charged with being unruly, the child has a right to a trial to determine whether the child is unruly; and that, at that trial,

the judge may only find the child unruly if the judge finds that the charge has been proven by clear and convincing evidence;

(6) At the trial, the child has the right to call witnesses and present evidence, including the right to subpoena witnesses and documents to the proceeding and the right to confront and cross-examine adverse witnesses, and the right to testify;

(7) That the child has the right against self-incrimination, including the right not to testify at the trial;

(8) That if the child pleads guilty or no contest, there will not be a trial (except as to the disposition in cases in which disposition is not part of the plea agreement), and that by pleading guilty, the child waives the right to a trial on the merits;

(9) That if the child pleads guilty or no contest, the child admits there is a need of treatment and rehabilitation;

(10) That if the child pleads guilty or no contest, the child waives the right to appeal the adjudication to the circuit court or to have a hearing before the judge on the issue of adjudication if the matter is being heard by a magistrate;

(11) That if the plea includes an agreement as to disposition, the child also waives the right to appeal the disposition to the circuit court or to have a hearing before the judge on the issue of disposition if the matter is being heard by a magistrate;

(12) That if the child pleads guilty or no contest, the court may ask the child questions about the offense to which the plea was made; if the child answers these questions falsely under oath, the child's answers may later be used against the child in a prosecution for perjury or false statement, unless the plea is a best interest guilty plea; and

(13) That if the child pleads guilty or no contest, the plea may have an effect upon the child's immigration or naturalization status, and, if the child is represented by counsel, the court shall determine that the child has been advised by counsel of the immigration consequences of a plea.

(b) **Determination of Voluntariness of Plea.** The court shall not accept a guilty or no contest plea without first, by addressing the child personally in open court, determining that the plea is voluntary and not the result of force or threats or promises apart from a plea bargain agreement. If a child stands mute or pleads evasively, a plea of not guilty shall be entered by the court.

(c) **Factual Basis for Guilty Plea.** The court shall neither enter a judgment upon a guilty plea nor approve an agreed disposition without satisfying itself that there is a factual basis for the guilty plea.

(d) **No Contest.** A child may plead no contest only with the consent of the court. Before accepting a plea of no contest, the court shall consider the views of the parties and the interest of the public in the effective administration of justice.

(e) **Agreement on Disposition.** If the court accepts a guilty or no contest plea pursuant to an agreement on disposition, the court shall approve the agreed disposition. If the court rejects a guilty or no contest plea, the dispositional agreement shall be null and void.

(f) **Judicial Diversion.** If the court accepts a guilty or no contest plea pursuant to a judicial diversion and approves the conditions of probation, the

plea shall not be entered as a judgment of gUilty and the child shall not be found delinquent. If the child violates the terms of the diversion and the court so finds, then the plea may be entered as a judgment of guilty, and the child shall be found delinquent. [Added by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. Pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), and with the consent of the court, a child may enter a "best interests" guilty plea. This is not a no contest plea. When the child enters an *Alford* plea, he or she is pleading guilty because it is in his or her best interests, but he or she does not necessarily agree to the factual basis of the plea as set out by the state's attorney. A guilty plea entered pursuant to *Alford* has all the legal effects of a guilty plea, except that the child cannot be charged with perjury or false statement if he or she later disputes the facts that serve as a basis for the guilty plea or denies his or her guilt of the offense.

The 2016 amendment to this rule adds a provision to allow the child to enter a no contest (nolo contendere) plea. Latin for "I do not wish to contend," Black's Law Dictionary defines a nolo contendere plea as follows: "A plea by which the defendant does not contest or admit guilt." *Black's Law Dictionary* 1269 (9th ed. 2009). *See also* Tenn. R. Crim. Proc. 11(a)(1) and (2). The no contest plea requires the court's approval and is similar in legal effect to an *Alford* plea.

The court is required to inquire about any prior discussions the child may have had regarding potential dispositions. The court should properly make itself aware of such interactions and "bargains," and of their effect on the child's willingness to plead guilty or no contest, before it makes a decision whether to accept any such plea. The court should also ascertain, through this inquiry, with whom any such discussions took place, and whether the child's attorney or parent, guardian or custodian was present.

The 2016 amendment adds the provision that if the child pleads guilty or no contest, the child waives the right to appeal the adjudication to the circuit court, or to have a hearing before the judge on the issue of adjudication if the matter is being heard by a magistrate.

The court may at any time prior to the beginning of a dispositional hearing permit a plea of guilty or no contest to be withdrawn, and if an adjudication has been entered thereon, set aside such adjudication and allow another plea to be substituted for the plea of guilty or nolo contendere. In the subsequent adjudicatory hearing, the court may not consider the plea which was withdrawn as an admission. Evidence of a guilty or no contest plea, later withdrawn, or of statements made in connection therewith, would not be admissible in any proceeding against the child.

The 2016 amendment adds that if the plea includes an agreement as to disposition, the child waives the right to appeal the disposition to the circuit court or to have a hearing before the judge on the issue of disposition, if the matter is being heard by a magistrate.

Finally, the 2016 amendment allows the court to accept a plea of guilty or no contest on a judicial diversion, pursuant to T.C.A. § 37-1-129(a), and defer further proceedings while placing a child on probation. In doing so, the plea shall not be entered as a judgment, and the child shall not found delinquent.

Compiler's Notes. The adoption of Rule 209, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 209 provided that it take effect July 1, 2016.

Rule 210. Adjudicatory hearings.

(a) **Scope of Hearing.** The adjudicatory hearing is the proceeding at which the court determines whether the evidence supports a finding that a child is delinquent or unruly, and whether the child is in need of treatment and rehabilitation. The adjudicatory hearing shall be held in accordance with T.C.A. § 37-1-129.

(b) **Time Limits on Scheduling Adjudicatory Hearings.** In all cases, except violations of valid court orders, in which a child is in detention or otherwise has been placed out of the home by court order shall be heard within 30 days of the date the child was placed outside of the home. For good cause shown, the adjudicatory hearing may be continued beyond the 30 day time limit to a date certain as the court may direct. All other cases shall be heard

within 30 days of the date of the filing of the petition if such scheduling appears to the court to be reasonable and possible considering the circumstances of the case, including without limitation, whether service on all parties has been achieved. Every case shall be heard within 90 days of the date of the filing of the petition. For good cause shown, the adjudicatory hearing may be continued beyond the 90 day time limit to a date certain as the court may direct.

(c) **Beginning Adjudicatory Hearing.** At the beginning of each hearing, the court shall:

(1) Ascertain whether the parties before the court are represented by attorneys;

(2) Verify the name, age and residence of the child who is the subject of the case, and ascertain the relationship of the parties, each to the other;

(3) Ascertain whether all necessary parties are present;

(4) Ascertain whether notice requirements have been complied with, and if not, whether the affected parties knowingly and voluntarily waive compliance;

(5) Explain to the parties the purpose of the hearing and the possible consequences thereof; and

(6) Explain to the parties their rights as set forth in Rule 205.

(d) **Evidence Admissible.** The court shall consider only evidence which has been formally admitted at the adjudicatory hearing. All testimony shall be under oath and may be in narrative form. Evidence shall be admitted as provided by the Tennessee Rules of Evidence. Evidence illegally seized or obtained shall not be received over objection to establish the allegations in the petition. In addition, no statement made by a child to the youth services officer or designated intake officer shall be admissible against the child prior to the dispositional hearing.

(e) **Adjudication; Standard of Proof; and Findings in Delinquent Cases.** At the conclusion of the adjudicatory hearing, the court shall enter an order in accordance with the following provisions:

(1) If the court finds that the delinquent offense has not been proved beyond a reasonable doubt, it shall dismiss the petition.

(2) If the court finds that the delinquent offense has been proved beyond a reasonable doubt, it shall enter an order finding the child guilty and shall immediately proceed to a hearing to determine whether the child is in need of treatment or rehabilitation, or shall schedule it for a later date. At that hearing:

(A) If the court does not find that the child is in need of treatment or rehabilitation, no further proceedings shall be held and the court shall discharge the child from any detention or other restriction previously ordered. In such event, the court shall enter an order finding that the child is not in need of treatment or rehabilitation. The child shall not be adjudicated delinquent.

(B) If the court finds the child is in need of treatment and rehabilitation, it shall enter an order finding that the child is in need of treatment or rehabilitation and that the child is adjudicated delinquent. The court shall immediately proceed to a dispositional hearing or schedule it to be heard on a later date.

(f) **Adjudication; Standard of Proof; and Findings in Unruly Cases.** At the conclusion of the adjudicatory hearing, the court shall enter an order in accordance with the following provisions:

(1) If the court finds that the unruly offense has not been proved by clear and convincing evidence, it shall dismiss the petition.

(2) If the court finds that the unruly offense has been proved by clear and convincing evidence, it shall enter an order finding the child guilty and shall immediately proceed to a hearing to determine whether the child is in need of treatment or rehabilitation, or shall schedule it for a later date. At that hearing:

(A) If the court does not find that the child is in need of treatment or rehabilitation, no further proceedings shall be held and the court shall discharge the child from any detention or other restriction previously ordered. In such event, the court shall enter an order finding that the child is not in need of treatment or rehabilitation. The child shall not be adjudicated unruly.

(B) If the court finds the child is in need of treatment and rehabilitation, it shall enter an order finding that the child is in need of treatment or rehabilitation and that the child is adjudicated unruly. The court shall immediately proceed to a dispositional hearing or schedule it to be heard on a later date.

(g) **Transfer to Home County.** The case of an out-of-county resident may be transferred to the child's county of residence for disposition. [Added by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. It is the Commission's intent that the court consider only evidence which has been properly admitted during the adjudicatory hearing. The Commission recognizes that the court may have held one or more hearings prior to the adjudicatory hearing which may have resulted in the admission of evidence. Furthermore, the Commission recognizes that the court's file may contain reports and other items submitted by the Department, CASA, law enforcement, or service providers. Such reports and items may not be considered by the court unless properly admitted during the adjudicatory hearing.

This rule combines previous Rule 17 regarding Time Limits on Scheduling Adjudicatory Hearings and Rule 28 Adjudicatory Hearings. The Commission felt this to be logically consistent and would aid practitioners' use of the rule. This rule highlights the statutory framework of a delinquent or unruly case with regard to the adjudicatory hearing.

This rule does not apply to a violation of a Valid Court Order.

During the adjudicatory hearing and prior to disposition, the court makes two distinct findings with regard to each child charged as a delinquent or unruly child: whether the evidence is sufficient to sustain the allegations in the petition, and, if so, whether the child is in need of treatment or rehabilitation. Upon making these findings, the court then proceeds to the dispositional hearing. T.C.A. § 37-1-129(b) states that upon a finding of guilt the court must "proceed immediately or at a postponed hearing" to determine whether the child is "in need of treatment or rehabilitation." This is consistent with the definition of "delinquent child" under T.C.A. § 37-1-102(b) ("'delinquent child' means a child who has committed a delinquent act and is in need of treatment or rehabilitation"), and T.C.A. § 37-1-129(f), which allows the court to continue the adjudicatory hearing to receive evidence bearing upon the issue of treatment and rehabilitation. Similarly, the definition of "unruly child" under T.C.A. § 37-1-102(b) also requires a finding of "in need of treatment and rehabilitation" in order to adjudicate the child to be an unruly child.

The Commission understands that many courts may, in an effort to achieve judicial economy, and absent contrary circumstances, elect to conduct both the "treatment and rehabilitation" phase of the adjudicatory hearing and the dispositional hearing immediately after the guilt phase of the adjudicatory hearing. In the event the court continues the adjudicatory hearing to receive evidence bearing upon the issue of treatment and rehabilitation, the court has the authority pursuant to T.C.A. § 37-1-129(f) to issue orders regarding the child pending the resumption of the hearing.

The Commission notes that T.C.A. § 37-1-129(b) states that the commission of acts which constitute a felony or that reflect recidivistic delinquency is sufficient to sustain a finding that the child is in need of treatment or rehabilitation.

The Commission notes that the Juvenile Offender Act, T.C.A. § 55-10-701 et. seq., also known as the Drug Free Youth Act, requires the adjudicatory court to send to the Department of Safety an order of denial of driving privileges when the child is "convicted of the offense." As explained above, a conviction does not necessarily lead to an adjudication of delinquency due to the added requirement that the court find that the child is in need of treatment and rehabilitation. All parties must be aware of the court's duty under the Act.

The new rule changes the requirement that the adjudicatory hearing be "scheduled for adjudication" within either 30 or 90 days to a requirement that the adjudicatory hearing be "heard."

The varying time limits in these rules for children in custody or detention and children not in custody indicate the Commission's strong intent that cases involving children in custody, and especially in secure detention, be given priority on the docket. Of course, all hearings should be scheduled and held as speedily as possible in the interest of providing timely treatment for children. The Commission recognizes the fact that a child's perception of time is quite different from that of an adult, with shorter periods of time being felt as being much extended, so that it is important that whatever action is taken be taken expeditiously, within the limits of practicability.

There are instances, however, where it will be quite appropriate to allow for a relatively longer period of time prior to disposition, in particular, for the child to prove to the court that a less restrictive disposition may be desirable in the case, for example. This is the purpose of the longer 90-day limit in cases in which children are not being held in custody, and of the provisions allowing for extensions of the time limits. Another valid reason for extensions of the limits would be to obtain psychological evaluations and testing which could not be obtained within the specified time limits.

In any case in which the time limits prescribed are not complied with, or in which the provisions for continuances are not complied with, the court may dismiss the charges with prejudice where it determines that failure to comply with the time limits constitutes a violation of the child's right to a speedy trial. In any case in which the time limits prescribed are not complied with, or in which the provisions for extensions are not complied with, the court may discharge the child from the jurisdiction of the juvenile court if the court determines that the interests of justice so require.

These rules do not require a pretrial conference; however, the Commission encourages courts to schedule a pretrial conference or settlement date during which negotiations may occur with the parties and counsel, law enforcement, victims, and the district attorney.

Advisory Commission Comments [2017]. The last sentence of the third paragraph of the Advisory Commission Comments rule is deleted. That sentence (which provided "See the Appendix to these rules regarding Valid Court Orders") should have been deleted in the comprehensive revision of the Rules of Juvenile Procedure effective July 1, 2016, because the appendix to which it referred was deleted at that time.

Compiler's Notes. The adoption of Rule 210, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 210 provided that it take effect July 1, 2016.

The amendment of Rule 210 by the amendment of the original Advisory Commission Comments and the addition of the [2017] Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 21, 2016, was ratified and approved by 2017 House Resolution 18 and Senate Resolution 15. The order promulgating the amendment of Rule 210 by amending the original Advisory Commission Comments and adding the [2017] Advisory Commission Comments, provided that it take effect July 1, 2017.

Law Reviews. Juvenile Court Hearsay (Donald F. Paine), 36 No. 10 Tenn. B.J. 35 (2000).

Tennessee Bar Association Committee Reports 1983-84, 20 No. 3 Tenn. B.J. 27 (1984).

Rule 211. Dispositional hearings.

(a) **Time Limits on Scheduling Dispositional Hearings.** Dispositional hearings shall be held within 15 days of the adjudicatory hearing if the child is in detention or otherwise has been placed out of the home by court order, and within 90 days of the adjudicatory hearing in all other cases. Upon good cause shown, the dispositional hearing may be continued to a date certain.

(b) **Separate from Adjudicatory Hearing.** A dispositional hearing shall be separate and distinct from the adjudicatory hearing to which it relates.

However, it may be held immediately following the adjudicatory hearing or at a later date.

(c) **Notice of Right to Appeal.** At the conclusion of the dispositional hearing, the court shall advise the child of the right to appeal the dispositional order.

(d) **Temporary Order.** Where a continuance of the dispositional hearing is ordered, the court may enter such temporary order that is in the best interest of the child. Detention may ordered, but only where such detention appears to be necessary for the protection of the child or others, or where necessary to assure the child's appearance at the subsequent dispositional hearing.

(e) **Evidence Admissible; Standard of Proof.** In arriving at its dispositional decision, the court shall consider only evidence which has been formally admitted and the juvenile court record of the child. All testimony shall be under oath and may be in narrative form. The rules of evidence shall apply except that reliable hearsay, including, but not limited to, documents such as psychiatric or psychological screenings or evaluations of the child or the child's parents or custodian or reports or assessments prepared by a probation officer, youth services officer or the Department of Children's Services, may be admitted provided that the opposing party is accorded a fair opportunity to rebut any hearsay evidence so admitted. However, this subdivision shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the Tennessee Constitution. The parties shall have the right to examine any person who has prepared any report admitted into evidence. The standard of proof at the dispositional hearing is preponderance of the evidence. [Added by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. The purpose of a dispositional hearing is to design an appropriate plan to meet the needs of the child and to achieve the objectives of the state in exercising jurisdiction. When possible, the initial approach should involve working with the child and the family in their own home so that the appropriate community resources may be involved in care, supervision, and treatment according to the needs of the child.

In choosing among statutorily permissible dispositions in delinquent and unruly cases, the judge should select the least restrictive disposition both in terms of kind and duration that is appropriate to the seriousness of the offense, the degree of culpability indicated by the circumstances of the particular case, and the age and prior record of the child. The preference is for the child to be treated and rehabilitated through community-level resources when appropriate and available. The Commission encourages the making of written findings of fact and reasons for ordering particular dispositions within the law.

If a child alleged to be unruly is placed under a "valid court order" pursuant to § 31.303(f)(3) of Title 28 of the Code of Federal Regulations, the dispositional hearing and order shall be in accordance with the federal regulations.

At the dispositional hearing, it is appropriate that youth services and probation officers be witnesses regarding admissible evidence of which they have knowledge. Youth services officers or probation officers may act as a fact witness.

Although a report may be admissible as reliable hearsay, all the contents of the report may not be reliable hearsay. This is especially important when the source gives an opinion that the person is not qualified to give.

Advisory Commission Comments [2017]. The third paragraph of the Advisory Commission Comments is amended by deleting a reference to the appendix that was deleted in the comprehensive revision of the Rules of Juvenile Procedure, effective July 1, 2016.

Compiler's Notes. The adoption of Rule 211, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 211 provided that it take effect July 1, 2016.

The amendment of Rule 211 by the amendment of the original Advisory Commission Comments and the addition of the [2017] Advisory Commission Comments, as promulgated

and adopted by the Supreme Court in its order dated December 21, 2016, was ratified and approved by 2017 House Resolution 18 and Senate Resolution 15. The order promulgating the amendment of Rule 211 by amending the original Advisory Commission Comments and adding the [2017] Advisory Commission Comments, provided that it take effect July 1, 2017.

Law Reviews. Juvenile Court Hearsay (Donald F. Paine), 36 No. 10 Tenn. B.J. 35 (2000).

Tennessee Bar Association Committee Reports 1983-84, 20 No. 3 Tenn. B.J. 27 (1984).

Rule 212. Probation or home placement supervision violation.

(a) **Procedure.** Proceedings to establish a violation of the conditions of probation or home placement supervision shall be conducted in the same manner as proceedings on petitions alleging delinquent conduct. The child whose probation or home placement supervision is sought to be modified or revoked shall be entitled to all rights that a child alleged to be delinquent is entitled to under law and these rules. A petition is required for a violation of probation. A petition is also required for a violation of home placement supervision when the child has been released from the custody of the Department of Children's Services. The petition shall identify the remedy being sought and the factual basis for the action.

(b) **Burden of proof.** The burden of proof shall be a preponderance of the evidence.

(c) **Disposition.** If the child violates the conditions of probation or home placement supervision, the court may make any other disposition which would have been permissible in the original proceeding, subject to T.C.A. § 37-1-137. [Added by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. The term "probation" refers to a child on either state or county probation, and a petition is required to initiate a proceeding to violate.

The term "home placement supervision" refers to a child who has been in state custody and is now placed at home for a trial period. A child on home placement supervision remains in state custody until discharged by operation of law at the expiration of 30 days. During that 30 day period the Department of Children's Services is authorized to remove the child from the home at its discretion. A petition is not required to remove the child, but notice must be filed with the court. A review hearing must be scheduled within 30 days of the child's removal, pursuant to T.C.A. § 37-1-137(d)(2) or within 7 days if the child is placed in detention, pursuant to T.C.A. § 37-1-137(e).

Upon discharge from custody, the child may continue on home placement supervision, a program that the Department refers to as "aftercare." When a child who is not in the legal custody of the Department violates home placement supervision (aftercare), a violation petition is required. A hearing is required and must occur within 7 days if the child is placed in detention. *See* T.C.A. § 37-1-137(e).

Advisory Commission Comments [2019]. The original Advisory Commission Comment provided: "A hearing is required and must occur within 7 days if the child is placed in detention." After the amendment to Tenn. Code Ann. § 37-1-137(e) (2018 Tenn. Pub. Acts, ch. 1052, § 41), the hearing must occur within seven (7) days of filing of the violation petition; in applying the rule, be aware that the original time frame described in the Advisory Commission Comment has been superseded by statute: the time for conducting the hearing now runs from the date of filing the petition alleging a violation.

Compiler's Notes. The adoption of Rule 212, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 212 provided that it take effect July 1, 2016.

The amendment of Rule 212, added the [2019] Advisory Commission Comment, as promulgated and adopted by the Supreme Court in its order dated January 8, 2019, was ratified and approved by 2019 Special Session House Resolution 3 and 2019 Regular Session Senate Resolution 13. The order promulgating amendment of Rule 212 by the addition the [2019] Advisory Commission Comment, provided that it take effect October 1, 2019.

Decisions Under Prior Law

1. Commitment to Department of Children's Services.

Trial court did not err by finding that defendant violated his probation and ordering that he be committed to Department of Children's Services custody because defendant violated his Serious Habitual Offender Community Action Program (SHOCAP) probation by failing to report to his probation officer; defendant and his mother agreed to the terms of the SHOCAP probation, including the reporting requirement, and the trial court found that his violations were intentional and deliberate. In re A'reeyon L., — S.W.3d —, 2018 Tenn. App. LEXIS 53 (Tenn. Ct. App. Jan. 30, 2018).

Rule 213. Modification of or relief from judgments or orders.

(a) Except in cases where the petition has been heard upon the merits and dismissed, the procedures herein shall be followed to obtain appropriate relief under this rule.

(b) **Modification of Orders.**

(1) *Clerical Mistakes.* Clerical mistakes and errors arising from oversight or omission in orders or other parts of the record may be corrected by the court at any time on its own initiative or on motion of any party.

(2) *Modification for Changed Circumstances.* An order of the court may be modified on the ground that, since the entry of the order, changed circumstances and the best interests of the child require it; however, an order committing a delinquent or unruly child to the Department of Children's Services or an order of dismissal may not be modified on these grounds.

(3) *Modification for Newly Discovered Evidence.* A dispositional order may be modified on the ground that newly discovered evidence so requires. The court, in making this determination, shall make any modification consistent with the best interests of the child.

(c) **Relief from Judgments or Orders.** An order of the court shall be set aside if it is determined that:

(1) It was obtained by fraud or mistake sufficient to satisfy the legal requirements for relief in any other civil action;

(2) The court lacked jurisdiction over a necessary party or of the subject matter; or

(3) Newly discovered evidence so requires. The court must determine that, with regard to such newly discovered evidence, the movant was without fault in failing to present such evidence at the original proceeding, and that such evidence may have resulted in a different judgment at the original proceeding.

(d) **Procedure.** Any party to a proceeding, a probation officer, or other person having supervision or legal custody of or an interest in a child may seek the relief provided in this rule. A motion shall set forth in concise language the grounds upon which the relief is requested. Notice of the date and time for a hearing on the motion shall be given to the parties to the proceeding and to those affected by the relief sought.

(e) **Disposition.** After the hearing, the court shall deny or grant relief as the evidence warrants. Where a modification of an order is granted, the court may order any disposition which would be permissible at the original dispositional hearing, or the court may schedule a dispositional hearing in accordance with these rules. [Added by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. T.C.A. § 37-1-139 authorizes the modification of and relief from orders under certain circumstances. Note that a motion, and not a petition, is to be filed when seeking relief pursuant to this rule.

The procedures in this rule regarding setting aside of orders draws from the concepts contained in T.C.A. § 40-26-105, writ of error coram nobis in criminal matters. Relief pursuant to this statute is limited to "subsequently or newly discovered evidence" and requires the court to find that the defendant was without fault in failing to present such evidence at the original proceeding and that such evidence "may have resulted in a different judgment" had it been presented at the original proceeding.

In the event an order is set aside, the District Attorney General will, of course, decide if a delinquency matter should be retried. The petitioner in an unruly matter will likewise make such a decision. The court, however, is to reschedule the hearing and proceed as it did with the original proceeding.

Placements after a child has been committed to the Department of Children's Services shall be reviewed as provided in T.C.A. § 37-1-137 and these rules.

Compiler's Notes. The adoption of Rule 213, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 213 provided that it take effect July 1, 2016.

DEPENDENT AND NEGLECT PROCEEDINGS.

Rule 301. Initiation of cases.

A dependent and neglect case is commenced by the filing of a petition. When the petitioner is not the Department of Children's Services, the court shall promptly refer the case to the Department for investigation. [Added by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. This rule is intended to define the commencement of a dependent and neglect case in juvenile court. The former practice of informally adjusting dependent and neglect cases has been eliminated.

A dependent and neglect case may be initiated by the Department of Children's Services, a private party, or the court. The clerk shall not prevent any person from filing a petition in accordance with the law.

When an intake court officer receives information alleging facts that, if true, indicate that a child is dependent and neglected and is subject to the jurisdiction of that court, the officer shall assist in the filing of a petition and refer the allegations for investigation by the Department of Children's Services. A private party shall be permitted to file a petition with the court clerk regardless of whether the officer assisted with the preparation of the petition. If a private party chooses not to file a petition, the officer may still make a referral to the Department.

There are situations in which a court must exercise its authority on an emergency basis to protect a child already under the jurisdiction of the court on a previously filed petition other than a dependent and neglect petition. The exercise of that authority is typically done in a bench order. In such circumstances, a dependent and neglect petition must be filed within 2 judicial days, pursuant to T.C.A. § 37-1-128.

Unless there are new dependent and neglect allegations, any subsequent petition alleging material change of circumstances, filed after the disposition of the original case, shall be considered a continuation of that original case.

Advisory Commission Comments. [2018] The 2018 amendment modifies the Advisory Commission Comment only: the terminology and cross reference in the last sentence of the fourth paragraph of the 2016 Advisory Commission Comment is amended to correspond with statutory amendments to Tenn. Code Ann. § 37-1-117 and § 37-1-128, and says: "In such circumstances, a dependent and neglect petition must be filed within 48 hours excluding non-judicial days, pursuant to T.C.A. § 37-1-117.

Compiler's Notes. The adoption of Rule 301, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 301 provided that it take effect July 1, 2016.

In its order filed, September 25, 2017, the Supreme Court provided that "The Advisory Commission on the Rules of Practice & Procedure annually presents recommendations to the Court to amend the Tennessee Rules of Appellate, Civil, Criminal, and Juvenile Procedure, and the Tennessee Rules of Evidence. With its meeting on August 4, 2017, the Advisory Commission completed its 2016-2017 term, and the Commission thereafter transmitted its recommendations to the Court.

"The Court hereby solicits written comments from the bench, the bar, and the public concern-

ing the Advisory Commission's recommended amendments set out in Appendix I (proposed amendments to the Rules of Appellate Procedure, the Rules of Evidence, the Rules of Civil Procedure, and the Rules of Criminal Procedure) and Appendix II (proposed amendments to the Rules of Juvenile Procedure) to this order. The deadline for submitting written comments is Wednesday, November 22, 2017. Written comments may either be submitted by email to appellatecourtclerk@tncourts.gov or by mail addressed to: James Hivner, Clerk, RE: 2018 Rules Package. 100 Supreme Court Building, 401 7th Avenue North, Nashville, TN 37219-1407 and should reference the docket number [ADM2017-01892]."

The proposed amendment to Tennessee Rules of Juvenile Procedure, Rule 301, promulgated by the Supreme Court in its order dated September 25, 2017, would add a 2018 Advisory Commission Comment that would read, "The 2018 amendment modifies the Advisory Commission Comment only: the terminology and cross reference in the last sentence of the fourth paragraph of the 2016 Advisory Commission Comment is amended to correspond with statutory amendments to Tenn. Code Ann. §37-1-117 and §37-1-128, and says: "In such circumstances, a dependent and neglect petition must be filed within 48 hours, excluding non-judicial days, pursuant to T.C.A. §37-1-117."

In its order filed January 8, 2018, the Supreme Court adopted amendments to this rule, effective July 1, 2018, subject to approval by resolution of the General Assembly.

The amendment of Rule 301 by the addition of the [2018] Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated January 8, 2018, was ratified and approved by 2018 House Resolution 208 and Senate Resolution 167. The order promulgating the amendment of Rule 301 by adding the [2018] Advisory Commission Comments, provided that it take effect July 1, 2018.

Rule 302. Procedures upon taking child into custody.

(a) **Child Taken Into Custody Without Court Order.** When a child is taken into custody without a court order pursuant to T.C.A. § 37-1-113(a)(3), a written protective custody order for the removal of legal custody, containing the probable cause determination required by T.C.A. § 37-1-114(a)(2), shall issue from a magistrate, as defined by T.C.A. §§ 37-1-107 or 40-1-106, within 48 hours of the taking of physical custody. The probable cause determination shall be based on a written affidavit, which may be sworn to in person or by audio-visual electronic means. If the court denies the protective custody order, the child shall be returned to the parent, guardian, or legal custodian. If the protective custody order is issued, a preliminary hearing shall be held within 72 hours, excluding non-judicial days, of the child being taken into custody.

(b) **Child Taken Into Custody Pursuant to Court Order.** If a child is removed from the home of a parent, guardian or legal custodian pursuant to a protective custody order, the child shall not remain in protective custody longer than 72 hours, excluding non-judicial days, unless a preliminary hearing is held.

(c) **Findings of Protective Custody Order.** A protective custody order issued pursuant to subdivision (a) or (b) shall include findings of fact supporting the probable cause determination required by T.C.A. § 37-1-114(a)(2). In addition, if the protective custody order places the child in the custody of the Department of Children's Services, the order shall include facts supporting a finding that it is contrary to the welfare of the child to remain in the home.

(d) **Preliminary Hearing.**

(1) *Appointment of Guardian ad Litem.* The court shall make every effort to appoint a guardian ad litem for the child prior to the preliminary hearing.

(2) *Notification of Rights.* At the beginning of the preliminary hearing, the court shall inform the parties of the purpose of the hearing and the possible consequences of the preliminary hearing, and shall inform the parties of their rights pursuant to Rule 303.

(3) *Evidence.* Reliable hearsay may be considered at the preliminary hearing.

(4) *Required Determinations.* The court, in making a decision on whether the child's continued removal from the home is warranted, shall:

(A) Determine whether probable cause exists that the child is a dependent and neglected child; and

(B) If probable cause is found, determine whether the child is subject to an immediate threat to the child's health or safety, or whether the child may be removed from the jurisdiction of the court; and

(C) Determine whether any less drastic alternative is available to the removal of the child from the custody of the parent, guardian or legal custodian.

(5) *Determination at Preliminary Hearing.* If the court finds that the child's continued removal from the home is not warranted, the court shall return the child to the person from whom custody was removed. If the court determines at the hearing that the child's removal is required, the court may order that the child be placed in the custody of a suitable person, persons, or agency. If the court returns the child to the person from whom custody was removed, the court may enter a temporary order setting forth conditions of the return designed to protect the rights and interests of the child and the parties pending further hearing.

(6) *Waiver of Time Limit for Preliminary Hearing.* The time limit for the hearing may be waived by a knowing and voluntary written waiver by the respondent. Any such waiver may be revoked at any time, at which time a preliminary hearing shall be held within the time frame outlined in T.C.A. § 37-1-117. [Added by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. Subdivision (a) establishes the procedure for obtaining a probable cause determination when the child has been removed from the home due to the existence of exigent circumstances and without a court order. T.C.A. § 37-1-117(b) currently requires both the probable cause determination defined in T.C.A. § 37-1-114(a)(2) and a court order for removal of a child from the child's parent, guardian, legal custodian or the person who physically possesses or controls the child. T.C.A. § 37-1- 113(a)(3) also references the probable cause determination contained in T.C.A. § 37-1-114(a)(2). Reading these three statutes in conjunction, T.C.A. § 37-1-113(a)(3) must be interpreted to allow the taking of physical possession of the child only, prior to the judicial probable cause determination and order. Subdivision (a) provides a time limit for the judicial probable cause determination and issuance of the statutorily-required order prior to the preliminary hearing. The judge or magistrate should be contacted after removal to make the probable cause determination and to issue a written order within the 48 hour limit. These requests and determinations are made *ex parte* as to the parent, guardian, or legal custodian. Non-judicial days are included in the time computation and shall not extend the 48 hour limit. As these requests address the immediate protection of the child, as referenced by T.C.A. § 37-1-117(b), the time limit requires that judges and magistrates be available at inconvenient hours to make probable cause determinations.

The probable cause determination in subdivision (a) must be based on a written affidavit reciting the facts, which may be sworn to in person or by audio visual electronic means. *Black's Law Dictionary* defines affidavit as "(a) voluntary declaration of facts written down and sworn to by the declarant before an officer authorized to administer oaths." *Black's Law Dictionary* 66 (9th ed. 2009).

The time limit of 48 hours tracks the time period in Rule 203 regarding the probable cause determination required after a warrantless arrest of a child alleged to be delinquent. That time limit is based on *Gerstein v. Pugh*, 420 U.S. 103 (1974), *County of Riverside v. McLaughlin*, 500 U.S. 44,57 (1991), *Cox v. Turley*, 506 F.2d 1347, 1353 (6th Cir. 1974), *State v. Bishop*, No. W2010-01207-SCR11- CD, 2014 Tenn. LEXIS 189, 2008 WL 888198 (Tenn. 2013), and *State v. Huddleston*, 924 S.W.2d 666 (Tenn. 1996). It is reasonable to apply the same

time limits for a probable cause determination by an independent magistrate to (1) a delinquent child arrested without a warrant, and (2) a parent whose child is removed without a prior court order, as well as the child who is removed in a dependent and neglect case.

If a child is taken into custody pursuant to either subdivisions (a) or (b) (which is applicable to the situation where the court issues a protective custody order prior to the child being removed from the home), a preliminary hearing must be held within 72 hours, excluding nonjudicial days, of when the child was taken into custody, pursuant to T.C.A. § 37-1-117. Pursuant to Rule 111, judges may consider entering a scheduling order at a preliminary hearing, especially when the child is in the custody of the Department of Children's Services. The scheduling order may include, but is not limited to, the dates of the Department's child and family team meeting, ratification hearing, foster care review board, adjudication, and dispositional hearings.

The second sentence of subdivision (c) is applicable to a child who is placed in custody of the Department of Children's Services. Federal law requires a "contrary to the welfare" finding in the first order that removes the child from the home in order for the child to be eligible for Title IV-E funding. 45 C.F.R. § 1356.21(E).

Advisory Commission Comments [2017]. The first paragraph of the original Advisory Commission Comment is amended by changing two references to T.C.A. § 37-1-128(b) to T.C.A. § 37-1-117(b), in light of the amendments to the statutes.

Compiler's Notes. The adoption of Rule 302, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 302 provided that it take effect July 1, 2016.

The amendment of Rule 302 by the amendment of the original Advisory Commission Comments and the addition of the [2017] Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated December 21, 2016, was ratified and approved by 2017 House Resolution 18 and Senate Resolution 15. The order promulgating the amendment of Rule 302 by amending the original Advisory Commission Comments and adding the [2017] Advisory Commission Comments, provided that it take effect July 1, 2017.

Rule 303. Notification and waiver of rights.

(a) **Right to Attorney.**

(1) *Notification of Right to an Attorney.* In all proceedings in which a party is by law entitled to representation by an attorney, the court shall expressly inform the party of the right to an attorney. If a party waives the right to an attorney, the court shall inform the party of the continuing right to an attorney at all stages of the proceedings.

(2) *Waiver of Right to an Attorney.* No party shall be deemed to have waived the assistance of an attorney until and unless:

(A) The party has been fully informed of the right to an attorney;

(B) The party subsequently knowingly and voluntarily waives the right to an attorney; and

(C) The waiver is confirmed in writing by the party.

(3) *Appointment of Attorney.* When an indigent party who is entitled to an attorney does not knowingly and voluntarily waive the right to an attorney, the court shall appoint an attorney to represent that party.

(b) **Notification and Waiver of Additional Rights.**

(1) *Notification and Waiver Where Party Represented by an Attorney.* When the party is represented by an attorney, the attorney shall fully advise that party of the party's rights under the Constitution of the United States, the Constitution of Tennessee, any other law, and any rule of court. The party shall make the decision whether or not to waive those rights, after full consultation with the party's attorney. The obligation of the attorney to advise the party of the party's rights in no way diminishes the court's obligations both to advise the party of the party's rights and to ascertain whether waivers of those rights are made knowingly and voluntarily.

(2) *Waiver of Rights Where Party Not Represented by an Attorney.* When the party is not represented by an attorney, that party may not waive any rights guaranteed to the party under the Constitution of the United States, the Constitution of Tennessee, any other law, or any rule of court unless the Court has fully advised the party of the party's rights and has determined that he or she knowingly and voluntarily waives those rights.

(3) *Notification of Rights to a Party Who has Waived the Right to an Attorney.* At the outset of any juvenile court hearing, the court shall advise any party who has waived the right to an attorney or who does not have an attorney of:

(A) The privilege against self-incrimination;

(B) The right cross-examine adverse witnesses;

(C) The right to present testimony on the party's behalf;

(D) The right to subpoena evidence on the party's behalf;

(E) The right to appeal any final order, the time limits for and manner in which the right to appeal can be perfected, and the right to an attorney on appeal.

(c) **Knowing and Voluntary Waiver.**

(1) *Criteria for Knowing and Voluntary Waivers.* A court shall not accept a waiver or deem a waiver to have been made voluntarily and knowingly if the party is or was unable to make an intelligent and understanding decision because of the party's mental condition, education, experience, the nature or complexity of the case, or any other relevant factor.

(2) *Procedure for Making and Confirming Waivers.* Any and all waivers of rights shall be made orally and in open court, and shall be confirmed in writing by the party and the judge. When the party is not represented by an attorney, the court shall advise that party in open court of the right to an attorney. The court shall not proceed with the hearing unless that party has waived the right to an attorney in accordance with the provisions of this rule. [Added by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. In a proceeding in which a party is entitled to counsel and in which the court has determined the individual is not indigent, the court should allow the party a reasonable time to retain counsel. However, if a party engages in a "cat and mouse" game with the court in order to impede the judicial process, then the court may make a determination that the party has effectively waived the right to counsel. *State v. Houston*, 2013 Tenn. Crim. App. LEXIS 112, 2013 WL 500231 (Tenn. Crim. App., Feb. 11, 2013).

A waiver of any right shall be made orally and in open court and confirmed in a writing signed by both the judge and the party waiving the rights. The confirming document may be a preprinted form, but it must specify the rights that are being waived and must acknowledge that the individual is choosing to waive those rights.

Compiler's Notes. The adoption of Rule 303, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 303 provided that it take effect July 1, 2016.

Decisions Under Prior Law

1. Failure to Provide Representation.

Although court appointed an "attorney ad litem" to represent mother in termination of parental rights hearing because of mother's mental condition, there was confusion as to the duties of the appointee; because the "attorney ad litem" acted more in the nature of a guardian ad litem, mother did not have legal representation. In re Valle, 31 S.W.3d 566, 2000 Tenn. App. LEXIS 107 (Tenn. Ct. App. 2000).

Notwithstanding appointment of "attorney ad litem" to mother in hearing to terminate parental rights, father was without any representation, and both parents should have been

accorded the protection of Tenn. R. Juv. P. 39(f). Furthermore, failure to provide this protection resulted in reversible error. In re Valle, 31 S.W.3d 566, 2000 Tenn. App. LEXIS 107 (Tenn. Ct. App. 2000).

Rule 304. Intervention.

(a) **Intervention as of Right.** Upon timely application, anyone shall be permitted to intervene in an action: (l)when a provision of the Tennessee Constitution, the United States Constitution, or a statute confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the subject matter of the action and the applicant is so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest unless the applicant's interest is adequately represented by an existing party; or (3) by written stipulation of all of the parties.

(b) **Permissive Intervention.** Upon timely application, anyone may be permitted to intervene in an action: (1) when a statute confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. In exercising its discretion, the court shall consider whether intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

(c) **Procedure.** Except for interventions for the purpose of modification of an order pursuant to Rule 310, anyone desiring to intervene shall serve a written motion to intervene upon the parties as provided in Rule 103. The motion shall state the grounds for the requested intervention and shall further state the claim or defense for which intervention is sought. For a person seeking to intervene as a matter of right, the motion shall state the statute or constitutional provision which gives the person the right to intervene. The court shall conduct a hearing on the motion to intervene as soon as practicable after filing of the motion. [Added by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. The original Rules of Juvenile Procedure did not contain a process for seeking intervention. The Tennessee Supreme Court concluded that intervention in juvenile court should be analyzed under the provisions of Rule 24 of the Tennessee Rules of Civil Procedure, specifically finding that application of the rule "would not compromise the efficacy of juvenile proceedings." *Gonzalez v. Tennessee Department of Children's Services*, 136 S.W. 3d 613, 617 (Tenn. 2004). Other jurisdictions have concluded that the state's rules of civil procedure should govern intervention in juvenile court. *See In re T.H.*, 753 S.E. 2d 207, 211 (N.C. App. 2014). Consequently, the language of this Rule is taken nearly verbatim from Rule 24 of the Tennessee Rules of Civil Procedure.

Subdivision (a) preserves any statutory right to intervene in a specific action and allows interventions by right when an applicant can show that the disposition of the action will, as a practical matter, impair that person's ability to protect the asserted interest. Permissive intervention, which is directed to the discretion of the juvenile court, is allowed when the person seeking intervention can show a claim or defense which is in common with or has questions of fact or law common to the claims and defenses of an original party. Allowing intervention is designed to prevent multiple litigation without unduly delaying the proceeding in the juvenile court. The court's discretion to permit intervention under subdivision (b) should be exercised in the context of the purposes of the Juvenile Court Act — particularly the provision of a "simple judicial procedure ... in which the parties are ensured a fair hearing[.]" T.C.A. § 37-1-101.

For the purposes of intervention, the term "person" includes any public or private agency — in particular, the Department of Children's Services when the Department is not the original petitioner. A person's application to intervene must be "timely"; that concept again is to be considered within the purposes of the Juvenile Court Act. The procedure established in subdivision (c) presumes that the court will

address the issue of intervention as soon as practicable without delaying the resolution of the action in question and without compromising the best interest of the child involved.

The rule does not attempt to define which persons can automatically intervene and which are to be automatically excluded from intervention. That determination will be made on an individual basis depending upon the particular facts of the case and the stage of the proceeding in which intervention is sought. A court also has the authority to allow intervention on a limited basis. *See In re Marquise T.G.*, No. M2011-00809-COA-R3-JV, 2012 Tenn. Ct. App. LEXIS 324, 2012 WL 1825766 (Tenn. Ct. App, 2012) (grandmother allowed to intervene for the purpose of seeking visitation, but not allowed to intervene to seek custody).

When a person seeks to intervene for the purpose of modification of an order, the person should refer to Rule 310.

Compiler's Notes. The adoption of Rule 304, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 304 provided that it take effect July 1, 2016.

Rule 305. Discovery.

(a) Each court shall ensure that the parties in dependent and neglect proceedings have access to information which would be available in circuit court.

(b) Parties shall attempt to achieve any necessary discovery informally, in order to avoid undue expense and delay in the resolution of cases. Only when such attempts have failed, discovery may be sought and effectuated in accordance with the Tennessee Rules of Civil Procedure without a court order.

(c) Leave to obtain discovery pursuant to the Tennessee Rules of Civil Procedure for reasons other than a failed attempt at informal discovery shall be freely given by the court when justice so requires.

(d) Upon motion of a party or upon the court's own initiative, the court may order that the discovery be completed by a certain date.

(e) Any motion to compel discovery, motion to quash, motion for protective order, or other discovery related motion shall:

(1) quote verbatim the interrogatory, request, question, or subpoena at issue, or be accompanied by a copy of the interrogatory, request, subpoena, or excerpt of a deposition which shows the question and objection or response, if applicable;

(2) state the reason or reasons supporting the motion; and

(3) be accompanied by a statement certifying that the moving party or counsel has made a good faith effort to resolve by agreement the issues raised and that agreement has not been achieved. Such effort shall be set forth with particularity in the statement.

(f) The court shall decide any motion relating to discovery in accordance with the Tennessee Rules of Civil Procedure.

(g) A child shall be required to respond to discovery requests only if the child is the petitioner or a respondent to the action.

(h) A guardian ad litem shall not testify at a deposition.

(i) Except as provided in subdivision (e) above, discovery materials shall not be filed with the court. [Added by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. This rule permits parties to utilize the discovery rules found in the Tennessee Rules of Civil Procedure if: (1) an attempt to conduct informal discovery fails; or (2) if the party has obtained permission in a court order. A party may utilize subdivision (c) of this rule only when informal discovery is not possible or practical, e.g., the party may need to depose a non-party witness prior to trial. When attempts at informal dis-

covery fail or are at an impasse, the parties should then presume that they are participating in formal discovery.

In order to reduce the cost of depositions, attorneys and parties should note that Rule 30.02 of the Tennessee Rules of Civil Procedure allows for non-stenographic recording and for telephone depositions. Likewise, Rule 26.03 of the Tennessee Rules of Civil Procedure permits the court to issue a protective order when a party seeks to limit discovery in order to avoid undue burden or expense, as well as for other reasons.

The Commission recognizes that formal discovery could potentially lengthen the time it takes to set and conclude dependent and neglect proceedings. Courts, attorneys, and parties should note that subdivision (d) permits a court ordered deadline for the completion of discovery. The Tennessee Rules of Civil Procedure allow the court to shorten deadlines for responding to discovery requests. Courts are encouraged to conduct scheduling conferences and issue scheduling orders as permitted under Rule 111.

Compiler's Notes. The adoption of Rule 305, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 305 provided that it take effect July 1, 2016.

Rule 306. Taking children's testimony.

(a) Any examination of a child witness shall be conducted in a manner that takes into account the child's age and developmental level. Such testimony shall be recorded.

(b) When a child testifies, the examination shall be conducted either in chambers or in a courtroom which has been cleared of observers and non-party witnesses.

(c) Upon motion of any party or upon its own initiative and upon good cause shown based upon the best interest of the child, the court may order one or more of the following accommodations:

(1) Arrangement of the courtroom or chambers so that certain individuals are not within the child's line of vision;

(2) Exclusion of the parties from chambers or the courtroom while the child is testifying; any motion for exclusion of the parties shall be made prior to trial, except in extraordinary circumstances;

(3) Examination of the child through written questions and written answers;

(4) Observation by the parties of the child's testimony by closed circuit television or other contemporaneous audio-visual transmission;

(5) Examination of the child by the court rather than directly by the parties or attorneys;

(6) Allowing the presence of a properly trained comfort animal;

(7) Permitting the child to have a stuffed animal or similar comfort toy while the child is testifying; or

(8) Permitting the child to be accompanied by a support person who is not a party or a witness.

(d) If the court excludes the parties from chambers or the courtroom while the child is testifying, the court shall ensure the following procedures are followed:

(1) Counsel for the parties and child(ren), including the guardian(s) ad litem, shall be permitted to be present during the child's testimony.

(2) The court shall inform any party who is not represented by counsel of the right to be represented by counsel and shall appoint counsel if requested by an indigent party who is entitled to an attorney.

(e) If the court examines the child rather than permitting the parties or attorney to directly examine the child, the court shall ensure the following procedures are followed:

(1) The parties or their counsel if represented, the guardian(s) ad litem, and attorney(s) ad litem shall submit written questions to the court prior to the child's testimony. The court shall ask the questions as written.

(2) If a party or attorney has an objection to a question, he or she may make the objection by raising his or her hand and then submitting the objection in writing. The written objection shall be provided to the party or attorney who wrote the question, and he or she shall be provided an opportunity to respond to the objection, before the court may sustain the objection.

(3) After all of the submitted questions have been asked by the court, the court shall take a recess. During the recess, the attorneys shall have an opportunity to consult with their clients. If a party or attorney wishes to ask additional questions, he or she shall submit the questions in writing prior to the end of the recess.

(4) The court shall continue the above process until there are no further questions for the child from any party or attorney. [Added by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. The Commission drafted this rule in order to provide guidelines to courts and attorneys as they seek to balance the due process rights of the respondents with the need to protect child witnesses from unnecessary trauma.

Subdivision (b) requires that when a child testifies the examination must be conducted either in chambers or in a courtroom which has been cleared of observers and non-party witnesses. Court appointed special advocates (CASAs) appointed pursuant to T.C.A. § 37-1-149, as well as foster parents, prospective adoptive parents, and relatives providing care for a child in state custody are not parties to the dependent and neglected action and should be excluded from the courtroom while the child is testifying.

When an unrepresented party requests appointment of an attorney or time to retain an attorney due to the court's decision to allow a child's testimony to be taken pursuant to subdivision (d), the hearing will likely need to be continued. In addition to the time it takes to appoint or retain the attorney, the attorney will need reasonable time to prepare.

Courts and attorneys should note that it is neither necessary nor desirable for the alleged perpetrator to be made a party to the dependent and neglect proceeding unless that person is the child's parent or legal guardian. In cases where the alleged perpetrator is not the parent or legal guardian, and where a court order limiting the alleged perpetrator's access to the child is appropriate, a related petition for a restraining order pursuant to T.C.A. § 37-1-152 and Rule 108 could accomplish the goal of protecting the child without granting the alleged perpetrator party status in the underlying action. In addition to other benefits, this strategy could limit or eliminate the alleged perpetrator's participation in the dependent and neglect case hearings and increase the child's comfort level.

Courts and attorneys may find it helpful to refer to Rule 112 concerning when testimony may be taken by audio-visual means.

Compiler's Notes. The adoption of Rule 306, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 306 provided that it take effect July 1, 2016.

Rule 307. Adjudicatory hearings.

(a) **Scope of Hearing.** The adjudicatory hearing is the proceeding at which the court determines whether the evidence supports a finding that a child is dependent and neglected. The adjudicatory hearing shall be held in accordance with T.C.A. § 37-1-129.

(b) **Time Limits on Scheduling Adjudicatory Hearings.**

(1) All cases in which a child has been placed out of the home by court order shall be heard within 30 days of the date the child was placed outside of the home. All other cases shall be heard within 30 days of the date of filing of the petition if such early scheduling appears to the court to be reasonable and possible considering the circumstances of the case, including but not limited to, whether service on all parties has been achieved. In any event, every case shall be heard for adjudication within 90 days of either the date the child was placed outside the home or date of filing of the petition, as applicable.

(2) Upon good cause shown, the adjudicatory hearing may be continued to a date certain.

(c) **Beginning Adjudicatory Hearing.**

(1) At the beginning of each hearing, the court shall:

(A) Ascertain whether the parties before the court are represented by attorneys;

(B) Verify the name, age and residence of the child who is the subject of the case, and ascertain the relationship of the parties, each to the other;

(C) Ascertain whether all necessary parties are present;

(D) Ascertain whether notice requirements have been complied with, and if not, whether the affected parties knowingly and voluntarily waive compliance;

(E) Explain to the parties the purpose of the hearing and the possible consequences thereof; and

(F) Explain to the parties their rights as set forth in Rule 303.

(d) **Evidence Admissible.** The court shall consider only evidence which has been formally admitted at the adjudicatory hearing. All testimony shall be under oath and may be in narrative form. Evidence shall be admitted as provided by the Tennessee Rules of Evidence.

(e) **Adjudication of Status, Standard of Proof, and Findings.**

(1) At the conclusion of the adjudicatory hearing, the court shall enter an order in accordance with the following provisions:

(A) If the court finds that the allegations have not been proved by clear and convincing evidence, it shall dismiss the petition.

(B) If the court finds that the allegations have been proved by clear and convincing evidence, it shall adjudicate the child dependent and neglected. The court shall immediately proceed to a dispositional hearing or schedule it to be heard on a later date.

(C) If the court finds that the child is dependent and neglected, the court shall additionally make a finding whether the parents or either of them or another person who had custody of the child committed severe child abuse.

(2) The court shall include findings of fact in its adjudicatory order. The adjudicatory order shall be filed within 30 days of the close of the hearing or, if a petition for certiorari is filed, within 5 days thereafter.

(f) **Transfer to Home County for Disposition.** The case of an out-of-county resident may be transferred to the child's county of residence for disposition. [Added by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. The varying time limits in these rules for children placed out of the home by court order versus those who remain in the home indicate that cases involving children placed out of the home be given priority on the docket. All hearings should be scheduled and held as speedily as possible in the interest of providing timely resolution for children and families. It is important that whatever action is taken be completed expeditiously, within the limits of practicability, given the fact that a child's perception of time is quite different from that of an adult, with shorter periods of time perceived as being much extended.

Some proceedings may be so complex that the court and parties may benefit from a pretrial conference to narrow or limit issues, decide evidentiary issues, and address other pretrial matters so as to achieve judicial economy.

This rule clarifies that the court must file its written adjudicatory hearing order within 30 days from the closing of the hearing, or, if a petition for certiorari is filed, within 5 days thereafter, pursuant to T.C.A. § 37-1-129(a). See Rule 110 for the computation of time.

Compiler's Notes. The adoption of Rule 307, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 307 provided that it take effect July 1, 2016.

Textbooks. Tennessee Jurisprudence. 14 Tenn. Juris., Habeas Corpus, § 8.

Law Reviews. Juvenile Court Hearsay (Donald F. Paine), 36 No. 10 Tenn. B.J. 35 (2000).

Tennessee Bar Association Committee Reports 1983-84, 20 No. 3 Tenn. B.J. 27 (1984).

Decisions Under Prior Law

ANALYSIS

1.. Evidence.
2. Time Limitations.

1. Evidence.

Finding that a minor child was dependent and neglected was appropriate because, even if the appellate court assumed that the evidence of shoplifting and possession should have been ignored under Tenn. R. Juv. P. 28(a), (c), there was ample evidence that the mother used drugs throughout her pregnancy, which resulted in the child being born drug-addicted and having to suffer through severe and life-threatening withdrawal. Cornelius v. Dep't of Children's Servs., 314 S.W.3d 902, 2009 Tenn. App. LEXIS 419 (Tenn. Ct. App. July 6, 2009), rehearing denied, Cornelius v. State, 314 S.W.3d 902, 2009 Tenn. App. LEXIS 836 (Tenn. Ct. App. Aug. 6, 2009), appeal denied, In re Brooks C., — S.W.3d —, 2010 Tenn. LEXIS 195 (Tenn. Feb. 22, 2010).

2. Time Limitations.

Mother's notice of appeal to the circuit court filed within ten days of entry of the order on the dispositional hearing, but more than ten days after entry of the order on the adjudicatory hearing, was a timely appeal of the adjudicatory hearing order under T.C.A. § 37-1-159 and Tenn. R. Juv. P. 36. In re Hannah S., 324 S.W.3d 520, 2010 Tenn. App. LEXIS 112 (Tenn. Ct. App. Feb. 12, 2010), appeal denied, In re Hannah V.S., — S.W.3d —, 2010 Tenn. LEXIS 794 (Tenn. Aug. 30, 2010).

Rule 308. Dispositional hearings.

(a) **Time Limits on Scheduling Dispositional Hearings.** Dispositional hearings shall be held within 15 days of the adjudicatory hearing if the child is placed out of the home by court order, and within 90 days of the adjudicatory hearing in all other cases. Upon good cause shown, the dispositional hearing may be continued to a date certain.

(b) **Separate from Adjudicatory Hearing.** A dispositional hearing shall be separate and distinct from the adjudicatory hearing to which it relates. However, it may be held immediately following the adjudicatory hearing or at a later date.

(c) **Notice of Right to Appeal.** At the conclusion of the dispositional hearing, the court shall advise the parties of the right to appeal the dispositional order.

(d) **Temporary Order.** Where a continuance of the dispositional hearing is ordered, the court may enter a temporary order that is in the best interest of the child.

(e) **Evidence Admissible; Standard of Proof.** In arriving at its dispositional decision, the court shall consider only evidence which has been formally admitted, and the juvenile court record of the child. All testimony shall be under oath and may be in narrative form. The Rules of Evidence shall apply except that reliable hearsay including, but not limited to, documents such as psychiatric or psychological screenings or evaluations of the child or the child's parents or custodian or reports or assessments prepared by a probation officer, youth services officer or the Department of Children's Services, may be admitted provided that the opposing party is accorded a fair opportunity to rebut any hearsay evidence so admitted. However, this subdivision shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Tennessee Constitution. The parties shall have the right to examine any person who has prepared any report admitted into evidence. The standard of proof at the dispositional hearing is preponderance of the evidence. [Added by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. The purpose of dispositions in juvenile court actions is to design an appropriate order to meet the needs of the child and to achieve the objectives of the state in exercising jurisdiction. When possible, the initial approach should involve working with the child and the family in their own home so that the appropriate community resources may be involved in care, supervision, and treatment according to the needs of the child and family.

At the dispositional hearing, it is appropriate that youth services and probation officers be witnesses regarding admissible evidence of which they have knowledge. Youth services officers or probation officers may be a fact witness but shall not engage in the unauthorized practice of law.

Although a report may be admissible as reliable hearsay, all the contents of the report may not be reliable hearsay. This is especially important when the source gives an opinion that the person is not qualified to give.

Though this rule allows for the dispositional hearing to be held within 15 days of the adjudicatory hearing when the child is placed out of the home by court order or 90 days in all other cases, it should be noted that under these rules the dispositional hearing may be held immediately following the adjudicatory hearing if the court determines that delay for preparation by the parties is not necessary.

Compiler's Notes. The adoption of Rule 308, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 308 provided that it take effect July 1, 2016.

Textbooks. Tennessee Jurisprudence. 14 Tenn. Juris., Habeas Corpus, § 8.

Decisions Under Prior Law

1. Time Limitations.

Mother's notice of appeal to the circuit court filed within ten days of entry of the order on the dispositional hearing, but more than ten days after entry of the order on the adjudicatory hearing, was a timely appeal of the adjudicatory hearing order under T.C.A. § 37-1-159 and Tenn. R. Juv. P. 36. In re Hannah S., 324 S.W.3d 520, 2010 Tenn. App. LEXIS 112 (Tenn. Ct. App. Feb. 12, 2010), appeal denied, In re Hannah V.S., — S.W.3d —, 2010 Tenn. LEXIS 794 (Tenn. Aug. 30, 2010).

Rule 309. Agreed orders.

(a) **General Provisions.** Any or all issues within a case may be resolved by a written agreement between all parties, submitted to the court in the form of an agreed order. An agreed order, signed by all parties or counsel, upon being approved by the court and entered in its minutes, becomes the order of the court. An agreed order should recite that the parties are aware that the agreement is the order of the court and that failure to comply with the order may constitute contempt of court.

(b) **Modification.** An agreed order may be modified in accordance with Rule 310. [Added by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. This rule clarifies that unless previously dismissed from the proceeding all parties to the original proceedings, including the Department of Children's Services and any interveners, are required to agree to an order for it to constitute an agreed order. Any party not wishing to participate in further proceedings may seek approval from the court to be dismissed as a party.

Advisory Commission Comments. [2018] This rule does not prohibit a court from accepting stipulations entered by the parties during a pending case.

Compiler's Notes. The adoption of Rule 309, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 309 provided that it take effect July 1, 2016.

The amendment of Rule 309 by the addition of the [2018] Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated January 8, 2018, was ratified and approved by 2018 House Resolution 208 and Senate Resolution 167. The order promulgating the amendment of Rule 309 by adding the [2018] Advisory Commission Comments, provided that it take effect July 1, 2018.

Rule 310. Modification of or relief from judgments or orders.

(a) **Modification of Orders.**

(1) *Clerical Mistakes.* Clerical mistakes and errors arising from oversight or omission in orders or other parts of the record may be corrected by the court at any time on its own initiative or on motion of any party. During the pendency of an appeal such mistakes may be so corrected before the record on appeal is transmitted to the appellate court and thereafter, while the appeal is pending, may be so corrected with leave of the appellate court.

(2) *Modification for Newly Discovered Evidence.* A dispositional order may be modified on the ground that newly discovered evidence so requires. The court, in making this determination, shall make any modification consistent with the best interests of the child.

(3) *Modification for Changed Circumstances.* An order of the court may be modified on the ground that, since the entry of the order, changed circumstances and the best interests of the child require it.

(b) **Relief from Judgments or Orders.** An order of the court shall be set aside if it is determined that:

(1) It was obtained by fraud or mistake sufficient to satisfy the legal requirements for relief in any other civil action;

(2) The court lacked jurisdiction over a necessary party or of the subject matter; or

(3) Newly discovered evidence so requires. The court must determine that, with regard to such newly discovered evidence, the movant was without fault in failing to present such evidence at the original proceeding, and that such evidence may have resulted in a different judgment at the original proceeding.

(c) **Procedure.** Any party to a proceeding, the guardian ad litem, or other person having legal custody of or an interest in a child may seek the relief provided in this rule. A request for relief under this rule shall set forth in concise language the grounds upon which the relief is requested. If relief is sought under subdivisions (a)(l) and (2) or (b), a motion shall be filed and notice shall be given pursuant to Rule 106. If relief is sought under subdivision (a)(3), a petition shall be filed and served pursuant to Rule 103.

(d) **Disposition.** After the hearing, the court shall deny or grant relief as the evidence warrants. Where a modification of an order is granted, the court

may order any disposition which would be permissible at the original dispositional hearing, or the court may schedule a dispositional hearing in accordance with these rules. [Added by order filed December 29, 2015, effective July 1, 2016; and by order filed January 8, 2018, effective July 1, 2018.]

Advisory Commission Comments. T.C.A. § 37-1-139 authorizes the modification of and relief from orders under certain circumstances. A motion is filed if relief is sought under subdivisions (a)(l) and (2) or (b). However, a petition is required if relief is sought because of changed circumstances under subdivision (a)(3).

The Commission anticipates that persons not a party to the original proceeding will request relief under this rule. In such cases, the motion should include a request to intervene as a party. In the event that the person is making new allegations that the child is dependent and neglected, the person should file a dependent and neglect petition under T.C.A. §§ 37-1-119 and 120, rather than a petition to modify.

Advisory Commission Comments [2018]. The 2018 amendment modifies subsection (a)(1) by adding the last sentence, which was inadvertently deleted in the comprehensive revision of the Rules of Juvenile Procedure effective July 1, 2016. Reference should be made to Rule 24(e), Tennessee Rules of Appellate Procedure for certain procedures for correcting the record during the pendency of an appeal.

Compiler's Notes. The adoption of Rule 310, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 310 provided that it take effect July 1, 2016.

In its order filed January 8, 2018, the Supreme Court adopted amendments to this rule, effective July 1, 2018, subject to approval by resolution of the General Assembly.

The amendment of Rule 310, which amended subdivision (a)(1) and added the [2018] Advisory Commission Comments, as promulgated and adopted by the Supreme Court in its order dated January 8, 2018, was ratified and approved by 2018 House Resolution 208 and Senate Resolution 167. The order promulgating the amendment of subdivision (c) and the addition of the [2018] Advisory Commission Comments, provided that it take effect July 1, 2018.

Decisions Under Prior Law

ANALYSIS

1. Order Not Final.
2. Answer.
3. Appeals.
4. No Changed Circumstances.
5. Rehearing Denied.

1. Order Not Final.

Legitimation order signed by referee was not a final order, in absence of either an order affirming the actions of the referee, or a signature by a judge approving a minute entry containing the referee's order. Chapman v. Malone, 874 S.W.2d 66, 1993 Tenn. App. LEXIS 751 (Tenn. Ct. App. 1993), appeal denied, — S.W.2d —, 1994 Tenn. LEXIS 112 (Tenn. Apr. 4, 1994), appeal denied, — S.W.2d —, 1994 Tenn. LEXIS 112 (Tenn. Apr. 4, 1994).

2. Answer.

Appointed counsel's representation did not deprive the mother of a fundamentally fair termination proceeding; counsel had a strategy, including on cross-examination, and by not filing an answer, which was not required, counsel avoided admitting or denying each allegation of the petition, which may actually have aided the mother. In re Carrington H., 483 S.W.3d 507, 2016 Tenn. LEXIS 49 (Tenn. Jan. 29, 2016).

3. Appeals.

Father's post-trial motion had no effect on the time for filing an appeal because the father did not raise the denial of his post-trial motion in his appeal; the juvenile rules provide for modification or relief from judgments or orders in certain limited circumstances, none of which was raised in the father's motion. In re Brian G., — S.W.3d —, 2018 Tenn. App. LEXIS 507 (Tenn. Ct. App. Aug. 30, 2018).

4. No Changed Circumstances.

Trial court properly found that the father had physically or emotionally abused the children, giving it express statutory authority to prohibit visitation until there was no reasonable likelihood that such abuse would recur under T.C.A. § 36-1-301 because the court previously upheld the trial court's determination that the father committed sexual abuse against the child. In re Emmalee O., — S.W.3d —, 2018 Tenn. App. LEXIS 321 (Tenn. Ct. App. June 13, 2018), rehearing denied, — S.W.3d —, 2018 Tenn. App. LEXIS 364 (Tenn. Ct. App. June 27, 2018).

5. Rehearing Denied.

Petition for rehearing was denied because no contact orders did not violate substantive due process; there was no evidence in the record to suggest a purpose to harm petitioner or that was arbitrary, irrational, improper, or egregious, and the orders did not "shock the con-

science" or otherwise lead to the conclusion that any substantive due process rights had been violated. In re Emmalee O., — S.W.3d —, 2018 Tenn. App. LEXIS 364 (Tenn. Ct. App. June 27, 2018).

Petition for rehearing was denied because petitioner did not demonstrate that fundamentally unfair procedures had been used at any time during the case. In re Emmalee O., — S.W.3d —, 2018 Tenn. App. LEXIS 364 (Tenn. Ct. App. June 27, 2018).

There were no grounds for vacating or modifying any of the existing orders because the purported "newly discovered evidence" petitioner raised would not have resulted in a different judgment at the original proceeding. In re Emmalee O., — S.W.3d —, 2018 Tenn. App. LEXIS 364 (Tenn. Ct. App. June 27, 2018).

FOSTER CARE PROCEEDINGS.

Rule 401. Ratification hearings.

(a) **Purpose of Ratification Hearing.** The court shall explain on the record the purpose of the hearing.

(b) **Notification of Parties.** The court shall verify all parties have been properly served. In the event a party's whereabouts are unknown and the party could not be notified of the ratification hearing, the court shall determine the Department of Children's Services' reasonable efforts to notify the party of the contents of the permanency plan. If the court finds the Department has made reasonable efforts to notify the party of the contents of the plan, then the court shall proceed with the ratification of the plan.

(c) **Review of Permanency Plan.** The court shall review the permanency plan for each child in foster care. In reviewing the permanency plan, the court shall address the following:

(1) Whether the parties participated in the development of the plan and are in agreement with the provisions of the plan;

(2) Whether the permanency goals are appropriate, and if a concurrent goal is needed;

(3) Whether the plan includes outcomes and corresponding action steps for each permanency goal;

(4) Whether the child's placement is safe and appropriate;

(5) Whether the child's well-being is appropriately addressed through health, education and independent living skills if applicable;

(6) Whether the visitation schedule is sufficient to maintain the bond between the child and parent, and the child and siblings, who are not residing in the same placement; and

(7) Whether the statement of responsibilities for each party are reasonably related to remedying the conditions that necessitate foster care or prevent the child from safely returning home.

(d) **Inclusion of Recommendations of Foster Care Review Board.** If a foster care review board hearing has occurred prior to the ratification hearing, the court shall review the recommendations of the board. If the board's recommendations are in the best interest of the child, the court shall incorporate the recommendations into the plan.

(e) **Evidentiary Hearing.** An evidentiary hearing shall be required to ratify the plan if the following occur:

(1) The parties do not agree on the provisions of the plan;

(2) The guardian ad litem objects to the provisions of the plan; or

(3) The court determines the Department has not prioritized the outcomes and corresponding action steps for each party in the statement of responsibilities.

(f) **Agreement — Modification.** If the parties are in agreement to the provisions of the plan and the plan is found to be in the best interest of the child, or at the conclusion of the hearing, the court shall ratify the plan upon making fact-specific findings pursuant to T.C.A. § 37-2-403. If the court modifies the plan, and a party is not present at the hearing, the court shall direct the Department to make reasonable efforts to notify the party of the modified provisions of the plan.

(g) **Abandonment Criteria.** The court shall explain on the record the law relating to abandonment and the possible consequences of termination of parental rights.

(h) **Rights of Party Not Served.** The court may issue a temporary order ratifying the plan. Such order shall be without prejudice to the rights of any party who has not been served with the original petition. If a party was not served, the court shall set a hearing within 60 days to determine whether the Department has conducted a diligent search.

(i) **Findings — Order.** The court shall make fact-specific findings pursuant to T.C.A. § 37-2-403 and shall enter an order within 30 days of the hearing. [Added by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. Permanency planning is the process of carrying out within a time-limited period a set of goal directed activities designed to help the foster child live with a permanent family. The permanency planning process requires the juvenile court to identify a permanency goal and oversee the implementation and modification of the permanency plan for each child in foster care. The permanency planning process includes, but is not limited to, the ratification hearing, periodic progress review hearing, foster care review board hearing and permanency hearing.

The purpose of the ratification hearing is for the court to review the permanency plan for the child prepared by the Department and approve the plan if it is in the best interest of the child. The permanency plan becomes an order of the court once ratified and should outline the responsibilities of each party to achieve one or more specific goals for the child. If court determines the permanency plan is not in the best interest of the child, the court should order that the plan be modified accordingly. In determining whether the permanency plan is in the child's best interest, the plan is to be reviewed by the court as described in subdivision (c) and T.C.A. § 37-2-403.

A ratification hearing is held to approve the initial permanency plan and all subsequent permanency plans. The initial permanency plan must be ratified within 60 days of the date the child is placed in foster care, except as provided in T.C.A. § 37-1-166. A subsequent plan must be ratified within 12 months of the original plan if the child remains in foster care. T.C.A. § 37-2-403.

The ratification hearing is separate and distinct from a periodic progress review (previously termed judicial review) or a permanency hearing. At the ratification hearing the court is not determining the compliance of the parties to the plan; it is reviewing the plan being presented for ratification and determining if the plan is in the best interest of the child.

T.C.A. § 37-2-403 provides that the permanency plan should be reevaluated and updated annually. However, new plans should be submitted to the court for ratification more frequently when the priority of responsibilities change, new facts are discovered which prevent the child from safely returning home, or there is a change in the goal on the plan. After the initial permanency plan is ratified, a subsequent permanency plan presented to the court for ratification should not be a duplicate of the initial plan. The subsequent plan should reflect the changes that have occurred in the child's case since the ratification of the prior plan.

A child adjudicated to be delinquent or unruly is a party to the proceeding and should attend the ratification hearing, as well as all hearings associated with permanency planning. Also, a child alleged or found to be dependent and neglected who is 14 years of age or older, should attend the ratification hearing, as well as all hearings associated with permanency planning.

Subdivision (d) provides that the court include in the permanency plan the recommen-

dations of the foster care review board if the court finds the recommendations to be in the best interest of the child.

Subdivision (e) requires that an evidentiary hearing be held if the parties do not agree or if the guardian ad litem objects to the permanency plan. In addition, if the Department has not prioritized the outcomes and corresponding action steps for each party in the statement of responsibilities, an evidentiary hearing must be held and testimony presented regarding the priority of responsibilities. The reason for this requirement is that when the court does review compliance of the parties at the periodic progress review or permanency hearing, the court is required to determine the weight assigned to each action step in order to determine whether the Department has made reasonable efforts and whether the parent is in substantial compliance.

If the parties are in agreement to the permanency plan, the court must also find that the plan is in the best interest of the child. This may be done without an evidentiary hearing.

Subdivision (g) requires the court to explain on the record the law relating to abandonment, pursuant to T.C.A. § 37-2-403(a)(2)(B).

Subdivision (h) provides that, if a party has not been served with the original petition, the court may enter a temporary order ratifying the permanency plan without prejudice to that person's rights. The court must schedule a hearing to determine whether the Department has conducted a diligent search. Absent parties, especially parents, should be included as soon as possible in the child's case in order to prevent a delay in permanency for the child.

Compiler's Notes. The adoption of Rule 401, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 401 provided that it take effect July 1, 2016.

Rule 402. Periodic progress reviews.

(a) A periodic progress review hearing shall occur when the court has not established a foster care review board or has elected to review certain cases instead of assigning the cases to the board.

(b) The court shall explain on the record the purpose of the hearing and review the following:

(1) The continued appropriateness of the permanency goals , and if a concurrent goal is needed;

(2) Whether the child's placement is safe and appropriate;

(3) Whether the child's well-being is being appropriately addressed through health, education, and independent living skills if applicable;

(4) Whether the visitation schedule continues to be sufficient to maintain the bond between the child and parent, and the child and siblings, who are not residing in the same placement;

(5) The reasonableness of the Department of Children's Services' efforts to identify or locate the parent or child whose identity or whereabouts are unknown;

(6) The reasonableness of the Department's efforts based on the prioritization of the outcomes and corresponding action steps in the statement of responsibilities; and

(7) The compliance of the parents or child with the statement of responsibilities in the plan.

(c) If a foster care review board hearing has occurred prior to the periodic progress review, the court shall review the recommendations of the board. If the court finds the board's recommendations are in the best interest of the child, the court shall incorporate the recommendations into the plan.

(d) If in addition to the periodic progress review the Department requests the court also ratify a new permanency plan, the periodic progress review and ratification hearing on the new plan shall be bifurcated.

(e) At the conclusion of the hearing, the court shall make fact-specific findings including a timeline for goal completion and shall enter an order

within 30 days of the hearing. If the court finds additional services are necessary to mitigate the causes necessitating foster care, the court shall order the Department to incorporate the services into the permanency plan. [Added by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. The periodic progress review (formerly known as judicial review) of the permanency plan is held pursuant to T.C.A. § 37-2-404. Either a foster care review board or periodic progress review must be held within 90 days of the date of custody and no less often than every 6 months thereafter.

The purpose of this hearing is to ensure that the child is safe, that provisions are being made for the child's well-being, and that the permanency plan and goals remain in the best interest of the child. The court has a duty to monitor and determine compliance with the terms of the permanency plan by the parties, and issue such orders as may be appropriate to enforce compliance by reviewing those matters outlined in subdivision (b). The periodic progress review is an opportunity for the court to correct potential delays or barriers to permanency for the child prior to the permanency hearing.

A child adjudicated to be delinquent or unruly is a party to the proceeding and should attend the periodic progress review. The Commission notes that there is a distinction between visitation and home passes when reviewing a child adjudicated delinquent or unruly and placed in a residential facility. The child may not be eligible for home passes, but this should not deter visitation between the parent or prior legal guardian and child at the facility.

If the Department is seeking ratification of a new permanency plan at this hearing, the hearings are to be bifurcated as the purpose of the hearings is different. *See* Rule 401.

Compiler's Notes. The adoption of Rule 402, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 402 provided that it take effect July 1, 2016.

Rule 403. Foster care review board.

(a) **Scheduling and Notice.** The court shall determine the date, time and location of each foster care review board and shall notify the Department of Children's Services and the board members no later than 14 calendar days prior to the scheduled review. Each case shall be set at a specific time that allows for a comprehensive review. All parties, their attorneys, guardians ad litem, and foster parents shall be notified in writing of the review not less than 10 calendar days prior to the scheduled review.

(b) **Documentation.** The Department shall provide supporting documentation in regard to the child's safety, well-being, and permanency as determined by local rule. Documentation should be provided to the court facilitator no less than 7 calendar days prior to review for distribution to the board members.

(c) **Quorum and Attendance.** Prior to the beginning of each review, the court facilitator shall verify that a quorum of members exists. In verifying the quorum, the court facilitator shall inquire as to any conflicts of interest of the board members requiring recusal. The review shall proceed only if it is determined that all necessary persons who are not present were properly notified. If timely notification was not provided, the court facilitator will reschedule the matter as soon as possible.

(d) **Conduct of the Review.**

(1) The board shall use a summary form to gather information.

(2) Information provided to the board shall only come from persons before the board during the review or from documentation provided by the parties.

(3) Only the parties, their attorneys, the child, and the guardian ad litem or attorney for the child have the right to be present during the entire review. Necessary persons may be present during the entire review if agreed to by all

the parties. Necessary persons are to present information to the board in the presence of the parties.

(4) The board may hear from the child outside the presence of the parties.

(e) **Recommendations.** The board shall make written recommendations that address the child's safety, well-being, and permanency. The board shall deliberate to develop recommendations. All deliberation shall occur outside the presence of the parties, their attorneys, and other persons present for the review. Recommendations shall be made addressing the needs pursuant to Rule 402(b) of these rules. All recommendations should be agreed upon by a majority of board. If there is no majority agreement for each recommendation, the court facilitator shall:

(1) Identify the conflict;

(2) Instruct the board to review all relevant documentation and testimony;

(3) Instruct the board to ensure that the recommendations provide for the safety, well-being, permanency of the child, and are in the child's best interest; and

(4) In the event no consensus can be reached, make a direct referral to the court.

(f) **Announcement of Recommendations — Scheduling Next Review.** After deliberation, the board will announce its recommendations to the parties and set a date for the next review. No additional information may be presented during the announcement of the recommendations. The court facilitator shall ensure the signatures of all parties present at the review are obtained on the summary form, noting those persons were present for the review. The court facilitator shall also note anyone else who was present for the review.

(g) **Summary Form Filed with Clerk.** The court facilitator shall file the summary form with the clerk of the court, who shall record the date and time of the filing. The clerk of the court shall send a copy of the summary form to all parties and their attorneys of record or guardians ad litem.

(h) **Review by Judge or Magistrate.** The court shall establish a procedure to provide the recommendations to the judge or magistrate within 10 judicial days of the review for the court to review the recommendations, determine if they are in the best interest of the of the child, and confirm as an order of the court at the next ratification hearing, periodic progress review, or permanency hearing.

(i) **Direct Referral.** When the board makes the determination that a direct referral shall be made by the court, the court facilitator will determine the type of direct referral as provided by T.C.A § 37-2-406(c)(2). The court facilitator will file the direct referral with the clerk of the court. The court facilitator shall inform the review board of the outcome of the direct referral at the next review of the child's case before the foster care review board.

(j) **Statements of Child.** Any statements made by a child at the review are not admissible in a delinquent or unruly proceeding prior to a dispositional hearing. [Added by order filed December 29, 2015, effective July 1, 2016.]

Compiler's Notes. The adoption of Rule 403, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 403

provided that it take effect July 1, 2016.

Rule 404. Permanency hearings.

(a) **Review of Previous Orders/Recommendations by Court.** Prior to the beginning of a permanency hearing, the court shall review previous ratification orders, periodic progress review orders, and foster care review board recommendations.

(b) **Purpose of Hearing.** The court shall explain on the record the purpose of the hearing.

(c) **Testimony.** The court shall receive testimony from the parties related to the following:

(1) Whether the Department's efforts to assist the parent or child in complying with the statement of responsibilities are reasonable based on the Department's prioritization of the outcomes and corresponding action steps in the statement of responsibilities in the permanency plan;

(2) Whether the parent or child is in substantial compliance with the statement of responsibilities in the plan;

(3) If the child is able to communicate, the child's views on the provisions in the plan;

(4) Whether the independent living plan or transitional living plan is designed to assist and prepare foster youth in making the transition from foster care to adulthood by providing opportunities to obtain life skills for self-sufficiency, independence, and permanency;

(5) If the youth is seventeen years old, testimony from the Department regarding extension of foster care services available to the youth at the age of eighteen and testimony from the youth as to whether the youth understands the available services;

(6) Whether the proposed permanency goals and timelines for achieving the goals are in the best interest of the child; and

(7) Whether barriers exist to successfully achieving the proposed permanency goals, and if services are needed to eliminate the barriers.

(d) **Reasonable Efforts Finding as to Goal.** At the conclusion of the hearing, if the goal on the existing permanency plan is to return home, the court shall make fact-specific findings as to whether the Department has provided reasonable efforts for the child to return home safely. If the plan contains a goal other than return home, the court shall make fact-specific findings as to whether the Department has provided reasonable efforts to place the child consistent with the specific goal. If the permanency plan contains concurrent goals, the court shall make reasonableefforts findings as to both goals.

(e) **Hearing for Youth Seventeen Years or Older Prior to Release from Department.** A permanency hearing shall be held 3 months prior to the release from foster care of a youth who is 17 years or older. The court shall hold an evidentiary hearing on the transition living plan and review the plan to ensure the plan sufficiently addresses the following, if applicable: support person or system, education, employment, health needs, information on available benefits through other agencies, available transportation, youth has received all essential documentation including government issued identification, and any special factors.

(f) **Youth Planning to Accept Extension of Foster Care.** At the permanency hearing to approve the transition plan for a youth who plans to accept extension of foster care, the court shall set a hearing date within 60 days of the youth's eligibility for extension of foster care for the purpose of confirming the voluntary placement agreement and ratification of the transition plan.

(g) **Bifurcated Permanency Hearing and Ratification Hearing.** If, in addition to the permanency hearing, the Department requests the court also ratify a new permanency plan, the permanency hearing and ratification hearing on the new plan shall be bifurcated with the permanency hearing occurring first. [Added by order filed December 29, 2015, effective July 1, 2016.]

Advisory Commission Comments. A permanency hearing is a separate and distinct hearing from the ratification and periodic progress review hearings. The purpose of the permanency hearing is to decide upon the final permanency outcome for the child. In determining the final permanency outcome, the court is to review the compliance of all parties and decide on a final permanency outcome for the child that is in the child's best interest. The court must outline a specific timetable and plan for the child to return home or to achieve another permanency goal, if returning home is not in the child's best interest.

In order to make a decision regarding the final permanency outcome of the case, the permanency hearing must be bifurcated from any ratification hearing on a new permanency plan. The decisions made during the permanency hearing dictate the contents of a new permanency plan. The permanency plan that is ratified after a permanency hearing should not be a revision of a previous plan. Rather, it should be a detailed and comprehensive schedule that charts the child's final path to permanency subsequent to the permanency hearing.

At the beginning of the hearing, the court must determine if all necessary persons are present pursuant to Rule 112. All children are required to attend the permanency hearing pursuant to T.C.A. § 37-2-409, except any child under a doctor's care who is prevented by the doctor from attending, a child placed outside the state, or a child on runaway status. The court should consider allowing a child who cannot attend because of the first two exceptions to participate by another means as prescribed in Rule 112. The court must hear directly from the child on the child's views on the provisions in the plan. When receiving testimony from the child, the court shall comply with the provisions of Rule 306.

Compiler's Notes. The adoption of Rule 404, as promulgated and adopted by the Supreme Court in its order dated December 29, 2015, was ratified and approved by 2016 House Resolution 145 and Senate Resolution 79. The order promulgating the adoption of Rule 404 provided that it take effect July 1, 2016.

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